

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

**RANDBURG**

**CASE NUMBER:** LCC 84R/00

**MAGISTRATE'S COURT CASE NUMBER:** 668/00

In chambers: **MOLOTO AJ**

Decided on: 12 December 2000

In the review proceedings in the case between:

**VALLEY PACKERS CO-OPERATIVE LIMITED**

Applicant

and

**DIETLOFF, A**

First Respondent

**DIETLOFF, J**

Second Respondent

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## JUDGMENT

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**MOLOTO AJ:**

[1] This is an automatic review in terms of section 19(3) of the Extension of Security of Tenure Act<sup>1</sup> ("ESTA") of an order of the Magistrate, Grabouw granted by default of appearance to defend on 11 October 2000, evicting the respondents from the property known as Kromvlei Estates, Grabouw ("the farm").

### Facts

[2] The applicant leases various houses on the farm from the owner thereof, Kromvlei Estates CC. The applicant states, in its particulars of claim, that the first respondent's right of residence arose solely from his contract of employment with the applicant and that the second respondent's right of residence arose from her relationship with the first respondent.

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1 Act 62 of 1997, as amended.

[3] The applicant states that it is the “person in charge”<sup>2</sup> of the farm and the house which the respondents occupy. The deponent to the founding affidavit is Mark Dixon. He states that he is the financial manager of the applicant and as such he is entitled to bring the application for the eviction of the respondents and to depose to the affidavit. No resolution has been filed.<sup>3</sup>

#### The requirements for an eviction order in terms of ESTA

[4] In order to evict an occupier from a farm, the owner or person in charge must comply with the various requirements of section 9 of ESTA. 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,

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2      “Person in charge” is defined in ESTA as “a person who at the time of the relevant act, omission or conduct had or has legal authority to give consent to a person to reside on the land in question;”

3      See *City Council of Springs v Occupants of the Farm Kwa-Thema, 210*, LCC 10R/98, 2 September 1999, [1999] JOL5280 (LCC), internet web site <http://www.law.wits.ac.za/lcc/1999/springs99sum.html> at para [32] where it was held that “[a]lthough it would have been a wise precaution for the applicant to attach an authorising resolution to its papers, this is not strictly necessary.”

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.

(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.”

#### Compliance with section 9(2)

[5] I am satisfied that the applicant has complied with section 9(2) of ESTA. Section 9(2)(a) has been complied with in that the first respondent resigned voluntarily in terms of section 8(2) of ESTA on 11 August 1999.<sup>4</sup> The respondent failed to vacate the farm despite having been given notice to do so, thus section 9(2)(b) has been complied with. In order to comply with section 9(2)(c) the applicant must comply with either section 10 or section 11. As the respondents were in occupation on 4 February 1997, the first respondent resigned voluntarily and his right of residence arose from his employment relationship section 10(1)(d) is applicable.<sup>5</sup> I am satisfied that there has been compliance with section

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4 The notice reads *verbatim* as follows: “Hiermee wil ek Andy my Bedanking inhandig. Ek moet u inlig vir al die aantal jare wat ek by Valley gewerk het was ek baie gelukkig. Ek wil u net vra om al my besonderhede agter mekaar te kry. Ek is jammer vir die kort kennisgewing.” The applicant accepted the resignation, although inadequate notice was given.

5 Section 10(1)(d) reads as follows:  
 “(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if-  
 ...  
 (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.”

10. The relevant notices in terms of section 9(2)(d) were served on the respondents, the municipality and the head of the relevant provincial office of the Department of Land Affairs as required, consequently there has been compliance with section 9(2)(d). Nonetheless I am unable to confirm the judgment due to non-compliance with other sections of ESTA as I will indicate below.

Non-compliance with section 9(3)<sup>6</sup>

[6] The magistrate failed to request a report in terms of section 9(3).<sup>7</sup> In *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons and Another*<sup>8</sup> it was determined that a section 9(3) report was not necessary in that particular case, more particularly because the occupier's right of residence was dependent on his employment and he had resigned voluntarily. In coming to this conclusion Gildenhuys J analysed the question whether a section 9(3) report is required by formulating the following test:

“[w]here it is obvious that the report cannot possibly contribute information on any matter to be decided by the court, the legislature cannot have intended that the report must still be furnished. In those circumstances the requirement for a report can be dispensed with. Given the importance of occupancy rights, a court must be disinclined, in the absence of compelling grounds, to find that a report will be redundant.”<sup>9</sup>

Gildenhuys J was satisfied that there were compelling grounds in that case to dispense with a section 9(3) report. I do not agree that the request of a report can be dispensed with. The wording of the section is clearly peremptory. This is not to say that a magistrate must wait indefinitely for such a report. See in this regard *Holt Leisure Park (Pty) Ltd v Josephs and Another*.<sup>10</sup>

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6 Section 9(3) is quoted at para [3] above.

7 Section 9(3) was introduced into ESTA on 24 March 2000 by the Land Affairs General Amendment Act, Act 11 of 2000. The notice of motion was issued and served on 20 September 2000.

8 [2000] 3 All SA 279 (LCC).

9 *Westminster* above n 8 at para [18].

10 LCC 62R/00, 24 August 2000, internet web site <http://www.law.wits.ac.za/lcc/2000/62r00sum.html>.

[7] Let me look more closely at the way Gildenhuis J interpreted section 9(3). With regard to the requirements of alternative accommodation<sup>11</sup> and hardship<sup>12</sup> he came to the following conclusion:

“Section 10(1) of the Tenure Act does not require me to consider the availability of alternative accommodation, or to consider the hardship which an eviction order might cause, before granting such an order under any of the subsections of section 10(1) . . .”<sup>13</sup>

Whilst it is true that prior to the inclusion of section 9(3) it appeared as if alternative accommodation was not a requirement of a section 10(1) eviction process I still think alternative accommodation is an important factor which a court must consider for the purposes of section 26(3) of the Constitution.<sup>14</sup> Section 9(3) is simply a mechanism to put information before the presiding officer to enable that officer to fulfil his or her constitutional duty. In the case of a person who has lost occupation rights through his or her own fault one can expect a court to be less sympathetic to the lack of alternative accommodation than if the occupier is being evicted because the landowner wants the occupier off the property.

[8] I am also not in agreement with Gildenhuis J when he concludes that hardship need not be considered in a section 10(1) eviction case. I would have thought that one of the most important factors to consider when determining the justice and equity of an eviction would be hardship. That does not mean that an occupier is entitled to disregard the fact that the property belongs to the land owner. It simply means that even in a section 10(1) eviction the hardship an eviction will cause must nonetheless be considered. In a section 10(1) situation it is likely that the most the hardship aspect will do is delay the inevitability of an eviction to minimise the hardship the occupier and his family will suffer. I wish to express my concern that the Legislature saw fit to require a report dealing only with the hardship that the occupier may suffer. I see no reason why the hardship the land owner may suffer if the eviction is not granted should have not be mentioned in the report. In fact it would be of great assistance to the

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11 Section 9(3)(a).

12 Section 9(3)(c).

13 *Westminster* above n 8 at para [7].

14 Constitution of the Republic of South Africa, Act 108 of 1996. Section 26(3) reads: “No one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

court if the independent person preparing the report also investigated this aspect. Of course the court is at liberty to call for evidence from the land owner on this aspect once the section 9(3) report arrives.

[9] In *Westminster*<sup>15</sup> Gildenhuis J was satisfied that neither “other affected persons” nor children were involved. The Court was therefore of the opinion that it need not call for a report in terms of section 9(3)(b). I am of the opinion that just because there are no children does not mean that there are no other “affected persons”. The occupier and all other persons enjoying residence rights through him (or her) must surely be affected persons. One might even argue that a land owner is an affected person, after all his property rights might be affected if the order is not granted or is postponed. I cannot conceive of any situation in which not one constitutional right will play a role in an ESTA eviction.

[10] In conclusion then I am of the opinion that *Westminster* was wrongly decided and that a section 9(3) report must be requested in all ESTA evictions where section 9(2)(c) is relied upon.

#### Non-compliance with section 12

[11] According to section 12(1) a court which orders the eviction of an occupier must:

- “(a) determine a just and equitable date on which the occupier shall vacate the land; and
- (b) determine the date on which an eviction order may be carried out if the occupier has not vacated the land on the date contemplated in paragraph (a).”

The eviction order of 11 October 2000 provides for a vacation date within one month after confirmation of the order by this Court. The order further provided that if the respondents then failed to vacate, they could be evicted, but that the eviction could not take place before 8 December 2000.

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15 *Westminster* above n 8 at para [17].

I am of the opinion that two separate calendar dates should be used, a date to vacate and a date on which the respondents will be evicted if they fail to move of their own accord.<sup>16</sup>

### Compliance with section 13

[12] Section 13 provides that a court must order the owner to pay the occupier compensation for structures erected or improvements made, if applicable, or to pay any outstanding wages to the occupier when granting an eviction order. The applicant advised the first respondent in the letter in which it had accepted his resignation that he owed the applicant money for the short notice period, for those days he still ought to have worked. From this it seems that there are no wages due to the respondent but as the matter is to be remitted to the magistrate he must clarify this aspect.

### Costs

[13] The magistrate granted costs against the respondents on the party-party scale. This Court has stated on numerous occasions that ESTA is social litigation and costs orders should not be granted, unless there are special circumstances which justify a costs order.<sup>17</sup> The costs order must be set aside.

### Order

[14] In the circumstances the order for the eviction of the respondents granted on 11 October 2000 in case 668/2000 in the Magistrate's Court, Grabouw is set aside in its entirety and is substituted by the following order:

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16 See *Roux v Lekekiso*, LCC 13R/98, 16 November 1998, [1998] JOL 4157 (LCC), internet web site <http://www.law.wits.ac.za/lcc/lccalph.html> at para [10]. See also *Vooraus Beleggings (Edms) (Bpk) v Molefe and Another*, LCC 9R/00, 7 March 2000, internet web site <http://www.law.wits.ac.za/lcc/2000/9r00sum.html> at para [7].

17 See for example *Ngwenya and Others v Grannersberger* 1999 (4) SA 62 (LCC) at para [16]; *Serole and Another v Pienaar* [1999] 1 All SA 562 (LCC); 2000 (1) SA 328 (LCC) at para [19].

- (a) The matter is remitted to the magistrate to request a report in terms of section 9(3) of the Extension of Security of Tenure Act, 62 of 1997;
- (b) When rehearing the matter the magistrate is required to comply with sections 12 and 13 of the Extension of Security of Tenure Act, 62 of 1997;
- (c) In the event that an eviction is granted the magistrate must make an order in terms of section 19(5) and then forward the papers to this Court for review in terms of section 19(3).

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**ACTING JUDGE MOLOTO**

For the applicant:

*Mr Claughton* instructed by *Claughton & Wemeyer, Grabouw*.

For the respondent:

*No appearance.*