

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In chambers: **MOLOTO J**

CASE NUMBER: LCC 15R/04

MAGISTRATE'S COURT CASE NUMBER: 95/02

Decided on: 3 March 2004

In the review proceedings in the case between:

JACO HOUGH BOERDERY TRUST

Applicant

and

PAUL SMITH

First Defendant

MAGRIET BEUKES

Second Defendant

SUSANNA BEUKES

Third Defendant

DONALD BEUKES

Fourth Defendant

JUDGMENT

MOLOTO J:

[1] The applicant, represented by its trustees, brought an action in the magistrate's court, Gordonia, held at Keimoes, for the eviction of the defendants from the applicant's farm known as Portion 29 of the farm Koms No 33, situate in the Kenhardt Division, Northern Cape Province ("the farm"). The action was brought in terms of the provisions of the Extension of Security of Tenure Act¹ ("the Act"). As the defendants entered no appearance to defend, the applicant obtained judgment by default. The matter has now been referred to this Court on automatic review in terms of section 19(3) of the Act.

[2] The facts of the case are briefly that the first defendant's right of residence arose solely from his employment agreement with the plaintiff. The right of residence of the other three defendants depended on the first defendant's right, as they were dependent on him. The defendants have been occupiers on the farm since 1998. On 25 August 2001, the first defendant resigned from his employment with the plaintiff. This termination of employment was confirmed by the Commission for Reconciliation, Mediation and Arbitration ("CCMA"), on 29 November 2001.

1 Act 62 of 1997, as amended

On 14 December 2001 the defendants were given notice in terms of section 9(2)(d)(i) of the Act. This is according to the affidavit filed on behalf of the plaintiff in support of the application for judgment by default. The particulars of claim and the affidavit in support of the application for judgment by default further stated the following: -

(1) **Particulars of Claim** (I quote verbatim) :

- “(10) Verweerders se reg van okkupasie het slegs, soos hierbo vermeld, uit hoofde van ‘n diensverhouding tussen Eerste Verweerder en J J A Hough ontstaan sedert 1998 welke diensverhouding beëindig is op 25 Augustus 2001 uit vrye keuse van Eerste Verweerder en welke diensbeëindiging kragtens Wet 66 van 1995 bekragtig is op 29 November 2001.
- (11) Dit was te alle relevante tye ‘n uitdruklike alternatiewelik by implikasie ‘n voorwaarde van die diensooreenkoms dat by beëindiging van die diensooreenkoms tussen Jaco Hough en Eerste Verweerder, die verblyfsreg van die Verweerders beëindig sou word en die reg tot okkupasie by diensbeëindiging verval.
- (12) Nieteenstaande versoek daartoe versuim en/of weier Verweerders om die vaste eiendom te ontruim en het Eiser al die Verweerders formeel kennis gegee ingevolge Artikel 9(2)(d)(i) van Wet 62 van 1997 dat ‘n Aansoek om Uitsetting sal volg by versuim van Verweerders om die vaste eiendom te ontruim. Eiser het voorts ingevolge Artikel 9(2)(d)(ii) en (iii) van Wet 62 van 1997 behoorlik kennis gegee aan die Munisipaliteit in wie se jurisdiksiegebied die vaste eiendom geleë is en die hoof van die betrokke provinsiale kantoor van Department van Grondsake.”

(2) **The affidavit**

- “(4.1) Ek bevestig dat die Eerste Verweerder se diensverhouding wettiglik beëindig is op 25 Augustus 2001 deurdat die Eerste Verweerder vrywilliglik bedank het. Hierdie diensbeëindiging is bekragtig op 29 November 2001 deur die Kommissie vir Versoening Bemiddeling en Arbitrasie en word ‘n afdruk van hierdie bevestiging hierby aangeheg vir gerief van die Agbare Hof gemerk as “Aanhangsel C”.

[3] The magistrate found that “[a]rt. 9(2)(a) en (b) is dus van toepassing en bewese deur die applikant”. I could find no such proof. I sent a query to both the magistrate and the plaintiff’s attorney requesting the following:

- (1) a copy of a letter, if any, of resignation from first respondent. If resignation was verbal, copy of a written acknowledgement of such resignation by the applicant;

and

(2) proof of compliance with section 9(2)(a).

[4] I received no reply from the magistrate. The plaintiff's attorney replied as follows. (I quote verbatim): -

"First respondent did not resign in writing and the written acknowledgment is lost. The applicant nevertheless testify under oath that the first respondent resign and that statement was never opposed in court by any of the respondents.

The right of residence as an occupier by the first respondent arises solely from an employment agreement and the first respondent's right of residence was terminated because he resigns as employee. (Section 8(2) of the Extension of Security of Tenure act no. 62/1997). This statement was also confirmed by the CCMA as shown in the records in the Magistrate's Court case. The relevant documents in that regard was attached to the affidavit of the applicant."

[5] The CCMA is silent on the termination of the right of residence, and in any case, has no jurisdiction to terminate an occupier's right of residence. The relevant part of the CCMA letter states:

"We are in receipt of the above referral for conciliation. However, this case has been closed due to the following reasons:

According to your application for condonation you indicated that you have stayed for 31 years on the farm and if this application is not condoned you will loose your stay on the farm. We would like to advise you that the CCMA lacks jurisdiction to handle the land Restitution problems. We would advise you to refer this matter to the Department of Land Affairs, Public Building, Knight Street, Kimberley, 8345. Telephone number : (053) 831 4090 the contact person is Ms Kele Dire who will assist you further."

[6] The requirements for the grant of an eviction order are prescribed in section 9(2) of the Act, which reads as follows: -

"(2) A court may make an order for the eviction of an occupier if -

- (a) the occupier's right of residence has been terminated in terms of section 8;
- (b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
- (c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and
- (d) the owner or person in charge has, after the termination of the right of residence, given -
 - (i) the occupier;
 - (ii) the municipality in whose area of jurisdiction the land in question is situated;
 and

- (iii) the head of the relevant provincial office of the Department of Land Affairs, for information purposes,

not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Land Affairs not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with."

[7] Section 9(2)(a) expressly provides that the occupier's right of residence must be terminated in terms of section 8 of the Act. It is not sufficient to allege that at all relevant times it was an express, alternatively an implied term of the employment agreement that upon termination of the employment contract, the right of residence would also terminate. Even if there is such an express or implied term, the right of residence must still be terminated expressly, and not through a term in the employment agreement. Of course, the termination of the right of residence may be given contemporaneously with the notice of termination of the employment relationship; and if the notice of termination is in writing, it may also be the same document. The reason for such termination of the right of residence to be express is that section 9(2)(a) provides that the occupier's right of residence must be terminated in terms of section 8 (my emphasis). Section 8 provides various grounds for terminating a right of residence, hence an owner or person in charge seeking such termination, should indicate the grounds he/she relies on.

[8] Section 9(2)(b) was also not complied with as the occupier was not notified of the time within which he was to vacate the farm.

[9] There is no evidence to show that section 9(2)(c) was complied with. This is a very important section as it deals with the grounds on which a court will base its order of eviction. It is, therefore, important for the applicant to make an election between sections 10 and 11. Such election is made by complying with section 9(2)(c). *In casu*, such election should have been that of section 11 as the respondents are said to have come on the farm in 1998.

[10] Finally, section 9(2)(d) provides that notices must be given to the occupier, the municipality in whose area of jurisdiction the land is situated and the relevant provincial head

of the Department of Land Affairs. However, these notices may only be given after² the termination of the right of residence. Such termination has to be in terms of section 8. Where there is no evidence of such termination, as in this case, then the giving of the notices in terms of section 9(2)(d) is a nullity.

[11] I find that the magistrate erred in finding that the plaintiff proved compliance with section 9(2)(a). On this finding alone, the order of the magistrate stands to be set aside. However, section 9(2)(b), (c) and (d) was also not complied with.

[12] The following order is made:

The order of the Magistrate made on 4 February 2004 is set aside in whole and the following order is substituted therefor:

- “1 The action is dismissed.
- 2 No order as to costs is made.”

JUDGE J MOLOTO

For the applicant:
Le Roux & Genote Ing Keimoes

For the respondents:
In default.

2 See section 9(2)(d). See also *Malan v Gordon and Another* 1999 (3) SA 1033 (LCC); [1999] 3 All SA 389 (LCC) at paras [27] - [28]; *Die Landbounavorsingsraad v Klaasen*, LCC83R/01, 29 October 2001 (unreported); and *Van den Berg v Skosana*, LCC10R2003, 18 February 2002, available from www.law.wits.ac.za/lcc.