

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

**RANDBURG**

**CASE NUMBER: LCC 24R/00**

**MAGISTRATE'S COURT CASE NUMBER: 12/2000**

In chambers: **Meer J**

Decided on: 11 May 2000

In the review proceedings in the case between:

**A J VAN WYK**

Applicant

and

**P KHOSA**

Respondent

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## JUDGMENT

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**MEER J:**

[1] This is an automatic review under section 19(3) of the Extension of Security of Tenure Act<sup>1</sup> (hereinafter referred to as “the Act”) of an order for the eviction of the respondent from the applicant’s farm, Roodepoort, Memel, in the province of Free State. The eviction order emanated from the Magistrate’s Court for the district of Vrede, held at Memel.

[2] The respondent, a man of 67 years<sup>2</sup>, has been an occupier on applicant’s farm for over ten years. When applicant bought the farm in 1989 respondent was living there and applicant took him into his service. In an affidavit supporting the eviction application, applicant alleges that respondent had a drinking problem, was under the influence on several occasions at work, and also absented himself from work without permission. This led to his dismissal six years ago in April 1994, on three months notice to vacate the farm. Respondent did not leave and was allowed to continue living on the farm until 30

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1 Act 62 of 1997

2 Respondent’s ID Number indicates that he was born in 1932.

November 1999 when he received a notice in terms of section 8(5) of the Act giving him 12 months notice to leave the farm.<sup>3</sup> Thereafter an application for his eviction in terms of the Act was served upon him on 21 February 2000. Respondent did not defend the application and was unrepresented at the hearing. Applicant's affidavit intimates that the application was prompted by the fact that respondent's presence became a problem for the lessor of the farm and applicant could not afford to lose rent. The affidavit goes on to state that given respondent's age and his long period of service, applicant has deposited the sum of R1318.94 into the trust account of a firm of attorneys, for the purchase of a piece of land for the respondent in Zamani, Memel. He is also prepared to assist respondent in transporting his possessions from the farm. Commendable though these measures may be, sadly they do not stand in the way of the eviction order being set aside on review, as appears below.

[3] I am of the view that the eviction order must be set aside in its entirety in terms of section 19(3)(c) of the Act because the applicant has failed to comply with the peremptory requirements for the granting of an eviction order specified at sections 9(2)(a), 9(2)(b), 9(2)(c) and 9(2)(d)(i) of the Act. It concerns me enormously that an eviction order can be granted in the face of such glaring omissions, given the clear letter of the law as well as the many judgments of this Court<sup>4</sup> which have emphasised

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3 Section 8 (5) states:

“(5) On the death of an occupier contemplated in subsection (4), the right of residence of an occupier who was his or her spouse or dependant may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependant has committed a breach contemplated in section 10 (1).”

4 See for example *Karabo v Kok* [1998] 3 All SA 625 (LCC); 1998 (4) SA 1014 (LCC) especially at par [14]; *Lategan v Koopman* [1998] 3 All SA 603 (LCC); 1998 (3) SA 457 (LCC) especially at par [8].

the need to comply with the procedural and substantive requirements specified at section 9 of the Act.<sup>5</sup>

### **Failure to comply with section 9(2)(a) of the Act**

[4] Section 9(2)(a) of the Act requires an occupier's right of residence to be terminated in accordance with the substantive grounds specified in section 8. Section 8(4)(a)<sup>6</sup> records the grounds for the termination of residence of an occupier such as the respondent, who has resided upon the land

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5 Section 9 reads as follows:

“9 **Limitation on eviction**

- (1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.
- (2) 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;
  - (b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
  - (c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and
  - (d) the owner or person in charge has, after the termination of the right of residence, given-
    - (i) the occupier;
    - (ii) the municipality in whose area of jurisdiction the land in question is situated; and
    - (iii) the head of the relevant provincial office of the Department of Land Affairs, for information purposes,
 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 Land Affairs 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.”

6 Section 8(4) states:

“(4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and-

- (a) has reached the age of 60 years; or
- (b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge,

may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.”

in question for ten years, and has either reached the age of sixty years or is a disabled employee or former employee. In contravention thereof respondent's right of residence was purportedly terminated in terms of section 8(5), the section under which the right of residence of an occupier who was the spouse or dependant of a deceased occupier contemplated at section 8(4) is terminated. Applicant's legal representative explained that a notice terminating respondent's right of residence in terms of section 8(5) was served on him because his wife was dead and she possibly could also have qualified as an occupier. Now section 8(5) makes it clear that it applies only to spouses and dependants of occupiers contemplated in section 8(4) (persons who have resided on the land for 10 years and are either over the age of sixty or a disabled employee or former employee), and not to spouses and dependants of *all* occupiers. This fact must have eluded applicant, for he does not allege that respondent's late wife was either sixty or a disabled employee or former employee and had resided on the land for ten years or more. I am at a loss to understand how the learned magistrate could have entertained a termination under section 8(5), not only on the mere possibility that the respondent's deceased wife could have been any unspecified occupier (as opposed to one specified in section 8(4)), but also given that the respondent is so clearly a person over sixty and a former employee to whom section 8(4) would apply. Neither applicant's legal representative nor the magistrate referred to section 8(4) nor displayed an understanding of its relevance to the case at hand.

[5] Under both sections 8(4) and 8(5) rights of residence may be terminated if an occupier has committed a breach as contemplated in section 10(1) of the Act.<sup>7</sup> Although the applicant's legal

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<sup>7</sup> Section 10(1) reads as follows:

**“10. Order for eviction of person who was occupier on 4 February 1997—**

(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if—

(a) the occupier has breached section 6 (3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;

(b) the owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term, and has not remedied the breach despite being given one calendar month's notice in writing to do so;

(c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it either at all or in a manner which could reasonably restore the relationship; or

representative alleged that a fundamental breach had been committed by respondent in terms of section 10(1)(c), there is no evidence to support such an allegation, nor did the magistrate enquire about this. Applicant's affidavit, as is stated above, cites a drinking problem and absenteeism from work as circumstances which led up to his dismissal, approximately six years ago, in April 1994. This, having predated the Act, can hardly qualify as a fundamental breach in terms of section 10, nor does applicant's affidavit couch it as such.

[6] The reference in applicant's affidavit to respondent's presence on the property currently being a problem for the lessor, also cannot constitute a fundamental breach. For inconvenient though this may be, it does not point to a fundamental breach on the part of respondent as contemplated at section 10(1)(c) and is also hardly couched as such.

[7] I note also that the notice in terms of section 8(5) terminating respondent's right of residence does not support the notion of a fundamental breach on the part of the respondent. This is so because the notice which was served on respondent on 30 November 1999 gives him 12 calendar months notice to leave the land. It is clear from section 8(5) that 12 months notice is given to an occupier's spouse or dependant who has not committed a fundamental breach. Even had section 8(5) been the correct section for the termination of respondent's residence, the magistrate ought not to have granted an eviction order on 22 March 2000, as he did, because the twelve month notice period (due to expire on 29 November 2000) had not run its course by that date. The magistrate clearly erred in so doing.

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(d) The occupier-

- (i) is or was an employee whose right of residence arises solely from that employment;  
and
- (ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act."

### **Failure to comply with section 9(2)(b) of the Act**

[8] In contravention of section 9(2)(b) applicant did not give respondent a period of notice to vacate the land as is contemplated by that section. For compliance with section 9(2)(b) applicant relied on the three month notice period given to respondent in 1994. This he cannot do for, after the expiry of this period of notice the respondent continued to reside on the farm, with the knowledge of the applicant for a further six years, during which there is no reference in applicant's affidavit to any action on his part to evict respondent. Given these facts it must be that the applicant, by his inaction, not only waived his rights to rely on the original period of notice for the purpose of section 9(2)(b)<sup>8</sup>, but also tacitly consented<sup>9</sup> to respondent's residence, and the three month notice thereby ceased to have any effect. The Act provides for tacit consent by way of presumptions at sections 3(4) and 3(5), which state:

- “(4) For the purpose of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved.
- (5) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge”

Clearly the presumptions referred to in both sections operate in respondent's favour.

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- 8 In *Vermeulen's Executrix v Moolman* 1911 AD 389 at 409 Innes JA (as he then was) said:  
 “ And the well known principle applies that an intention to waive rights of any kind is never presumed. There must therefore be clear evidence not only of the owner's knowledge, but of his inaction for a sufficient time and under effective circumstances.”
  - 9 In *Rademeyer and Others v Western Districts Council and Others* 1998 (3) SA 1011 (SE), commenting on tacit consent under the Act, the Court stated at 1016:  
 “ In my view, it must be accepted that the initial occupation of the respondent's property by the intervening respondents took place without the prior consent of the respondent..... It seems to be clear, however, that upon becoming aware of the presence of the intervening respondents on the respondent's property, or at the latest by 4 November 1997, the respondent's attitude was that the intervening respondents could remain on the respondent's property until alternative arrangements could be made to house them elsewhere.”  
  
 and then at 1017B:  
  
 “... the conduct of the respondent in permitting the intervening respondents to remain on the respondent's property and resolving to provide them with water and sanitation... constitutes at the very least tacit consent to the intervening respondents to reside on the respondent's property.”

[9] Nor, I believe, can the twelve month notice period given in terms of section 8(5) be said to be compliance with the notice requirement specified at section 9(2)(b). This is so, not only because section 8(5) was the incorrect section for the termination of respondent's residence (as I have found above) but also because the twelve month notice period within which respondent was required to vacate the farm in terms of section 8(5) had not expired prior to the purported termination of residence and the granting of the eviction order.

### **Failure to comply with Section 9(2)(c) of the Act**

[10] In contravention of section 9(2)(c) the conditions for an eviction order in terms of section 10 (which applies to respondent, given that he was an occupier on 4 February 1997) were not complied with. Applicant relied on his contention that respondent had committed a fundamental breach as set out at section 10(1)(c)<sup>10</sup>, for compliance with section 9(2)(c) and the reference to section 10 cited therein. I have already found in paragraphs [5] -[7] above that applicant did not make out a case for a fundamental breach on the part of respondent. I merely add that applicant's actions in making funds available for the purchase of a piece of land for respondent as well as his offer of transportation, militates against the notion of a fundamental breach and the breakdown of the relationship between the parties in terms of section 10(1)(c). I am accordingly unable to find that there has been compliance with section 9(2)(c).

[11] I have already mentioned that the applicant, commendably, set aside funds to purchase a plot for the respondent, as suitable alternative accommodation, with the full knowledge<sup>11</sup> that the Act does not require an owner like him (that is, one who relies on the conditions set out in section 10(1)(c) for an eviction) to make such provision. This poses the question whether a plot of land in replacement of a dwelling structure can ever be said to be suitable alternative accommodation as contemplated at section 10. I do not make a finding in this regard, as indeed, I am not required to.

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10 Above n 7.

11 Applicant's legal representative alluded to this fact in argument.

**Failure to comply with Section 9(2)(d)(i)**

[12] In contravention of section 9(2)(d)(i) applicant failed to give respondent two calendar month's written notice of his intention to obtain an order for eviction, nor did he give him notice of the application to court two months before the hearing. Applicant did, however, give the requisite notices in terms of section 9(2)(d)(ii) and (iii) to the relevant municipality and head of the relevant provincial office of the Department of Land Affairs.

[13] For all of the above reasons I make the following order in terms of section 19(3)(c):

The order for the eviction of the respondent from the applicant's farm, Roodepoort, Memel granted in case number 12/2000 in the Magistrate's Court for the district of Vrede held at Memel on 22 March 2000 is set aside in whole.

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**JUDGE Y S MEER**

For the applicant:

*C Cilliers, Du Randt-Cilliers Prokuriers, Vrede*

For the respondent

*Unrepresented.*