

IN THE LAND CLAIMS COURT OF SOUTH AFRICA**HELD IN RANDBURG****CASE NO: LCC 28R-2012****MAGISTRATE Case No E3/2011****In Chambers****In the matter between:****REMHOOGTE BOERDERY GRABOUW (Pty) Ltd****Applicant****and****WILLEM BOOYSEN****Respondent**

JUDGMENT

KAHANOVITZ AJ:

1. This matter comes before me on automatic review in terms of section 19(3) of the Extension of Security of Tenure Act, Act 62 of 1997 (hereinafter referred to as "the Act").

2. The applicant is the owner and in charge of the farm commonly known as Van Arieskraal situate in the jurisdiction of the Magistrates Court at Grabouw in the district of Caledon. It applied for the eviction of its ex employee the respondent by issuing an application out of the Grabouw Court on 27 October 2011. According to the return of service filed in court the papers were served on the first respondent personally by the sheriff on the 15th December 2011 at 11.00 at the farm after earlier attempts to serve on him on the 2nd December and 13th December were unsuccessful. The papers were also served on the Theewaterskloof Municipality, the local authority on the 12 December 2011 in order to comply with section 9(2)(d) of the Act. The notice of motion gives notice that the matter would be heard on 10th February 2012 and records that the respondent has five days within which to file a notice of intention to defend and 15 days within which to file any answering affidavit. In this regard the applicant relies on the uniform rules of the high court.¹ The respondent did not file any papers whatsoever.
3. The facts as stated in the founding affidavit of the applicant's duly authorized employee Johannes le Roux are all that were before the magistrate. Le Roux attests that the applicant entered into an employment contract with respondent to work on the farm as of January 2004 and he was given permission to stay in a house together with his family (*viz* his wife, 2 adult females and three minor children) as long as he was employed. The applicant did not reveal the exact ages of the children. Le Roux further attests that the respondent was dismissed

¹ See section 17(4) of the Act.

from his employment after a disciplinary enquiry held on 15 December 2010.² As proof of these events Le Roux attached annexure "E," the minutes of the disciplinary enquiry. Le Roux later³ attests that a letter dated 18 July 2011 was addressed to the respondent "informing him that a disciplinary hearing was held where he was found guilty and subsequently dismissed." In his affidavit he states that respondent was at that stage given notice to vacate the house. As proof of this he attaches annexure "F." The application to evict in terms of the Act follows but only in late 2011.

4. The applicant avers compliance with section 9(3) of the Act by stating that "I have been advised that the Act furthermore provides that a probation officer's report must be requested which report must be handed into the Court at the time of hearing of this Application. I have accordingly requested the Applicant's attorney of record to take the necessary steps to ensure that such a report is requested."⁴ The record forwarded to this court contains a copy of a letter sent by the clerk of the civil court to the regional office of the Department of Land Affairs dated 3 November 2011 requesting that a probation report be prepared and be ready for court by 25 January 2012. No report appears to have been received or considered by the magistrate

5. The Respondent did not enter a notice of intention to defend and filed no papers. The local authority served also did not file any papers and placed no information before the court in this matter where the respondent and his co-occupants including dependants faced eviction.

² Founding affidavit paragraph 15.2

³ Founding affidavit paragraph 15.5

⁴ Founding affidavit paragraph 21

6. The matter was called before the Magistrate on 3 February 2012 for reasons that are unclear and then was postponed to 10 February 2012, the date on the notice as delivered. On 10 February 2012 the Magistrate noted that there was no appearance for the Respondent and he issued an order. It should be noted that the order granted is noticeably longer than the order requested in the Notice of Motion. It *inter alia* orders that the respondent vacate the premises by 31 May 2012 – and should he and those living with him fail to do so the Sheriff assisted by the SAPS may carry out the eviction order on 1 June 2012. The eviction order was granted and later a diligent clerk of the civil court noticed that the magistrate had neither suspended the order nor forwarded it to this Court as required for automatic review. This was rectified and the matter referred to me in chambers on 19 April 2012. The eviction order is suspended by virtue of section 19(5) of the Act.

7. I am unable to confirm the eviction order *inter alia* for the following reasons:

7.1 Firstly it is difficult to determine exactly why the magistrate decided that an eviction order was valid in law. 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 review. Here the magistrate has given no reasons.

7.2 The deponent explained that the respondent's right to occupy the house was linked to his employment contract Annexure "C." The deponent then refers to paragraph 14 of Annexure "C" where reference

is made to a housing contract. That housing contract is not annexed to the affidavit and thus the court is not fully informed of the terms and conditions of this right of residence.

7.3 The magistrate in the order declared that the respondent's right of residence had been terminated in accordance with section 8 of the Act. This, in these circumstances requires the applicant to satisfy the court that the respondent "had been dismissed in accordance with the provisions of the Labour Relations Act."⁵ The applicant referred to annexure "E" as proof of the dismissal and attests that "the disciplinary hearing took place on the 15th of December 2010 at which hearing the Respondent was found guilty and as a result thereof he was dismissed⁶." However annexure "E" records that while the chairperson of the enquiry was inclined towards dismissal, the penalty imposed was not dismissal as attested, but a two week suspension without pay and forfeiture of the annual bonus. Annexure "F" then refers to a different disciplinary enquiry of 12 April – of which no record is attached – and states that the respondent must vacate the house by 30 June in one paragraph and by 31 August in the next. The allegations attested to in the founding affidavit are accordingly not supported by this rather confusing state of affairs as appear in the annexures.

7.4 In his affidavit⁷ the applicant's deponent refers to section 9(2)(d) of the Act and states :-

"I have been advised that this subsection provides that instead of giving the requisite 2

⁵ See Section 8(2) of the Act.

⁶ See paragraph 15.2

⁷ See paragraph 19.4

(two) months notice to the Respondent the Applicant can give 2 (two) months notice of its intention to bring this application to the Respondent, the local Municipality as well as the Department of Land Affairs. I will therefore instruct the Applicant's attorney to proceed in this way"

While the deponent fails to correctly summarize these provisions of the Act, at least applicant and its attorney were aware of the requirement. Unfortunately it appears that neither he nor the attorney who was so instructed complied with the requirements of section 9(2)(d). In the first place there is no proof of service on the Department of Land Affairs now called the Department of Rural Development and Land Reform. Further it is apparent from the dates set out above that neither the occupant/respondent nor the local authority, in the absence of receiving two calendar months notice, were served with the application papers as they ought to have been "*not less than two months before the date of the commencement of the hearing of the application.*"⁸ While the attorney of record appears to have signed the notice of motion on 14 October – giving more than two months time to give notice to all requiring that notice, the sheriff unfortunately for the applicant only served on the parties in mid December and thus when the matter was determined on 10 February the parties concerned had not been given the statutory two months notice.

7.5 Further *ex facie* the papers it appears that this family of seven (7) having had almost eight years residence on the farm face an eviction as a result of this application. For the reasons set out in the *El Rio* matter⁹ I am not satisfied that this is a matter of where it is sufficient simply to request a

⁸ See section 9(2)(d) of the Act.

⁹ *El Rio Farming (Pty) Ltd v Jacobs* (LCC36R/11) [2011] ZALCC 12 (25 August 2011)

probation officers report and then not to insist upon it. The deponent states that the report “must be handed into the Court at the time of the hearing”¹⁰ but did not remain true to this assertion before the magistrate. In casu the report was requested in terms of the Act by the court on 3 November 2011 and by applicant’s attorney on 1 December 2011. The eviction order to evict these 7 occupants from the farm was granted not after a long wait as occurred in the few earlier cases where the court has suggested that there is no need to wait should the officer responsible take too long to submit the report. More importantly it was granted by a magistrate in a situation where there was no evidence re their personal circumstances, their ages, their health, the availability of alternative accommodation, their schools (if any) – all information which could have been gleaned from a report obtained in terms of section 9(3). In the absence of this report an eviction order wasn’t competent here.

7.6 Finally in *Diedericks*¹¹ it was held that save in exceptional circumstances an eviction order is not competent unless there is evidence of engagement with the local authority. There is no evidence of any engagement in this matter prior to magistrate granting an eviction order.

8. These circumstances described in paragraph 7 above, result in this order being granted in a manner that is not “just and equitable”¹² and without considering “all relevant circumstances.”¹³

¹⁰ See paragraph 21 of the record

¹¹ *Diedericks v Univeg Operations South Africa (Pty) Ltd t/a Heldervue Estates (LCC18/2011)* [2011] ZALCC 11 (23 August 2011)

¹² See section 8 (1) of the Act

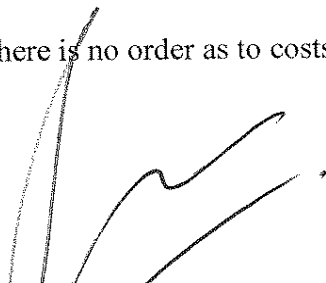
¹³ See section 26(3) of the Constitution of the Republic of South Africa Act 108 of 1996.

9. Accordingly:

9.1 the order as granted by the magistrate Grabouw herein is set aside; and

9.2 the application dismissed; and

9.3 there is no order as to costs.



Acting Judge Kahanovitz

