

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In chambers: **Bam P**

CASE NUMBER: 9R/2000

MAGISTRATE'S COURT CASE NUMBER: 9428/99

Decided on: 7 March 2000

In the review proceedings in the case between:

VOORAUUS BELEGGINGS EDMS (BPK)

Applicant

and

AARON MOLEFE

First Respondent

EMILY MOLEFE

Second Respondent

JUDGMENT

BAM P:

[1] On 3 February 2000 the Registrar of this court received an order for eviction of the respondents accompanied by the record of proceedings in this matter from the Additional Magistrate, Potchefstroom for automatic review in terms of Section 19(3) of the Extension of Security of Tenure Act, Act 62 of 1997 (hereinafter referred to as "ESTA"). I spoke to the magistrate on the telephone shortly thereafter and I was informed that the eviction had been duly executed on 1 February 2000. Furthermore the magistrate stated that she had been informed that the respondents were living perilously in the open without accommodation. I made the following order as a matter of urgency on 22 February 2000:

- "1. The order for eviction given by default by the Additional Magistrate of Potchefstroom on 15 December 1999 in this matter is hereby set aside in whole in terms of section 19(3)(b) of the Extension of Security of Tenure Act 62 of 1997.
2. The applicant is ordered to immediately restore to the respondents the full rights of occupation they enjoyed prior to the date when the eviction order was granted.
3. The applicant is granted leave, if so advised, to re-new the application for eviction upon the same papers supplemented by such further notices as will comply with the provisions of the relevant Act.

4. Reasons for the above order will be forwarded to the Additional Magistrate within seven (7) days but the above order is to be implemented with immediate effect.”

[2] The Registrar was requested to inform all the parties immediately of the reversal of the magistrate’s order. The magistrate undertook to obtain the assistance of the Deputy-Sheriff to inform the respondents (who clearly did not have a permanent or reliable address) of my order. My reasons for making the order which I made on 22 February 2000 are as follows:

[3] The magistrate’s order read as follows:

“Na aanhoor van Applikant se prokureur beveel die Agbare Hof dat:

1. Eerste Respondent en Tweede Respondent (en die gemelde Respondente se afhanklikes) beveel word on die Plaas Walkraal, en wel te wete die resterende gedeelte van die gedeelte 6 (‘n gedeelte van gedeelte 2) van die Plaas Walkraal No 498, IQ Transvaal, 379.0625 ha groot en beter bekend as plaas “Walkraal”, te verlaat voor of op 31 Januarie 2000 om 12:00;
2. Indien die bogemelde Respondente weier of versuim om die Plaas Walkraal te verlaat voor of op die tydperk in Paragraaf 1 hierbo vermeld word magtiging verleen vir die onmiddellike uitreiking van ‘n Lasbrief vir Uitsetting en die uitvoering daarvan op of na 1 Februarie 2000;
3. Wat die voorwaarde van die bogemelde Respondente se verblyf tot en met 31 Januarie 2000 betref, die *status quo* sal geld, met die uitdruklike voorwaardes dat die Respondente nie die eiendom verder sal beskadig en/of ongemagtigde sal toelaat, en/of verder sal toelaat, om die eiendom te okkupeer nie;
4. Eerste Respondent en Tweede Respondent, gesamentlik en afsonderlik, aanspreeklik is vir die kostes van hierdie aansoek.”

[4] The magistrate dutifully brought to the court’s attention the fact that the record of proceedings had mistakenly not been forwarded promptly to this court on automatic review and tendered an apology. The order had been given on 15 December 1999.

[5] The terms of section 19(3) are peremptory. The provision reads:

“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-

- (a) confirm such order in whole or in part;
- (b) set aside such order in whole or in part;
- (c) substitute such order in whole or in part; or

(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 addition, in terms of Rule 35(A)(1) of the Land Claims Court Rules,¹ a magistrate making an order for eviction under ESTA must:

- “(a) allow not less than 15 days for the review process in determining the date for vacation of the land and the date on which the eviction order may be carried out, unless the urgency of the matter justifies a shorter period;
- (b) forthwith transmit to the Court the record of the proceedings and his or her reasons for the order; and
- (c) inform the parties to the proceedings who were present when the order was applied for or when the order was made that the record of the proceedings will be transmitted to the Court for automatic review.”

[6] If the failure to submit the papers to this Court timeously was all that was amiss, I would have considered merely suspending the execution of the eviction order and allowing time for review.

[7] I notice that only one day was allowed for carrying out the eviction order in terms of section 12(1)(b). It is so that this subsection does not lay down any criteria for the determination of the date for carrying out the eviction such as a “just and equitable date” as is required in the determination of the date of vacation in terms of section 12(1)(a). This ought not to be taken to mean that the concepts of justice, fairness and equity which permeate this entire legislation should be discarded without further ado in applying the section.² The inherent injustice and hardships that could arise are aptly demonstrated by the facts of this case. Similar concerns have been expressed in two other cases decided by this court. In *Lategan v Koopman & Andere*,³ the court was considering the determination of a date for carrying

1 Inserted by GN 20049, Government Gazette 594, 7 May 1999.

2 Especially in regard to evictions, fairness, justice and equity play an important role under the Act. See also Keightley “The Impact of the Extension of Security of Tenure Act (1999) 15 *SA Journal on Human Rights* (Juta, Cape Town 1999) at 279 footnote 12, part of which reads as follows:

“Fairness, justice and equity also play an important role in evictions under the Act, as evidenced by ss 10(1)(b), 10(3), 11(1), 11(2), 11(3), 12(1), 12(2) and 13(2)”.

3 1998 (3) SA 457 (LCC); [1998] 3 All SA 603 (LCC).

out an eviction order in relation to making allowance for completion of the automatic review process. The Court (per Gildenhuys J) sounded a warning prophetic of the very case before us. He stated the following:

“Daarom behoort ñ landdros, in die bepaling van ñ datum wanneer ñ uitsettingsbevel uitgevoer mag word, die hersieningsproses in gedagte te hou. Dit kan groot ontwrigting veroorsaak en onregverdigheid tot gevolg hê indien ñ uitsettingsbevel uitgevoer word, en die bevel daarna op hersiening deur hierdie Hof ter syde gestel word.”⁴

In *Roux v M M Lekekiso*,⁵ the Court (per Dodson J) dealing with the date of execution expressed a further consideration:

“The date determined in section 12(1)(b) should then allow the respondent sufficient time to pack up and vacate the farm without a resort to the mechanisms for execution of an order.”⁶

[8] It seems appropriate for me to re-enforce the recommendation that the setting of the date for the execution of an eviction order should, in every case, as in the case of the determination of the date for vacation, be just and equitable. Equity may justify a very short period. Had the papers been sent to this Court timeously, the eviction date might have been just and equitable.

[9] A further examination of the record of proceedings left the court in doubt as to whether proper service in terms of section 9(2)(d)(i) had been effected upon the respondents in spite of the assertions made in this regard in the applicant’s founding affidavit. A copy of annexure “JTM5-2” in the record of proceedings which would have indicated the manner in which service was effected was very faint and completely illegible. The magistrate informed me (telephonically) that the service had been by way of “aanhegting” by which I understood her to signify affixation to the door of respondent’s place of residence. The magistrate also indicated that she had verbally warned the respondents of the eviction matter pending against them on a previous date when, I presume, they were in court.

4 *Lategan* above n 3 at 465H; in All SA at 609h-g.

5 LCC 13R/98, 16 November 1998, [1998] JOL 4157 (LCC); internet website address <http://www.law.wits.ac.za/lcc/lccalph.html>.

6 *Roux* above n 5 at para [10].

[10] It is clear to me, even with that explanation, that on the face of the documents submitted to the Court there has been inadequate compliance with the form of service prescribed in the regulations to ESTA.⁷ There is no indication either by the signature of the respondents or by certification of the Deputy-Sheriff that the respondents received the notice nor is there any indication of the manner or time of its service.

[11] A similar problem arose in *Van Greunen Boerdery BK v Innes & Another*⁸ and Moloto J stated the following:

“In terms of the Regulations, a notice in terms of section 9(2)(d)(i) must be served on the occupier by the sheriff within whose area of jurisdiction the land in question is situated. There is no evidence of service of this notice by the sheriff. Neither is there an acknowledgement of receipt of the notices as required under Regulation 11(1)(a). Instead the words “weier om te teken” are inscribed. Regulation 11(1)(a) reads:

11. (1) It shall be presumed, unless the contrary is proved, that the service notice under these regulations has been duly effected if the party alleging service produces in court
 - (a) an acknowledgement of receipt is proved by the person on whom the notice was required to be served or by a person accepting service on his or her behalf;

The magistrate has to consider the issue of service, and in that regard, his attention is drawn to Regulation 11(2), which reads:

11. (2) If the court hearing a matter is not satisfied that service was effected in accordance with these regulations or if the court is not satisfied that a copy of the notice was in fact received by the person on whom it was required to be served, it may make such order as it deems fit.”⁹

[12] The eviction order in this case was granted by default in circumstances that leave this court in doubt as to whether the requisite notices in terms of section 9(2)(d) were properly served on the respondents. The procedure adopted in launching the proceedings before the magistrate was by way of an application on notice of motion supported by founding and supporting affidavits on behalf of the

7 Regulations published in GN 1632, Government Gazette 19587, 18 December 1998. Regulation 11 prescribes what constitutes proof of service.

8 LCC 56R/99, 9 September 1999, [1999] JOL 5295 (LCC); internet website address <http://www.law.wits.ac.za/lcc/1999/vangreunensum.html>.

9 *Van Greunen* above n 8 at paragraph [13].

applicant. There were no answering affidavits filed on behalf of respondents and so the magistrate only had the applicant's version of the facts before her. It cannot be determined from the record why the respondents did not enter appearances or file answering affidavits. In other words, I am uncertain as to why it was imperative to finalise the matter in the absence of the parties who would suffer the most.

[13] Since the enactment of ESTA, magistrates have the power to grant final orders for eviction on application¹⁰ To do so they have to apply the rules of procedure applicable to such applications in the High Court.¹¹ In addition, averments in the applicant's affidavits must contain all the essential prerequisites for an eviction order in terms particularly of sections 8 to 13 of ESTA.¹² There is a duty on the magistrate to make suitable enquiries from an applicant before granting eviction orders especially when the respondents are absent. It may be that proceeding by way of application, especially if unopposed, is inappropriate for the purpose of giving final orders of eviction given, *inter alia*, the exacting and manifold demands of ESTA.¹³ This is a matter that could be addressed by the Rules Board when they act in terms of section 17(3) of ESTA.

[14] In the affidavits filed on behalf of the applicant, some allegations are made indicating compliance with only some of the prerequisites but not all. The apparent failure to comply with section 9(2)(d) has already been noted. In addition, I have not found any averments indicating compliance with sections 8(1)(c) and 8(1)(e) of ESTA. Section 8(1)(c) requires the magistrate, for the sake of justice and equity, to weigh up the interests of the applicant against those of the respondent and compare hardships that the eviction will cause the one as against the other. Section 8(1)(e), also for the sake of justice and equity, requires the magistrate to have considered the fairness of the procedure followed by the applicant including whether or not the respondent had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.

10 *De Kock v Juggels & Another* 1999(4) SA 43 at 50B-D.

11 Sections 17(3) and (4) of ESTA.

12 *De Kock* above n 10 at 51H; *Karabo & Others v Kok & Others* 1998 (4) SA 1014 (LCC) at 1019D; [1998] 3 All SA 625 (LCC) at 630f.

13 Compare *Grobbelaar v Freund* 1993 (4) SA 124 (O) at 128B.

[15] There is also no averment that the respondent was dismissed from his employment in accordance with the provisions of the Labour Relations Act as required in terms of section 8(2). In fact the dismissal appears to have been a unilateral act on the part of the applicant with no regard to any form of procedure.

[16] This review was unfortunately written without the benefit of submissions from the parties or of written reasons from the magistrate because of its urgency. For the various reasons set out above, I am satisfied that the magistrate's order must be set aside.

PRESIDENT F C BAM

For the applicant:

Mr H G Aucamp of Aucamp Attorneys, Potchefstroom

For the respondent

Unrepresented