IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER**: LCC 11R/00
MAGISTRATE'S COURT CASE NUMBER: 1639/99

In chambers: **Meer J**

Decided on: 17 March 2000

In the review proceedings in the case between:

WJ WESSELS Applicant

and

ABIE SEPTEMBER & FAMILY Respondents

JUDGMENT

MEER J:

[1] This is an automatic review in terms of Section 19(3) of the Extension of Security of Tenure Act[1] (hereinafter referred to as "the Act") of an order granted by the Magistrate for the District of Bothaville, for the eviction of the respondents from the applicant's farm on or after 16 May 2000.

[2] Having read the papers I am of the view that the eviction order granted by the learned Magistrate on 16 February 2000 must be set aside and substituted with a *rule nisi* the terms of which appear at paragraph [10] below. My reasons for this appear below.

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1 Act 62 of 1997 as amended.

In contravention of High Court Rule 6(5) the Magistrate erred in granting an eviction order brought on notice of motion in accordance with form 2[2]

[3] The applicant, owner of the farm Modderfontein Oos, caused an application for the eviction of the respondent and his family from the farm to be served upon the respondent. The application is by way of notice of motion to which is attached two affidavits by the applicant. Section 17(4) of the Act provides that the rules of procedure applicable in civil applications in a High Court apply in respect of any proceedings in a magistrate's court in terms of the Act, until rules of court for the magistrate's courts are made in terms of section 17(3). Such rules have not as yet been made. High Court rule 6(5) provides that the notice of motion of all applications other than those brought *ex parte* must be in accordance with form 2(a) to the first schedule of the High Court rules. This is the correct form to be used in applications which are not *ex parte* as it informs the respondent of his/her procedural rights.[3]

[4] In contravention of High Court rule 6(5)(a) the application for the eviction of the respondents was brought on notice of motion in accordance with form 2 of the first schedule, typically used in *ex parte* applications where a litigant approaches the court for relief affecting his or her rights alone. Clearly this is the incorrect form in an eviction case where the relief sought affects not only the rights of the applicant, but significantly too, those of the persons whose evictions are sought. The prejudice to the respondents where form 2 as opposed to form 2(a) is incorrectly used in an application such as this is that they are not informed of the requisite time periods for the delivery of pleadings as specified in form 2(a), nor given an opportunity to avail themselves thereof. These periods are 10 days after service of the application for the respondents to notify the applicant of their intention to oppose[4], 15

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2 Contained in the first schedule to the High Court Rules.

3 For a full discussion on form 2 and form 2(a) see *Van der Merwe v Maduna* LCC 67R/99,11 November 1999, internet website address http://www.law.wits.ac.za/lcc/1999/vdmerwessum.html at para 2-4.

4 Rule 6(5)(b).

days thereafter for delivery of answering affidavits[5] and 10 days for the delivery of a replying affidavit by the applicant[6].

[5] Although the notice of motion was addressed to the clerk of the court as well as to the respondents and was served upon them, it does not call upon the respondents to notify their intention to oppose the application and to provide a service address. Nor does it specify the aforementioned time frames, or warn of the consequences of the failure to oppose, as occurs in a notice of motion based on form 2(a). The respondents in this case neither furnished notices of opposition nor answering affidavits nor did they appear in court (in person or through a legal representative) on the date of hearing.

[6] This Court has previously, in the review judgment *Van der Merwe v Maduna and others*[7] discussed in considerable detail the prejudice occasioned by the use of the incorrect form 2 in eviction proceedings. In the present case no explanation was sought, and none provided, as to why the incorrect form was used, and there most certainly was no hint of urgency. [8] The Magistrate ought not, in the circumstances, to have entertained the application. In my view the Magistrate clearly erred in granting the eviction order.

Compliance with Section 9(2) of the Act

[7] From the affidavit of the applicant it would appear that the requirements for the granting of an eviction order in terms of section 9(2) of the Act may indeed be present. In compliance with section 9(2)(a) the affidavit states that the respondent's right of residence was terminated in accordance with section 8 of the Act. From the affidavit it emerges that the respondent's right of residence arose solely from an employment agreement with the applicant. His right of residence was terminated when a dispute which caused his employment to end (the dispute arose because he demanded an increase of

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5 Rule 6(5)(d)(ii).

6 Rule 6(5)(e).

7 See above n 3. This aspect is also discussed in *African Charcoal (Pty) Ltd v Ndlovu* LCC10R/00, 7 March 2000, as yet unreported.

8 High Court Rule 6(12)(a) and (b) permits the court to dispense with the forms and service provided in the rules in urgent applications.

R100 per month), was referred to the CCMA and determined in the applicant's favour. This would appear to be a termination of the respondent's right of residence in terms of section 8(3) and (4) of the Act.

[8] In compliance with section 9(2)(b) the applicant's affidavit alleges that the respondents failed to vacate the premises within the notice period given to them, and in compliance with section 9(2)(c) the affidavit states that the conditions for an eviction order in terms of section 10 or 11 have been fulfilled. Clearly section 10 is relevant as the first respondent is alleged to have been an occupier on 4 February 1997. In compliance with section 10(1)(c) the affidavit states that because the respondent will no longer work for the applicant, it is not practically possible to remedy or restore the relationship between them, and further that it is not possible for the respondents to remain on the farm. Finally, in accordance with section 9(2)(d) there is proof that the requisite notices to the respondents, municipality and head of the relevant provincial office of the Department of Land Affairs were given.

[9] Clearly at the hearing of this matter the Magistrate was influenced to grant the eviction order because of the apparent compliance with section 9(2) of the Act, whilst overlooking completely the applicant's failure to comply with Uniform Rule 6.

[10] From all of the above it appears that, but for the deficiency in the contents of the notice of motion, the papers before the Magistrate may well constitute sufficient allegations to establish on a *prima facie* basis the jurisdictional facts necessary for a final eviction order under section 9(2). I am of the view that the substituting of the Magistrate's order with a rule *nisi*[9] calling upon the respondents to show cause why a final eviction order under section 9(2) should not be made, would be a practical way to remedy the failure to comply with Uniform Rule 6. Accordingly I make the following order:

A The Order given by the Magistrate in the Magistrate's court for the district of Bothaville held at Bothaville, in case number 1639/99 on 16 February 2000 is hereby set aside and substituted with the rule *nisi* set out in B hereunder.

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9 A similar approach was adopted in *City Council of Springs v Occupants of the Farm Kwa-Thema 210* [1998] 4 All SA 155 (LCC).

B A rule *nisi* is hereby issued returnable on 12 April 2000, calling upon-
Abie September and all persons residing with him on the farm Modderfontein Oos, Bothaville to appear at the Magistrate Court for the district of Bothaville, at Bothaville on 12 April 2000 at 09:00, personally or through their legal representative, to show cause why an order in the following terms should not be granted:

1 ordering Abie September and all persons residing with him to vacate the property and remove all their belongings therefrom, by not later than 16 May 2000;

2 in the event of Abie September and all persons residing with him failing to vacate the property within the time limit set in 1, authorising and directing the Sheriff to evict Abie September and all persons residing with him on 19 May 2000

3 granting the applicant such further or alternative relief as the Magistrate may deem appropriate;

C The applicant is ordered-

1 to serve a copy of the rule *nisi* (in B) on Mr Abie September and all those persons residing with him by no later than 25 March 2000 to which shall be attached the following:

(a) a copy of the judgment and order handed down in case 1639/99 by the Magistrate for the district of Bothaville on 16 February 2000;

(b) a notice informing Abie September and all those residing with him that the Land Claims Court has substituted the eviction order issued by the Magistrate's court on 16 February 2000 by the rule *nisi*;

(c) a copy of form 9 of Schedule 1 to the Land Claims Court Rules (published in Government Gazette 17804, 21 February 1997, as amended by GN 345, Government Gazette 18728, 13 March 1998 and GN 20049, Government Gazette 594, 7 May 1999).

2 to serve a copy of this Order and of all papers filed with the Magistrate in case 1639/99, on the head of the provincial office of the Department of Land Affairs Bloemfontein and on the municipality, Bothaville; and

3 to file with the Clerk of the Magistrate's Court at Bothaville by no later than 29 March 2000, proof by way of affidavit or otherwise, that the provisions of C1 and C2 of this Order have been complied with.

D The Magistrate-

1 may upon the return date of the rule *nisi*, discharge or change the terms of the order as may be appropriate in the light of evidence presented and submissions made;

2 is directed to give consideration to and make suitable orders in respect of the matters referred to in section 13 of the Extension of Security of Tenure Act, 1997 (Act No 62 of 1997), if and when an eviction order is made;

3 is directed to include in any eviction order directions in respect of the persons on whom and the manner in which such order must be served, such service to be effected only after the automatic review of the order by this Court; and

4 is directed to forward any eviction order which may be made against the respondents forthwith to the Land Claims Court for automatic review under section 19(3) of the Extension of Security of Tenure Act,1997.

[11] Finally I note from the papers that two postponements were granted for the hearing of this matter at the request of the applicant's attorney, the second for no apparent reason. This notwithstanding, an unqualified costs order, (which includes costs occasioned by these postponements), was awarded against the respondents. I note also my concern that the proceedings were heard in camera for no apparent reason.

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JUDGE Y S MEER

For the applicant:
W J Botes, Bock & Van Es, Bothaville

For the respondents:
Unrepresented.