

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

CASE NUMBER: LCC 55R/00

In chambers: **MEER J**

MAGISTRATE'S COURT CASE NUMBER: 999/99

Decided on: 15 August 2000

In the review proceedings in the case between:

HOLDENGARDE, RP

Plaintiff

and

ZONDI, TM

1st Defendant

NGOBE, G

2nd Defendant

JUDGMENT

MEER J:

[1] This is an automatic review in terms of section 19(3) of the Extension of Security of Tenure Act¹ (hereinafter referred to as the “the Act”) of an order granted by the Magistrate, Greytown on 7 April 2000 for the eviction of the defendants from the farm Proud Acres, Seven Oaks. The plaintiff is the owner of the farm. The defendants were employed on the farm and their rights of residence arose from their contracts of employment.

[2] The eviction was granted by default in the absence of the defendants, who despite engaging the service of an attorney and delivering a notice of intention to defend, failed to file a plea or to attend court after receipt of a notice of set down. The record indicates that the defendants were dismissed for

1 Act 62 of 1997, as amended.

theft on 24 June 1999 after the holding of a disciplinary hearing.² It also indicates that the first defendant had in fact been convicted for the theft and fined R500 prior to his dismissal. The defendants were given notice to vacate the land by 26 June 1999, but their attorney arranged with the plaintiff for this period to be extended until 31 July 1999, because the defendants were considering referring the matter to the CCMA.³ In September 1999 the plaintiff issued summons for the eviction of the defendants in terms of the Act. The defendants filed a notice of intention to defend dated 21 October 1999 but did not follow this with a plea. Thereafter the record indicates that the plaintiff received CCMA referral forms⁴ dated 10 November 1999 indicating that the defendants wanted their dismissals to receive the attention of the CCMA. Beyond these forms the plaintiff heard no more about the referral, either from the defendants or the CCMA, and assuming that nothing further was coming of it, he pursued his eviction suit. In January 2000 the plaintiff served a notice of bar upon the defendants calling upon them to file their plea within five days, failing which they would be barred from doing so. Still no plea emanated and the matter was ultimately heard in April 2000. Like the plaintiff, the magistrate also accepted that the CCMA referral had come to naught. His judgment states it was obvious that neither the defendants nor the CCMA had gone any further with the referral, and comments also that in any event the referral was out of time, having been lodged later than the specified 30 day period after the dismissals.⁵

[3] For an eviction order to be granted there must be compliance with all of the peremptory requirements specified at section 9 of the Act. Of these I am satisfied that there has been compliance with the requirements of section 9(2), but not with those of section 9(3) as is more fully explained below. I am accordingly not able to confirm the eviction order.

2 It was alleged that each defendant committed a separate act of theft. Their disciplinary hearings were, however, held on the same day.

3 Commission for Conciliation, Mediation and Arbitration. The CCMA was established by section 112 of the Labour Relations Act 65 of 1995.

4 Form 7.11 of the Labour Relations Act.

5 Section 191(1) of the Labour Relations Act specifies that an employee has 30 days within which to refer a dispute about the fairness of a dismissal to the CCMA or relevant bargaining council.

Compliance with section 9(2)

[4] Section 9(2)(a) requires the defendants' rights of residence to have been terminated in accordance with section 8. Section 8(2) provides that a right of residence of an employee may be terminated if the employment contract was terminated in accordance with the provisions of the Labour Relations Act.⁶ Section 8(3) provides that if there is a dispute pertaining to the termination of employment, the termination of residence only takes effect when the dispute has been determined in accordance with the Labour Relations Act. As is stated in paragraph [2] above, the defendants filled in forms referring their dismissals to the CCMA, albeit more than thirty days after their dismissal.⁷ Mindful of the provisions of section 8(3), and as it was not clear from the record whether the dismissals were actually being investigated by the CCMA, I invited both the magistrate and the parties to make submissions about the status of any dispute. Submissions were received from the plaintiff's attorneys only. The submissions draw attention to the fact that the CCMA documents received by the plaintiff contained no application for condonation, and conclude that because nothing further had been heard from the CCMA, it must have refused to register the application. The point is also made that the plaintiff commenced the eviction proceedings during July 1999 and the defendants had more than sufficient time to bring any CCMA proceedings to finality. Whilst I am unable to say from the information before me whether the CCMA refused to register the claim, I am inclined to agree with the plaintiff. There is nothing before me in the papers to indicate that the defendants pursued the referral to the CCMA beyond the filling in of the forms. One could possibly even infer from the defendants' conduct that the CCMA forms were completed in an attempt to delay the eviction process. For notwithstanding the defendants stating in June 1999⁸ that they were considering referring their dismissals to the CCMA⁹

6 Above n 3.

7 Section 191(2) of the Labour Relations Act provides for an employee to apply for an extension of the 30 day limit on good cause shown. See the discussion in Du Toit et al *Labour Relations Act of 1995: A Comprehensive Guide* 2nd ed (Butterworths, Durban 1998) at 320 on the right of an employer to be heard before a condonation is granted; see also the same authority at 319 and fn 57 on the jurisdiction of the CCMA if a condonation has not been granted.

8 Which is when they were served with notices to vacate.

9 At which point the plaintiff granted them a month's extension to stay on the farm during which time they were to refer a dismissal dispute to the CCMA.

they only took steps towards referring the dismissals to the CCMA in November 1999, about three weeks after the summons for their eviction was served on them. The failure of an employee to pursue a referral to the CCMA and a dispute remaining unresolved for that reason, ought not to constitute grounds for finding that the dispute is undetermined for the purposes of section 8(3). Section 8(3) clearly contemplates a decisive determination of a dispute about the termination of employment beyond the mere referral thereof. It would clearly frustrate the operation of the Act if referrals of disputes to the CCMA were used to delay evictions in this manner. As there is nothing before me to indicate that defendants pursued the referral to the CCMA beyond the completing of forms, or that condonation was granted for a late referral which is being investigated, I accept that there is no dispute pending before the CCMA. Consequently I find that the defendants' employment was terminated in accordance with the Labour Relations Act as specified in section 8(2).

[5] I am able to find that there has been compliance with section 9(2)(b) in that the defendants did not vacate the land within the period of notice given. There was clearly compliance with section 9(2)(c) in that the magistrate had regard to the factors set out at section 11(3)¹⁰ in deciding whether it was just and equitable to evict persons like the defendants who became occupiers after 4 February 1997. In addition sections 9(2)(d)(i) and (iii) were complied with as the requisite notices of intention to obtain eviction orders were given to the defendants and to the head of the relevant office of the Department of Land Affairs. As the farm is alleged, by the plaintiff, not to fall within a municipal area no notice in

10 Section 11(3) provides:

“In deciding whether it is just and equitable to grant an order for eviction in terms of this section, the court shall have regard to-

- (a) the period that the occupier has resided on the land in question;
- (b) the fairness of the terms of any agreement between the parties;
- (c) whether suitable alternative accommodation is available to the occupier;
- (d) the reason for the proposed eviction; and
- (e) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land.”

terms of section 9(2)(d)(ii) was given.¹¹ The definition of “municipality” is extremely wide, embracing various governmental bodies.¹² The magistrate must satisfy himself that the land is not within the area of jurisdiction of a “municipality” as contemplated in the Act before he can accept that section 9(2)(d)(ii) may be dispensed with. Should it be accepted by the plaintiff that the land is within the area of jurisdiction of a “municipality” as defined by section 10B of the Local Government Transition Act¹³ then the plaintiff should serve a copy of this judgment on the relevant body and ensure that the rehearing of the matter takes place at least two months after such service.

Failure to comply with section 9(3)

[6] In contravention of section 9(3) the magistrate failed to request a report dealing with the matters specified in section 9(3)(a)-(d)¹⁴ and for this reason the order cannot be confirmed. I note that the Act requires a request for a section 9(3) report in respect of persons who, like the defendants, were evicted for theft, and who became occupiers after 4 February 1997 and whose evictions for that reason occur after regard is had to the factors at section 11(3). The Act, however, does not require a section 9(3) report in respect of persons similarly evicted for theft who became occupiers on or before 4 February

11 See the comments in this regard in *Lategan v Koopman en Andere* 1998 (3) SA 457 (LCC); [1998] 3 All SA 603 (LCC) at para [13] and compare the comments of the same judge in *Van Breda v Filander* 1999 (4) SA 498 (LCC) at para [8].

12 The Act defines “municipality” as a municipality in terms of section 10B of the Local Government Transition Act, 1993. Section 10B defines “municipality” as including “a local council, a metropolitan council, a metropolitan local council, a representative council, a rural council and a district council”.

13 Act 209 of 1993.

14 Section 9(3) provides as follows:

“(3) For the purposes of subsection (2) (c), the Court must request a probation officer contemplated in section 1 of the 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 hardships which an eviction would cause the occupier; and
- (d) on any other matter as may be prescribed.”

1997 and whose evictions for that reason occur in accordance with section 10(1).¹⁵ The only difference between the two categories of persons is the dates on which they became occupiers. Given their common misdemeanours, there seems to me to be little logic in specifying a section 9(3) report in respect of the one category of occupier and not the other.

[7] I notice that the magistrate did not make it clear that the eviction order shall be suspended pending the review thereof by this Court.¹⁶ It would be prudent to make this clear in future eviction orders.

Order

[8] The following order is made:

- (i) the whole of the order made by the Magistrate, Greytown in case 999/99 on 14 July 2000 is set aside;
- (ii) the matter is remitted to the Magistrate, Greytown;
- (iii) section 9(3) of the Extension of Security of Tenure Act 62 of 1997 must be complied with;
- (iv) in complying with paragraph (iii), the magistrate must set a date which allows a reasonable period for the person preparing the report to submit the report;
- (v) after receipt of the report or expiry of the reasonable period, the matter may be set down for re-hearing;

15 *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons and Another* LCC 44R/00, 7 July 2000, internet web site <http://www.law.wits.ac.za/lcc/2000/44r00.sum.html> at para [19].

16 Section 19(5) of the Act, introduced by section 11(b) of the Land Affairs General Amendment Act 11 of 2000, specifies that any order for eviction shall be suspended pending the review thereof by this Court.

- (vi) a copy of the report (if any) and the notice of set down for the re-hearing, must be served on the defendants by the sheriff;
- (vii) each party participating in the proceedings at the time of the re-hearing must have a proper opportunity to respond to any report obtained in terms of section 9(3);
- (viii) the parties are admonished to behave towards each other without hostility pending the resolution of this matter.

JUDGE YS MEER

For the plaintiff:

Van Rooyen & Forder Inc, Greytown.

For the defendants:

Ishana Hassim and Associates, Pietermaritzburg.