IN THE LAND CLAIMS COURT OF SOUTH AFRICA

(HELD IN RANDBURG)

CASE NO: LCC 77R/2011

Before the Honourable Kahanovitz AJ

14 February 2012

In the matter between:

JACOBA CORNELIA NEL **Applicant**

and

MOHAU DAVID BELENG AND 5 OTHERS **Respondents**

JUDGMENT

KAHANOVITZ AJ:

[1] This matter comes before me on automatic review in terms of Section 19 of the Extension of Security of Tenure Act 62 of 1997.

[2] On 06 December 2011 the Magistrate in Case Number 320/11 heard argument from the applicants' attorney and thereafter at the end of argument on this unopposed matter stated that the application for eviction was granted and that the respondents 1 to 5 must leave the property on or before 31 January 2012 – and in the event that they did not the sheriff be authorized to evict them on 01 February 2012.

[3] The Magistrate gave no reasons for his finding and simply granted it at the end of the applicants' attorney's address. Magistrates are reminded that, after granting an order of eviction in terms of the Act , they are required in terms of Land Claims Court Rule 35A(1)(b) to ensure that the record of proceedings and reasons for the order are forthwith transmitted to this court for automatic reviow. In terms of the Section 19(3) of the Act all eviction matters need be "subject to automatic review by the Land Claims Court, which may –

(a) confirm such order in whole or in part ;

(b) set aside such order in whole or in part;

(c) substitute such order in whole or in part;

(d) remit the case to the Magistrate's court with the directions to deal with any matter in such manner as the Land Claims Court may seem fit."

[4] In this matter the applicant, owner of the farm Die Rand in the district of Linday deposed that the first respondent had worked on the farm since 01 September 1997 and lived there with his wife. At some uncertain time but apparently quite recently – they were joined by the third respondent – the first and second respondents' son – and his wife and their child. The application was for the eviction of all 5 persons.

[5] I am unable to confirm this order for the following reasons –

5.1 Section 9(3) of the act requires that a court "must request a probation officer contemplated in section 1 of the Probation Services Act, 1991 (Act 116 of 1991), or an officer of the department or any other officer in employment of the State ..... to submit a report within a reasonable period..." This provision is mandatory. There is no evidence in the papers of such a request for report ever having been made by the Court itself. This failure to even ask for a report is fatal to the confirmation of an eviction order[1] .

5.2 The deponent further submits that the provisions of Section 8 of the Act i.e. the termination of the right of residence was fulfilled by virtue of the fact that the employment relationship came to an end. Her affidavit records the following regarding the termination of the right of residence. At paragraph 9 she states – "sodanige reg van verblyf is beeindig in

[1] Theewaterskloof Holdings (Pty) Ltd, Glaser Division v Stevens & another 2002(3) SA 401 (LCC) ; Glen Elgin Trust v Titus and another [2001] 2 All SA 86 (LCC) ; Nederduitse Hervormde Kerk (Geemente van Ruskoppies DwaalBoom) v Kotsedi [2007] JOL 20054 (LCC)

samespreking op 5 Mei." Her affidavit reveals an acrimonious discussion taking place between the parties on 5 May where the 1st and 2nd respondents state that if the others are not employed 1st and 2nd respondents will leave the farm on 11 April. Applicant states that she told them they could leave and that 1st respondent then resigned . There is mention of some further discussions on 6 May between the representative of the Department of Land Affairs (sic), first respondent, the applicant and her lawyers. She in the affidavit records that during those discussions the first respondent acknowledged that there had been no unlawful eviction and that he had resigned effective 30 April because of the fact that first applicant did not wish to employ the first respondent. These dates are later contradicted by applicant in paragraph 9 when she adds that the 5 May discussion included an agreement that the respondents would leave with transport provided on 9 May. The respondents do not leave and there is no clear termination of the of the right of residence save for the rather confusing record referred to above . It accordingly appears that there was no compliance in respect of all respondents with Section 8 of the Act.

5.3 The dismissal dispute issue was thereafter referred to the CCMA and was settled at the CCMA in August 2011 shortly before issue of this summons for eviction. The settlement at the CCMA records expressly at paragraph 6.1 that "this settlement agreement is only relating to the employment relationship of the parties." Accordingly even at that stage there appears to be no termination of the right to residence or notice to vacate in terms of the Act.

5.4 Finally it appears that there is no proof that the applicant has given written notice to the Municipality or the Head of the relevant provincial Department of Rural Development and Land Reform as is required by one of two possible methods in terms of Section 9(2)(d). The applicants' attorney is recorded as having told the court that notice was served on those authorities and he is recorded in the Magistrates transcript as submitting his letters as evidence of proof. The letters are marked exhibits A and B . There is no however no proof of service on these officials evident from the letters or elsewhere. The letters themselves record that they are forwarded in terms of " Act 60 of 1997" and the attached Notice of Motion makes no mention of it or the correct Act viz 62 of 1997 either. A recipient could be none the wiser as to why this letter is being delivered (if it ever was in this case). This doesn't constitute proper notice in terms of section 9 (2) (d) - and further does not satisfy the requirements of service in terms of either the specific regulations promulgated in terms of Act 62 of 1997 or in terms of the Court rules of service.

In view of the above it is not necessary for me to consider further any of the other merits involved in the matter. I accordingly order that -

The order as granted by the Magistrate is set aside.

There is no order as to costs

Acting Judge Kahanovitz