IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **PIETERMARITZBURG** on 7 June 2010 CASE NO: LCC 59/2009
before **MEER J**

In the matter between:

MKOKONI ELLIAS MAKHAZA	**APPLICANT**
And	
FCL FARMING CC	**FIRST RESPONDENT**
MAGISTRATE BERGVILLE	**SECOND RESPONDENT**

JUDGMENT

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[1] Applicant seeks an order that two judgments against him by the Second Respondent, the applicable Magistrate, in the Bergville Magistrate's court be reviewed and set aside. The first judgment for the sum of R30 632.00 was granted against Applicants in default of appearance by Applicant on 9 October 2007, under case number 18/2007. The second judgment under case no 132/2008 was granted on 17 March 2009. It flowed from an application by Applicant for *inter alia* the rescission of the judgment in case no 18/2007, a declaration that the attachment and sale of Applicant's cattle in satisfaction of such judgment was unlawful and an order for the return of such cattle or their equivalent.

The Judgment in case No 18/2007

[2] On 26 February 2007 First Respondent issued summons against Applicant as Defendant in which he claimed payment of R30 632.00 as

grazing fees for the period 1 January 2006 to 1 February 2007. In defence Applicant raised the following special pleas which were filed on 26 April 2007:

First Special Plea

[3] Applicant as defendant pleaded that he is a labour tenant as defined in the Land Reform Labour Tenants Act No 3 of 1996 ("the Labour Tenants Act'), that there was no agreement for the payment of grazing fees, and the demand for grazing fees thus constituted a constructive eviction as defined in the Labour Tenants Act

[4] He pleaded moreover that in terms of Section 13 (1A) of the Labour Tenants Act the Magistrate's Court did not have jurisdiction to interpret and apply the provisions of such Act and the claim stood to be dismissed or referred to the Land Claims Court for adjudication.

Second Special Plea

[5] Applicant as defendant pleaded inter alia that he is an occupier as defined in the Extension of Security of Tenure Act No 62 of 1997 and the demand for grazing fees in the absence of an agreement constituted a constructive eviction.

Subsequent proceedings in the Court a quo in Case 18/2007

[6] Thereafter during May 2007 the First Respondent filed a request for further particulars with attorneys Siphali in Bergville, the correspondents for Applicant's attorneys, the University law Clinic in

Pietermaritzburg. According to Applicant the request was brought neither to the attention of Applicant nor his Attorneys. Similarly a notice of application to compel served on Siphali attorneys on 13 July 2007, and a subsequent notice of application in terms of Magistrate's court Rule 60 (3) also so served, did not get sent to Applicant or his attorney.

[7] On 9 October 2007 the Second Respondent granted default judgment against Applicant as defendant, for the amount claimed. Applicant did not attend court as he was unaware of the date of hearing due to his not having received the requisite documents from Attorneys Siphali. Therafter on about 23 September 2008 the Sheriff for the area attached 19 head of cattle belonging to applicant and sold them in execution, in satisfaction of the judgment.

The Judgment in case no 132/2008

[8] On 25 September 2008 the Applicant applied under case no 132/2008 for *inter alia* the rescission of the judgment in case no 18/2007, a declaration that the attachment and sale of Applicant's cattle in satisfaction of such judgment was unlawful and an order for the return of such cattle or their equivalent. At the commencement of the application a request for the recusal of the Second Respondent was refused.

[9] Mr Mbhense, who represented Applicant, explained that Applicant had been in default of appearance due to the failure of the correspondent attorneys to serve documents and notify him of the date of trial. The Applicant, he explained, only became aware of the default

judgment once his cattle were attached. Whilst notices were served on Applicant prior thereto, as the applicant is illiterate he did not realize they were important or urgent. Consequently the application for rescission was not brought timeously and condonation was sought in respect thereof.

[10] Mr Mbhense submitted that the Applicant had a bona fide defence in case no 18 /2007 as per his special pleas, emphasizing that in terms of Section 13 (1) (A) of the Labour Tenants Act the Magistrate's Court's jurisdiction had been ousted.

[11] Mr Marshall who represented the First Respondent argued in limine that as the application for rescission had been brought under a different case number, to the matter in respect of which default judgment was granted, the entire application should be dismissed with costs. There was no provision in the Act or the rules of the Magistrate's Court for applications for condonation or rescission to be brought under different case numbers to those wherein the default judgment had been granted.

[12] Mr Marshall took issue with the fact that affidavits had not been supplied by the University Law Clinic and Siphali attorneys in support of applicant's explanation for his failure to appear in Court. He disputed that Applicant only had knowledge of the judgment in September 2008 as alleged by him. The Appellant, he submitted had ample opportunity to approach the Court from December 2007 to September 2008, but elected not to do so. The application for condonation, he argued should accordingly not succeed.

[13] Mr Louw on behalf of the Second Respondent similarly submitted that condonation should not be granted. As Applicant had not stated the grounds upon which he alleged labour tenancy, the jurisdiction of the Magistrate's Court, he argued, had not been ousted.

[14] In dismissing the application for rescission the Court a quo dealt neither with condonation nor with the merits. Instead the ground upon which the application was dismissed was procedural as it were. The application was dismissed because the Magistrate found Applicant had used the incorrect procedure contrary to the Magistrate's Court Act and rules. This he had done by bringing the rescission application under a different case number to the case number under which the judgment was granted. On that basis the application was dismissed with costs.

On Review

[18] Section 13 (1A) of the Land Reform Labour Tenants Act states and I quote:

"With the exception of issues concerning the definition of "occupier" in section 1(1) of the extension of Security of Tenure Act, 1997 (Act No 62 of 1997), if an issue arises in a case in a Magistrate's court or a High Court which requires that court to interpret or apply this Act and –

(a) no oral evidence has been led, such court shall transfer the case to the Court and no further steps shall be taken in the case in such court;
(b) any oral evidence has been led, such court shall decide the matter in accordance with the provisions of this Act"

The reference to "Court" at subparagraph (a) above is to the Land Claims Court as appears from the definition section of the Labour Tenants Act.

[19] It is clear from the mandatory requirement at subparagraph (a) that in respect of Case No 18/2007 the Magistrate when confronted with the first special plea was required to transfer the case to this Court as that special plea raised the labour tenancy status of Applicant, an issue which would have required the court a quo to interpret or apply the Labour Tenant's Act. The fact that Applicant did not elaborate in great detail on the basis for claiming to be a labour tenant, does not detract from this. The Magistrate erred in not referring the case to the Land Claims Court. He erred moreover in granting default judgment against Applicant. Had the Magistrate referred the matter to the Land Claims Court as was required the rescission application under case No 132/2007 would not have been necessitated.

[20] It is debatable whether I need concern myself with the rescission application, given my finding above, for the rescission application in essence was prompted by a default judgment which ought not to have been granted, in the light of the mandatory requirements of Section 13 (1A) of the Labour Tenants Act. I nonetheless proceed to deal with the submissions presented in respect of that application.

[21] I have not been referred to any authority or any section of the Magistrate's Court Act or Rules for the proposition that the failure to bring the rescission application under the same case number as that of the judgment which is sought to be rescinded, is fatal to an application for

rescission. Magistrate Court Rule 49 which deals with rescission applications, does not say so. As case numbers are generally allocated by the administration office of a Court, which in the case of a Magistrates Court would be the office of the Clerk of the Court, if the wrong practice was followed, in the absence of evidence to the contrary, one must assume that the fault therefore must lie to some extent with the office of the Clerk of the Court. The latter office one expects would guide litigants and indeed legal practitioners who may not be familiar with the practice pertaining to allocation of case numbers in rescission applications.

[22] It is in any event my view that a procedural error involving an incorrect case number in circumstances where it is apparent to all interested parties that the two case numbers are interrelated, gives rise to no prejudice and ought not to have been used as a reason for the dismissal of the application or indeed a reason not to consider the merits of the application. For the Court a quo to have dismissed the application in the circumstances and for the stated reasons, was an irregularity.

[23] With regard to condonation for the late bringing of the rescission application, applicant's explanation to the effect that he did not understand the import of documents served on him and only became alive to the import of the situation when the cattle were attached, and then applied for rescission, ought to have been considered as grounds for condonation.

In view of all of the above I grant the following order:
1.The following decisions taken by the Second Respondent against the Applicant in favour of the First Respondent are reviewed and set aside:

1.1 Default judgment granted against Applicant at Bergville Magistrate's Court on 7 July 2007 under case number 18/2007

1.2 Judgment granted against Applicant at Bergville Magistrates Court on 17 March 2009 under case number 132/2008

2. The First Respondent shall pay the costs of this Application.

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JUDGE Y.S.MEER

Heard on: 7 June 2010 **Handed Down on:** 7 June 2010

For Applicants: *T Mbhense, Attorney Ladysmith Justice Centre, Ladysmith, KwaZulu Natal*

For Respondents: *Mr Marshall, Attorney at Macualay & Riddell, Ladysmith, KwaZulu Natal*