IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER**: LCC 49R/00
In chambers: **DODSON J** **MAGISTRATE'S COURT CASE NUMBER:** 111/99

Decided on: 24 July 2000

In the review proceedings in the case between:

VAN ZYL, WS N.O. Plaintiff

and

MAARMAN, D Defendant

JUDGMENT

DODSON J:

[1] The plaintiff in this matter sued the defendant for eviction and outstanding rent in the Boshof Magistrate's Court, Free State Province. The Land Claims Court has been requested to review the proceedings in the magistrate's court in terms of section 19(3) of the Extension of Security of Tenure Act.[1] I will refer to this Act as ESTA.

[2] The plaintiff sued in his capacity as trustee of the Wimita Trust. The cause of action in the particulars of claim was based on an oral lease by the plaintiff of certain premises on a farm to the defendant. Plaintiff contended that the lease was for a period of twelve months, that the lease had come to an end but the defendant had failed to vacate, despite demand. A claim for outstanding rental and in respect of the defendant's holding over of the premises was included. Summons was issued and served on 4 November 1999. The defendant did not file a notice of appearance in time. Default judgment was granted in the magistrate's court on 12 November 1999. A warrant of eviction and execution against property was issued on the same day.

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1 Act 62 of 1997.

[3] I pause, at this point, to make the observation that the five court day period for filing of a notice of appearance provided for in rule 5(1) of the Magistrates' Courts rules is unfairly short, particularly for rural defendants.[2] The situation is aggravated by the problems in the legal aid system in South Africa of which this Court can take judicial notice. It is unrealistic to expect an unsophisticated, rural person, whose first language is not English or Afrikaans, to absorb the significance of the summons and to act on it (which will probably require the securing of legal aid) within five days. The authorities responsible for the rules may need to consider whether such a short period for entering appearance is not contrary to the *audi alteram partem* rule and the constitutional right of access to court enshrined in section 34 of the Constitution.[3] It is also a source of much wasteful and expensive litigation aimed at undoing the effects of judgments granted by default in favour of plaintiffs who are quick to act on a failure to abide by this time limit. In terms of rule 13(2) of the Magistrates' Courts rules, the State or a servant of the State is blessed with a twenty court day period within which to enter an appearance to defend. The State has easy access to legal services provided by the state attorney. Compared with this, the position of a rural defendant struggling to find legal representation through the State legal aid system is starkly unfair.

[4] I must also say that I do not consider the standard form of summons used in the magistrates' courts to be a particularly user-friendly document. In my view, consideration should be given to amending both the High Court and Magistrates' Courts rules to require service with the summons of a form similar to Form 9 of the Land Claims Court rules. This form incorporates a warning of the significance of the documents being served and the need to act on them urgently. The form is in all eleven official languages.[4]

[5] I return to the facts. On 1 December 1999, the defendant brought an application for rescission of the default judgment. The defendant brought a further application for suspension of the warrants,

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2 Rule 6(5)(b) of the High Court rules also allows only 5 days to file a notice of intention to defend.

3 Constitution of the Republic of South Africa Act 108 of 1996.

4 The warning in the form reads as follows:

> "These documents are very important and may affect your rights. If you need advice on what to do, you should contact a lawyer of your choice or the Legal Aid Board immediately. The Registrar of the Land Claims Court (tel 011 781 2291), the Law Society of your province or your nearest magistrate's court will be able to refer you to persons who can help you."

which was granted on 9 December 1999. In his affidavit in support of the application for rescission of judgment, the defendant alleged that he was protected from eviction by reason of the fact that he was an occupier as defined in ESTA and further that he was, in terms of section 8(4) of ESTA, entitled to reside on the premises permanently because he had lived there for ten years and had reached the age of sixty years. In his affidavit, the defendant denied that he had entered into any lease agreement with the plaintiff. The application for rescission of judgment was opposed by the plaintiff. The application was argued on 9 February 2000 and dismissed by the magistrate. The order suspending the warrants was discharged. In his reasons for judgment, the magistrate indicated that, notwithstanding the defendant's protestation to the contrary, it was clear that a lease agreement had existed, that the defendant was not employed by the plaintiff and that in these circumstances, he could not qualify as an occupier under ESTA.

[6] The defendant then noted an appeal to the Free State High Court. This, however, was subsequently withdrawn and the defendant's attorney, instead, sent all of the relevant documentation to this Court. He asked that the case be reviewed in terms of this Court's automatic review jurisdiction in terms of section 19(3) of ESTA. I then invited the parties to make written submissions and the magistrate to advance further reasons, before I made a decision in respect of the matter. After this the magistrate forwarded the record of the proceedings.

[7] I will assume in favour of the plaintiff that a lease agreement did exist between him and the defendant. On this basis, the crisp point which arises is whether the existence of a lease agreement precludes a person from benefiting from the protection afforded by ESTA to certain occupiers of rural land.[5] It is clear from the record, the magistrate's reasons and the parties' submissions that there was no other basis for the rejection of the application for rescission of judgment.

[8] An occupier is defined in ESTA as follows -

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5 Note that this Court has already treated an occupier in terms of a lease agreement as an "occupier" for purposes of ESTA in a number of cases. See for example *Dlamini v Mthembu and Another* 1999 (3) SA 1030 (LCC); *Mthembu v Tango; Mthembu v Motha*, LCC 25R/99, 12 July 1999, [1999] JOL 5123 (LCC), internet web site: http://www.law.wits.ac.za/lcc/1999/mthembusum.html; *Nel v Calitz and Another* LCC 63R/99, 1 November 1999, [1999] JOL 5717 (LCC) internet web site: http://www.law.wits.ac.za/lcc/1999/nelsum.html. Nonetheless, I will assume in favour of the applicant that I am not bound by these decisions because this point was not specifically addressed in those cases.

> "'occupier' means a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding-
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> (a) a labour tenant in terms of the Land Reform (Labour Tenant) Act, 1996 (Act 3 of 1996);
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> (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself and does not employ any person who is not a member of his or her family; and
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> (c) a person who has an income in excess of the prescribed amount;"

The "land" referred to in the definition is, in terms of section 2 of ESTA, essentially rural land which has not been proclaimed as a township (subject to certain exceptions which are not important for present purposes).

[9] Once a person qualifies as an occupier, he or she may only be evicted if certain conditions are satisfied. Moreover section 8(4) provides as follows -

> "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-
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> (a) has reached the age of 60 years; or
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> (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,
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> 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."

This provision obviously gives such an occupier a very secure form of tenure.

[10] The main basis for the magistrate's conclusion that a lease agreement precluded the application of ESTA, was the finding in *ABSA Bank Ltd v Amod*[6] that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[7] did not apply to persons who had originally occupied land in terms of a lease agreement, but whose rights had ended. That Act, which I will refer to as "PIE", was held

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6 [1999] 2 All SA 423 (W).

7 Act 19 of 1998.

in *Amod* only to apply to persons who had originally occupied the land unlawfully.[8] It thus had no application to the common law of landlord and tenant.[9] Reference was made in this regard to the presumption that a statute does not alter the common law unless the statute does so expressly or by necessary implication.[10] This reasoning, said the magistrate, could equally be applied to ESTA. To hold otherwise would lead to chaos as ESTA would prevail over the terms of contracts freely entered into by the parties.

[11] I agree with the findings in *Amod*.[11] However, as the *Amod* judgment confirms, that legislation has a fundamentally different purpose to that of ESTA. PIE regulates the eviction of "unlawful occupiers", persons considered in *Amod* to be those -

> "who have for historic or other reasons and without the permission of the owner moved onto an owner's land and created an informal settlement."[12] (my emphasis)

Central to the *Amod* decision was the conclusion that PIE applied to persons who have never enjoyed consent to reside on the land concerned. This was apparent primarily from the fact that PIE replaced the Prevention of Illegal Squatting Act.[13]

[12] ESTA has a fundamentally different purpose. It aims to provide more secure tenure to persons who have or had consent or a legal right to occupy land which belongs to another person.[14] This is apparent from the long title, the preamble and the definition of "occupier" quoted in paragraph [8]

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8 Above n 6 at 430b.

9 Above n 6 at 430g.

10 Above n 6 at 428e.

11 In saying that I agree with the decision in *Amod*, I should mention this qualification. I am not necessarily convinced that PIE does not apply where existing lawfully erected improvements on land are occupied unlawfully from the outset of the occupation. This appears to be the import of the *Amod* judgment at 429c-e, although the reference to "or occupied a building . . . thereon" at 429j seems to contradict what is said earlier in the judgment.

12 Above n 6 at 430d.

13 Act 52 of 1951.

14 *Sentrale Karoo Distrikraad v Roman and two similar cases*, LCC 6R-8R/00, 4 February 2000, [2000] JOL 6112 (LCC), internet web site http://www.law.wits.ac.za/lcc/6r00sum.html at para [4].

above. An "occupier" as defined in ESTA is expressly excluded from the definition of "unlawful occupier" in PIE.[15] In those circumstances, I cannot conceive on what basis the *Amod* decision can be considered to be applicable to ESTA. Another basis for distinguishing that decision is that it applied to urban and not rural land.

[13] Moreover, scrutiny of ESTA shows that it is replete with provisions which make it clear that an agreement between the parties does not preclude the application of ESTA and that the impact of an agreement may be varied or nullified by ESTA. This is apparent, for example, from the following provisions:

(a) The heading to section 25 is "Legal status of agreements" and section 25(2) reads:

> "A court shall have regard to, but not be bound by, any agreement in so far as that agreement seeks to limit any of the rights of an occupier in terms of this Act."

(b) The definition of "occupier" in ESTA includes features which characterise a lease agreement, namely "consent" and a "right in law" to reside "on land which belongs to another person".

(c) Section 8, which deals with the termination of the right of residence, also contemplates the application of ESTA, notwithstanding the existence of an agreement from which the right of occupation derives. The relevant portions of section 8 read as follows:

> "(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to-
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> (a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
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> . . .

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15 An "unlawful occupier" is defined in PIE as meaning -

> "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996)."

(d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time;" (my emphasis)

To me a lease agreement would seem to be a classic case of an agreement from which the right of residence of an occupier might derive.

(d) Section 10(1)(b) also refers to ". . . any agreement pertaining to an occupier's right to reside on the land . . . ".

(e) Sections 11(3)(b) and 12(2)(a) refer to "the fairness of the terms of any agreement between the parties".

[14] The magistrate also suggests that ESTA only applies where the occupier resides on the land pursuant to an employment agreement. Again, there is nothing in the definition of "occupier" or in ESTA generally to support this. On the contrary, there are provisions in ESTA which make specific provision for that category of "occupiers" who are also employees. Such a specific provision would not have been necessary if all "occupiers" were also employees. Thus section 8(2) refers specifically to "[t]he right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement . . ." and section 10(1)(d)(i) uses similar terminology.

[15] The plaintiff's legal representatives referred to certain absurdities which would result if the restrictive interpretation for which they contended was not accepted. The first was the example of an owner of land who is sequestrated and then refuses to leave his or her land after it has been sold in the course of the winding up of the insolvent estate on the grounds that he or she is a protected "occupier". I do not now express an opinion as to how ESTA might be applied in such a situation. Such a result may be an absurd one, but that does not justify the interpretation for which the plaintiff contends in this case. It has nothing to do with the situation where a person occupies or occupied the land in terms of a lease.

[16] The other alleged absurdity was the notional example of an attorney who leases a dwelling on a farm and earns an amount just below the prescribed amount of R5000.00. He develops a drinking

problem and fails to pay the rent because his income is used to feed his habit. The person claims the protection of ESTA. Plaintiff's legal representatives argued that the terms of a lease agreement would then not be capable of enforcement. What this argument ignores is that ESTA does not necessarily nullify the terms of a lease agreement or grant an absolute and permanent right of residence. Even if such a person qualified as an occupier, ESTA does not preclude the owner from seeking the eviction of the person or from claiming arrear rental.[16] This is so even in the case of an occupier who enjoys the protection of section 8(4) of ESTA.[17] Rather ESTA regulates, and seeks to introduce equitable standards or requirements into, the process of seeking relief against an occupier. This is apparent from sections 8, 10 and 11, which still allow the termination of the right of residence and consequential eviction, albeit on the basis of more equitable processes and more stringent requirements than is the case at common law. These equitable requirements relate, for example, to the conduct of the parties and other circumstances surrounding the termination of the right of residence (section 8(1) and 10(1)(a)), whether there has been a fair opportunity to remedy a breach, if it is remediable (section 10(1)(b) and (c)) and the balancing of the interests of the owner and the occupier (section 8(1)(c) and 11(3)(e)). The application of such provisions to a person such as that in the example does not amount to an absurdity and is in accordance with a court's constitutional obligation to evict persons only "after considering all the relevant circumstances".[18]

[17] In the circumstances, there is no doubt in my mind that the fact that a right of occupation derives from a lease agreement does not preclude the application of ESTA. A "substantial defence"[19] was made out in the defendant's application for rescission of judgment and the magistrate ought to have granted the relief sought.

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16 A claim for damages for holding over may be affected by section 8(7)(b) of ESTA.

17 See para [9].

18 Section 26(3) of the Constitution. See in this regard *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons and Another*, LCC 44R/00, 7 July 2000 as yet unreported.

19 See in this regard Erasmus and Van Loggerenberg *Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa* 9th ed Vol 2 (Juta, Cape Town 1997) at 49-4.

[18] Having arrived at that conclusion, the question which must then be asked is whether or not this Court has jurisdiction to set aside the magistrate's decision to refuse rescission of judgment. Section 19(3) of ESTA provides as follows -

> "Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted on or before 31 December 1999, shall be subject to automatic review by the Land Claims Court, which may -
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> (a) confirm such order in whole or in part;
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> (b) set aside such order in whole or in part;
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> (c) substitute such order in whole or in part; or
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> (d) remit the case to the magistrate's court with directions to deal with any matter in such manner as the Land Claims Court may think fit:"

In this case, the default judgment was not granted or purportedly granted in terms of ESTA. Moreover, it is the refusal to rescind the default judgment, rather than the grant thereof which is open to criticism upon review.

[19] In *Skhosana and Others v Roos t/a Roos se Oord and Others*[20] this Court was concerned with a similar case. There too default judgment had been granted on the basis of particulars of claim which made no reference to ESTA. There too, an application was made for rescission of judgment on the basis that the defendant was protected as an occupier under ESTA. The application was dismissed when the defendant's attorney failed to arrive at court to move the application. An application was made to the Land Claims Court for a review of the magistrate's decision to dismiss the application for rescission of judgment. The review application was brought under section 20(1)(c) of ESTA. The Land Claims Court was prepared to assume jurisdiction,[21] despite the fact that the eviction order was not granted in terms of ESTA and despite the fact that ESTA was raised for the first time in the rescission application.

[20] In this case the matter is referred to us for automatic review in terms of section 19(3) of ESTA, rather than review at the instance of one of the parties in terms of section 20(1)(c). The Court's review

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20 Reported as *Skhosana v Roos* in [1999] 2 All SA 652 (LCC).

21 Although the Court ultimately found that the magistrate had not acted incorrectly in dismissing the application for recission of judgment.

powers under section 19(3) are wide, as appears, in particular, from paragraphs [12], [17] and [18] of the *Skhosana* judgment. The Court specifically said the following regarding the automatic review jurisdiction:

> "[t]he legislature in providing for the automatic review of ESTA cases clearly intended that the Land Claims Court must scrutinise the records of those cases to ensure that the provisions of ESTA were correctly applied. It would be absurd if, on the one hand, an eviction order made under the provisions of ESTA has to be reviewed by this Court while, on the other hand, an eviction order under common law consequent upon a decision that ESTA does not apply, is not subject to such review."[22]

In the circumstances, the fact that these are automatic review proceedings, does not mean that the *Skhosana* judgment is not applicable. Moreover, this is authority for an approach to the Court's automatic review jurisdiction which brings the entire proceedings before the magistrate's court under review.

[21] The decision of this Court in *Mahlangu and Another v Van Eeden and Another*[23] is further authority for the assumption by this Court of jurisdiction to review the entire proceedings before a magistrate under section 19(3), notwithstanding that a defence based on ESTA is raised at a late stage.

[22] Once one accepts that the Court has jurisdiction to review the entire proceedings in the magistrate's court in terms of section 19(3), where ESTA was only raised in that court after the eviction order was granted, it follows that the Land Claims Court must have jurisdiction to upset any stage of the proceedings which was not in accordance with the law. This is consistent with the introductory part of section 20(1) of ESTA which provides that the Land Claims Court -

> ". . . shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act . . ."

The corollary of this is of course that magistrates must also refer cases to this Court for automatic review in terms of section 19(3) of ESTA where -

(a) there has been an eviction order not originally granted in terms of ESTA;

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22 Above n 20 at para [12].

23 LCC 53/99, 2 June 2000, internet web site: http://www.law.wits.ac.za/lcc/2000/53_99sum.html.

(b) the applicability of ESTA has been raised in subsequent proceedings before that court pertaining to that order; and

(c) the outcome of those subsequent proceedings is that the eviction order stands.

[23] I make the following order -

(i) The whole of the order of the magistrate made on 9 February 2000 is set aside;

(ii) The order is substituted with an order which reads as follows -

"(a) The application for rescission of the judgment handed down on 12 November 1999, is granted;

(b) All warrants of execution and eviction issued pursuant to the judgment granted on 12 November 1999 are set aside, including any steps taken in terms of the said warrants;

(c) The plaintiff must reinstate the defendant and all those holding under him in their occupation of the premises formerly occupied by them on the farm Kameelhof, Boshof;

(d) The defendant is given leave to file his plea within 10 days of the date of this order of the Land Claims Court."

(iii) No costs are payable by either party in respect of the proceedings in the Land Claims Court.

(iv) The question of the costs of the application for rescission of judgment is left for the decision of the magistrate.

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JUDGE A DODSON

For the plaintiff:

Duncan and Rothman Attorneys, Kimberley

For the defendant:

Towell and Groenewaldt Attorneys, Kimberley