

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

**RANDBURG**

In chambers: **MOLOTO AJ**

**CASE NUMBER: LCC 88R/00**

**MAGISTRATE'S COURT CASE NUMBER: 2590/00**

Decided on: 13 December 2000

In the review proceedings in the case between:

**VAN NIEKERK NO**

Applicant

and

**NKOSI, T**

First Respondent

**KHUMALO, F**

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, Standerton granted by default of appearance to defend on 19 October 2000, evicting the respondents from various portions of the farm Vlakfontein, Mpumalanga. I will refer to these various portions collectively as "the farm".

### Facts

[2] The applicant is the executor of the deceased estate of Ernest Gerald Cuyler (the "deceased"). A certain Mr Bierman leased the farm from the deceased. Bierman gave the respondents permission to live on the farm and to erect either a tin or clay house on the farm. The respondents are alleged by the applicant to be occupiers for the purposes of ESTA presumably because they were granted

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1 Act 62 of 1997, as amended.

permission by the person in charge. As the owner has died the executor seeks the eviction of the respondents in order to give vacant possession of the farm to the Willows Trust. The Trust entered into a sale agreement with the deceased shortly prior to his death. The Trust took possession of the farm on 1 September 1998. The Trust is demanding vacant possession of the farm as was agreed in the sale agreement.<sup>2</sup>

[3] The respondents right of residence arose solely from their contracts of employment with Bierman. The respondents had agreed that these contracts would end on 31 August 1998 and they were aware that the employment was for a fixed term only. Bierman asked the respondents to vacate the farm when he himself was doing so at the end of his lease period. The respondents have refused to vacate the farm.

#### 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;

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2       It should be noted that section 24 of ESTA makes provision for successors in title to be bound by consent granted by a previous owner to an 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.

(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.”<sup>3</sup>

#### Compliance with section 9(2)

[5] I am satisfied that the applicant has complied with all but paragraph (c) of section 9(2) of ESTA. Section 9(2)(a) has been complied with as the respondents were given notice by Bierman to vacate the farm at the end of the fixed term contract. The respondents 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 applicant must comply with section 10. I am satisfied that, in the circumstances of this case there must be compliance with section 10(2). I will return to this aspect shortly. 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).

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3 Section 9(3) was introduced into ESTA on 24 March 2000 by the Land Affairs General Amendment Act, Act 11 of 2000.

Non-compliance with section 9(3)

[6] The magistrate failed to request a report in terms of section 9(3).<sup>4</sup> I am therefore unable to confirm the eviction order.

Non-compliance with section 10(2)

[7] As I have indicated, I consider section 10(2) to be applicable to this matter. Consequently the applicant must show that there is suitable alternative accommodation available. The applicant has indicated that there are some 1000 houses which have been built as part of the Standerton housing program. I do not have any information from the respondents explaining why they have not taken the necessary steps to obtain such a house. If there are indeed such houses available I find it strange that the respondents have chosen to remain on the farm since their occupation rights terminated at the end of August 1998. No doubt the section 9(3) report will shed some light on this aspect.

Non-compliance with section 12

[8] 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).”

Clearly two separate dates are envisaged, a date to vacate and a date on which the respondents will be evicted if they fail to move of their own accord.<sup>5</sup> Whilst it might be technically correct for the

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4 Section 9(3) is quoted in para [4] above.

5 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].

vacation date to be a date 21 days after review I am of the opinion that the magistrate should specify calendar dates. This will allow for greater certainty. It is advisable for the applicant to suggest a vacation date that allows for the review to take place, although no eviction order may be executed until this Court has reviewed the proceedings and confirmed the eviction order.<sup>6</sup>

### Compliance with section 13

[9] Section 13 provides, amongst other things, that a court must order the owner to pay the occupier compensation for structures erected or improvements made when granting an eviction order.<sup>7</sup> As the applicant has alleged that the respondents were allowed to erect houses on the farm the magistrate ought to have conducted an enquiry in terms of section 13 to determine whether or not the respondents were entitled to compensation or whether the respondents ought to have been given an opportunity to demolish the structures and to remove any salvaged materials.

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6 Section 19(5) provides that:  
 “any order for eviction contemplated in section 19(3) shall be suspended pending the review thereof by the Land Claims Court.”  
 Section 19(5) was introduced on 24 March 2000 by the Land Affairs General Amendment Act, 11 of 2000.

7 Section 13(1) provides:  
 “If a court makes an order for eviction in terms of this Act-

- (a) the court shall order the owner or person in charge to pay compensation for structures erected and improvements made by the occupier and any standing crops planted by the occupier, to the extent that it is just and equitable with due regard to all relevant factors, including whether-
  - (i) the improvements were made or the crops planted with the consent of the owner or person in charge;
  - (ii) the improvements were necessary or useful to the occupier; and
  - (iii) a written agreement between the occupier and the owner or person in charge, entered into prior to the making of improvements, provides that the occupier shall not be entitled to compensation for improvements identified in that agreement;
- (b) the court shall order the owner or person in charge to pay any outstanding wages and related amounts that are due in terms of the Basic Conditions of Employment Act, 1983 (Act 3 of 1983) the Labour Relations Act or a determination made in terms of the Wage Act, 1957 (Act 5 of 1957); and
- (c) the court may order the owner or person in charge to grant the occupier a fair opportunity to-
  - (i) demolish any structures and improvements erected or made by the occupier and his or her predecessors, and to remove materials so salvaged; and
  - (ii) tend standing crops to which he or she is entitled until they are ready for harvesting, and then to harvest and remove them.”

### Costs

[10] The magistrate granted the order prayed and I accept for the purposes of this judgment that no costs were awarded as the matter was undefended. This is in keeping with the approach of this Court that unless there are special circumstances which justify a costs order no costs order is granted.<sup>8</sup>

### **ORDER**

[11] I make the following order:

- (a) the order for the eviction of the respondents granted by default by the Magistrate, Standerton on 19 October 2000 in case 2590/00 is set aside in its entirety;
- (b) the applicant is given leave to approach the court for an eviction order on the same papers suitably amended or amplified;
- (c) the magistrate is directed to request a report in terms of section 9(3);
- (d) when setting the matter down for re-hearing the applicant must give the municipality and the head of the regional office of the Department of Land Affairs at least ten court days notice of the hearing.

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**ACTING JUDGE J MOLOTO**

For the applicant:

*Van Heerden, Schoeman Incorporated*, Standerton.

For the respondents:

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<sup>8</sup> 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].

*No appearance.*