IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER**: LCC 11R/04
In chambers: **MOLOTO J**
MAGISTRATE'S COURT CASE NUMBER: 2115/03
Decided on: 22 April 2004

In the review proceedings in the case between:

J A McKENZIE N O First Applicant
AVALON VINEYARDS (EDMS) BPK Second Applicant

and

PIETER LUKAS First Respondent
MAGRIET SMIT Second Respondent
ELMARIE SMIT Third Respondent
HILTON SMIT Fourth Respondent

JUDGMENT

MOLOTO J:

[1] The magistrate, Wellington granted an order on 22 January 2004 for the eviction of the respondents from the farm Nabygelegen, Wellington ("the farm"), the property of the second applicant. The order was granted in terms of the Extension of Security of Tenure Act[1] ("the Act"). The matter was then referred to this Court on automatic review in terms of section 19(3) of the Act.

[2] Before dealing with the review, I wish to address the issue of the delay in finalising the matter. The file was received at this Court on 9 February 2004 and a query was dispatched, with the file, to the magistrate and the applicants' attorneys on the same day. The file, with the magistrate's answer to the query, was received at this Court on 8 April 2004, only after a reminder had been sent to the magistrate on 1 April 2004. This was an inordinate delay for which no explanation was tendered. I find this completely unacceptable. Justice delayed is justice denied. What makes the situation worse is that the magistrate's order states that the respondents

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1 Act 62 of 1997, as amended

must vacate the farm on 31 January 2004, failing which the sheriff must evict them within 7 days of the 31st January 2004. The magistrate did not order the suspension of the order in terms of section 19(5) of the Act, pending review proceedings. If the respondents were indeed evicted 7 days after 31 January 2004, which would be 7 February 2004, that would mean that by the time the file was received at this Court on 9 February 2004, the respondents had already been evicted. This Court has repeatedly stated in judgments[2] that magistrates must allow sufficient time for review of cases when setting eviction dates in terms of section 12 of the Act.

[3] Turning to the review, it is important to note at the outset, that the order of the magistrate was obtained by default of appearance. That being so it is important for the trier of fact to satisfy himself that the respondents were served with the papers. *In casu*, there is no proof of service of Annexures "C"and "D" to the founding affidavit on the respondents. These Annexures are a notice in terms of section 9(2)(d)(i) to be served on the first and second respondents respectively. The returns of service relative to the notices read as follows:

> "U word hiermee in kennis gestel dat die verweerder in hierdie saak uitgesit is uit die perseel genoem in die bogenoemde lasbrief en die eiser in besit daarvan gestel is."

[4] The above statement says nothing about service of the Annexures. If correct, the statement reveals a serious irregularity : that the respondents were evicted before a court order was obtained. This is not only in contravention of section 9(1) of the Act, but also of section 26(3) of the Constitution.[3]

[5] The explanation tendered by the applicants' attorneys confuses the matter further. I quote the explanation in full :

> "Hiermee terugvoering van u skrywe gedateer 6 Februarie 2004.
>
> 1 Mnr. Coetzee noem in paragraaf 5 van sy beëdigde verklaring dat hy die kopie van gemelde kennisgewing verloor het. Hy verduidelik egter dat hy dit wel oorhandig het.

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2 *Karabo and Others v Kok and Others* [1998] 3 All SA 625 (LCC) at para [16]; *Lategan v Koopman and and Others* 1998 (3) SA 457 (LCC); *Roux v Lekekiso*, LCC13R/98, 16 November 1998 [1998] JOL 4157 (LCC).

3 Act 108 of 1996. Section 26(3) reads:

> "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

2 Die inhoud van aanhangsels “C” en “D” is foutief.

a U sal merk dat die relase uitgevoer 3/10/03 ten opsigte van die betekening van hierdie aansoek, afskrifte hierby aangeheg, op die eerste en tweede Respondent persoonlik beteken is te Nabygelegen plaas. Daar is ook geregistreerde briewe na hierdie adres gestuur, bewyse aan die Landdros gelewer is. Dus as die Respondente reeds gedurende Mei 2003 verhuis het sou die dokumente nie in Oktober en Desember na dieselfde adres versend gewees het nie.

b Ons het gepoog om met die balju wie die eerste kennisgewing beteken het in verbinding te tree. Hy het egter afgetree en hy het geen rekords om aan ons te voorsien nie.

c Die Respondente het gedurende middel Januarie 2004 na ‘n plaas in Worcester verhuis.

Dit is dus ons respekvolle submissie dat op die oorwig van waarskynlikhede en na aanleiding van bogemelde, dit blyk dat die inhoud van gemelde aanhangsels bloot ‘n fout was. Respondent het die plaas uit eie vrye wil verlaat. Hulle het ook hul meubels en ander besittings saam geneem.

Graag versoek ons dan dat die bevel soos deur die Agbare landdros gegee, bevestig moet word.”

[6] From the above explanation the following emerge:

1 If the contents of annexures “C” and “D” are incorrect, then those annexures should either have been amended or replaced with correct annexures. No such amendments or replacements are mentioned in the explanation and there are no amended annexures “C” and “D” in the file.

2 The returns of service dated 3 October 2003 relate to service of the Notice of Motion, as the attorney correctly explains. They do not relate to the service of annexure “C” and “D”. There is no proof of service of annexures “C” and “D”.

[7] The situation is compounded by the fact that there is also no clear proof that the notice in terms of section 9(2)(a) was served. The magistrate relied on the word of the deponent to the founding affidavit only, in circumstances where the deponent alleged having served a written notice on the respondents but was unable to furnish either the notice itself or proof of service thereof.

[8] The following order is made :

The order of the magistrate made on 22 January 2004 is set aside in whole and the following order is substituted therefore :

"(1) The application is dismissed.

(2) No order as to costs is made."

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JUDGE J MOLOTO

For the applicants:
M Geldenhuys of *Ingwersen Feenstra & Marais*, Wellington.

For the respondents:
In default.