



**THE LAND CLAIMS COURT
REPUBLIC OF SOUTH AFRICA**

**CASE NO: LCC 102/2011
CASE NO: LCC 103/2011**

Before Mpshe AJ and Kahanovitz AJ

Decided on 02 April 2012

In the matter between:

**AJB TRUST
AJ BEHRENS**

**FIRST APPELLANT
SECOND APPELLANT**

And

**SOLOMON SELLO BOIYANE
JOHANNES SEGONE**

**FIRST RESPONDENT
SECOND RESPONDENT**

JUDGMENT

Mpshe AJ

INTRODUCTION

These matters came before us on appeal. These appeals emanate from the Magistrate Rustenburg. The Respondents in both appeals were Respondents in eviction applications instituted by the appellant in the court *a quo*.

BACKGROUND

1. Initially there were six different matters which were by agreement argued together in the magistrates' court. Solomon Sello Boiyane in appeal LCC102/2011 was the Respondent in the magistrates' court in case number 11179/2010 while Johannes Segone in appeal LCC103/2011 the Respondent in case number 11181/2020 in the court *a quo*. In the other matters the magistrate granted eviction orders against the remaining respondents. Their matters do not concern me in these appeals

2. Eviction orders were sought against them in accordance with the Extension of Security of Tenure Act 62 of 1997 ("The Act") and refused in these two matters now on appeal. It was agreed by both parties that the appeals be heard together.

3. The Magistrate in the court *a quo* dismissed the eviction application in respect of both Respondents. The appellant contends that in each of those two matters :
 - 3.1 The Honourable Magistrate erred in finding of fact and ruling of law that the provisions of section 8 of the Act were

not complied with;

3.2 The Honourable Magistrate erred in finding of fact and ruling of law that the provision of section 9 of the Act were not complied with;

3.3 The Honourable Magistrate erred in finding in fact that the Respondent's right was not validly terminated;

3.4 The Honourable Magistrate erred in ruling of law that the notice in terms of section 9(2) (d) was not validly served;

3.5 The Honourable Magistrate erred in finding in fact and ruling in law that the Respondents right of residence was not directly linked to the existence of an employment contract;

3.6 The Honourable Magistrate erred in ruling of law that the requirements for an eviction order in terms of the Act had not been satisfied.

4 I need first to deal with issues raised by the Respondents common to both appeals. Counsel for both Respondents submitted that the issues of *locus standi* of the Appellant and the lack or absence of a Section 9(3) report as provided for in the Act¹ in any event meant that the eviction applications should not have succeeded. The latter is generally referred to as the probation officers report.

¹ Respondents Heads of Argument pages 4-7 thereof.

- 5 Counsel for the Respondent Mr.Botha submitted that although these two issues had not been raised in the court a quo, this court can accept argument on them and referred the court to a decided case.²
- 6 While the Diggers Development (Pty) Ltd case is distinguishable from this case , on a careful reading of the record these two *in limine* points are not being raised for the first time in this appeal

LOCUS STANDI AND OWNERSHIP OF PROPERTY.

- 7 This issue was initially raised at the hearing in the court *a quo*³. The Respondents there were legally represented by an able attorney Mr.Matshitse who is no stranger to this court.

Erasmus⁴ states:

“A fact which is admitted is eliminated from the issues to be tried

² *Diggers Development (PTY) LTD v City of Matlosama [2012] Jol 28177 (SCA).*

³ Record p.3 lines 15-25 and p.4 lines 1-5.

⁴ SUPREME COURT PRACTICE page 2 lines 5-11.

and the Plaintiff is relieved of the duty of bringing evidence to establish it. This is trite in our law.⁵”

- 8 What is disconcerting on this issue is the fact that Counsel for the Respondents Mr.Botha was directed by the bench to the judgment in the court *a quo*. He did not give reasons why that part of the record should be reconsidered by the Court as the issue had been canvassed and conceded in the Court *a quo* and as I did not hear any submissions of misdirection against the presiding officer in the Court *a quo* it accordingly ought not to have been raised on appeal.

Probation Officers Report:

10. Mr.Botha for the Respondent argued that an order cannot be granted in the absence of a probation officers report as contemplated in Section 9(3) of the Act.

Section 9(3) reads:

(3) For the purpose of subsection (2) (c), the court must request a probation officer report contemplated in section 1 of the

⁵*Van Deventer v De Villiers 1953 (4) S.A. 72 (C) at 74.*

Probation Services Act, 1991 (Act No.116 of 1991), or an officer of the department or any other officer in the employment of the state, as may be determined by the Minister, to submit a report within a reasonable period-

- a. On the availability of suitable alternative accommodation to the occupier;*
- b. Indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education;*
- c. Pointing out any undue hardship which an eviction would cause the occupier; and*
- d. On any other manner as may be prescribed*

11. Mr.Botha in his Heads of Argument submits that:

11.1 In the present case there is no indication that the report was omitted due to an unreasonable delay in the furnishing thereof – there is , in fact, no indication at all on the record why a report was not submitted. The issue of a section 9(3) was simply ignored during the hearing in the court *a quo*.

11.2 The lack of section 9(3) report is also in itself a reason why the dismissal of the eviction application was correct.

12. It is however not true that the issue of a section 9 (3) report was simply ignored during the hearing in the court of *a quo*.

13. I have to refer to the record⁶.

“Mr.Keeney: Your Worship we have not been provided with such a report Your Worship. The Applicant has in fact requested the report Your Worship. Whilst that is not on the papers for obvious purposes Your Worship that was requested prior to the Notice of Motion being served. Two letters have been caused to be sent Your Worship, both to the chief Magistrate of this Honourable Court to the effect that such probation officer’s report be requested from the department and further a letter was addressed to the department,- the provincial director of the Department of Land Affairs and both, -the letter to the Chief Magistrate is dated 3 August 2010 and the letter.... (Intervenues)

14. This matter was again visited in the court *a quo* by the Respondents’ attorney⁷.

“So Your Worship it is my submission that there was no compliance at all by the applicant and for that reason the application should be dismissed with costs. With regard to the probation officer’s report, as my learned colleague has indicated, I did speak with (inaudible) at Land Affairs Brits Mr.Rafelegeo. He said he compiled the report and submitted it

⁶ Record page 23 lines 16-25 and page 24 lines1-14.

⁷ Record page 37 line 21-25 up to page 38 line 1-4.

to the court. I do not know whether they have been misfiled or whatsoever.”

- 15 It is not disputed that a letter requesting the section 9 (3) report was dispatched by the Appellant to the Chief Magistrate and Director of Land Affairs on the 3 August and 4 August 2010 respectively. However, the Magistrate as enjoined by section 9 (3) is to make that request.
- 16 The request was done two months before the trial in the court *a quo*. The record suggests that the report was prepared and submitted but for reasons unknown it did not find its way into the court file.
- 17 It is indeed correct that it is compulsory to request this probation report so as to enable the magistrate to satisfy himself/herself as to (a)-(d) of section 9(3). This report is indeed important particularly in the case of families. *In casu* the Respondents surprisingly placed little evidence re their personal circumstances on record. The court *a quo* had no knowledge as to whether Respondent lived with families or any other dependents⁸. The absence of a section 9(3) report accordingly is where they themselves have not raised these issues in my opinion not fatal to the proceedings and cannot be regarded a bar to the proceedings⁹.

8 Judgment at page 9 lines 2-18.

9 *Port Elizabeth Municipality v Peoples Dialogue on hand and shelter* 2001(4) S.A.759 ECD 771 E-F.

Panmar Research Farms (PTY) LTD v Magome and another 2002(5) S.A.621 LCC

18 I conclude that the court *a quo* correctly continued to hear the matter without the probation officer's report.

MERITS.

19. I now deal with the grounds for appeal.

Appeal LCC102/2011

Respondent: Solomon Sello Boiyane.

BACKGROUND

This Respondent resided on the farm remaining extent of Portion 19, Estancia of the farm Modderfontein 332 in the Rustenburg District. He started working for the Appellants on or before the 5 August 2002. He then resigned from the employ during June 2008. Appellant therefore launched an eviction application against the Respondent.

The Magistrate in the court *a quo* dismissed the eviction application against this Respondent and the Respondent under appeal LCC103/2011 for different reasons.

20. Regarding LCC102/2011 the reasons for the dismissal of the eviction

application is the non-compliance with section 8 of the Act.¹⁰

Section 8(2) provides as follows:

The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provision of the Labour Relations Act.

Section 9 (2) provides that:

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.

21. Termination of right of residence must accordingly precede an eviction order as per section 9(2) (a) of the Act. However, termination of right of residence becomes redundant if the occupier resigns or is dismissed from employment. This is the law provided the right of residence arose solely from an employment agreement¹¹.

22. Counsel for the Appellants submits that the termination of residence

¹⁰ Magistrate judgment at paginated page 67 lines 11-25.

¹¹ Section 8(2) of the Act.

was achieved by the resignation of the Respondent. This cannot be correct given the fact that the Respondent disputes that his residence arose solely from the contract of employment.

23. Respondent started residing on the property in 1988 through his father and occupied a two-roomed house allocated to his father. In 2002 he took up employment with the Appellants and continued to live in the house allocated to his father. In other words Respondent resided on the property long before, almost thirteen years before taking up employment with the Appellant.

24. There is no evidence that the residence of the Respondent was connected to the employment agreement. The fact that other Respondents admitted that their residence arose from their respective employment contracts as submitted by Counsel for the Appellant does not take the matter any further.

In the court *a quo* counsel for the Appellant Mr. Keeney admitted that a notice to terminate right of residence was never served on the Respondent.

25. I am accordingly satisfied that Appellant did not comply with sections 9(2) (a) and 8(2) of the Act.

This appeal stands to be dismissed.

APPEAL LCC103/2011. JOHANNES SEGONE.

BACKGROUND.

26. This Respondent was an occupier on the Appellants property. He has been in the employ of the Appellant since 13 August 2001 until 31 July 2008 when he was retrenched.

27. *This eviction* application was dismissed on the basis that Appellant did not comply with section 9(2) (d) (i) of the Act.

Section 9 (2) (d) (i) states:

A court may make an order for the eviction of an occupier if-

(a).....

(b).....

(c).....

(d) The owner or person in charge has, after the termination of the right of residence, given-

(i) The occupier;

(ii)

(iii)

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 Rural Development and Land Reform 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.

28. It is common cause that the section 9(2) (d) (I) notices was issued and received by the Respondent. The dispute is that it was not personal service on the Respondent. There was service but on “(friend) P.Mosito, at the address of the DEFENDANT, a person apparently not less than 16 years of age.”¹²

29. The evidence reveals that the said notice was served in two official languages being English and Setswana. This is ascertainable from the face of the prescribed Form E notices.

30. Appellant submitted that service of the notice was a proper service. Appellant put reliance on the provisions of Regulation 9 (4) to the Act.

Regulation 9(4) reads as follows:

Where the person serving a notice in terms of subregulation (1) or (2) is unable to serve the notice on the occupier personally, service must be effected-

a. by leaving a copy of the notice in an official language

12 Return of service Deputy Sheriff Tau

which the occupier is reasonably believed to understand best, and in another official language, at the occupier's place of residence with a person apparently in charge of the premises at the time of delivery and apparently not less than 16 years of age;

b. by affixing a copy of the notice in an official language which the occupier is reasonably believed to understand best, and in another official language, to the door of the occupier's place of residence; or

c. By sending a copy of the notice in an official language which the occupier is reasonably believed to understand best, and in another official language, by registered post to the occupier's last-known postal address.

31. I am satisfied that Appellant satisfied Regulation 9(4) (a). Appellant has thereby complied with Section 9(2) (d) (i) of the Act.

This appeal stands to succeed

I consequently make the following order.

- a. Appeal LCC102/2011 is dismissed.
- b. Appeal LCC103/2011 is granted.
- c. The Respondents Johannes Segone in Magistrate Rustenburg case 1118/2010 is to vacate the premises on or before 30 April 2012 failing which the sheriff is authorized to evict him on 2 May 2012 or thereafter
- d. No order as to costs.

Mpshe A.J

I concur.

Kahanovitz A.J

PARTIES:

APPELLANTS: W.B. Van Heerden

(VAN VELDEN-DUFFEY INC)

RESPONDENT: Isaac Matshitse

(MATSHITSE ATTORNEYS)