

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

CASE NUMBER: LCC 81R/00

MAGISTRATE'S COURT CASE NUMBER: 510/00

In chambers: **Meer AJ**

Decided on: 27 December 2000

In the review proceedings in the case between:

GLEN ELGIN TRUST

Applicant

and

TITUS, J

1st Respondent

TITUS, C

2nd Respondent

JUDGMENT

MEER AJ:

[1] An order in terms of the Extension of Security of Tenure Act¹ (hereinafter referred to as “the Act”) for the eviction of the respondents from the farm Glen Elgin, Grabouw was granted in the Grabouw Magistrate’s Court on 15 September 2000. The respondents did not oppose the application nor did they attend the court when the eviction order was granted. This is an automatic review of the eviction order under section 19(3)² of the Act.

1 Act 62 of 1997, as amended.

2 Section 19(3) provides:

“Any order for eviction by a magistrate’s court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in the Gazette, 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.”

[2] The respondents were occupiers on the farm as defined in the Act.³ The first respondent's right of residence stemmed from his employment on the farm since 1991, whilst that of the second respondent derived from her relationship as the wife of the first respondent. The first respondent's right of residence was lawfully terminated in terms of section 8(2)⁴ of the Act when he was dismissed in accordance with the provisions of the Labour Relations Act⁵ on 23 September 1998 pursuant to a final warning. The reason for dismissal was that he frequently absconded from work. After an unsuccessful appeal to the applicant against his dismissal, the first respondent was given notice on 29 September 1998 to vacate the farm.

[3] I am satisfied that the peremptory procedural and substantive requirements for the granting of an eviction order, as set out in section 9(2),⁶ were complied with in this case. In compliance with section

3 "Occupier" is defined as follows: "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-

- (a) a labour tenant in terms of the Land Reform (Labour Tenant) Act, 1996 (Act 3 of 1996);
- (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
- (c) a person who has an income in excess of the prescribed amount;"

4 Section 8(2) reads as follows:
 "The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act."

5 Act 66 of 1995.

6 Section 9(2) of the Act provides:
 "(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,
 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,

9(2)(a) the first respondent's right of residence was terminated in terms of section 8(2) when he was dismissed in accordance with the Labour Relations Act. As the right of residence of the second respondent was dependent upon that of the first respondent, her right of residence was terminated with his. The respondents were given notice to vacate the farm, but failed to do so, and accordingly there has been compliance with section 9(2)(b). In accordance with section 9(2)(c) the conditions for an order for eviction in terms of section 10⁷ were complied with, in that the eviction order was granted because the first respondent had committed a fundamental breach of the employment relationship as set out in section 10(1)(c).⁸ In compliance with section 9(2)(d) the requisite notices of intention to obtain an order for eviction were served on the respondents, the municipality and the relevant office of the Department of Land Affairs.

[4] I now go on to consider compliance with Section 9(3).⁹ That section makes it mandatory for the court to request a report within a reasonable period on various matters pertinent to an eviction, namely the availability of alternative accommodation, the constitutional rights of those affected and the undue

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."

7 Section 10 is applicable to persons like the respondents who were occupiers on 4 February 1997.

8 Section 10(1)(c) reads:

"(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if-
 ...
 (c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship;"

9 Section 9(3) reads:

"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 No116 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."

hardship to the occupier occasioned by an eviction and any other matter as may be prescribed.¹⁰ The magistrate requested such a report, the report was submitted and the officer who compiled it testified at the hearing. The report states that there is no alternative accommodation for the respondents. They have been living rent free on the farm for two and a half years since the dismissal of the first respondent and are assisted financially by second respondent's family who also live on the farm. Their eldest child is at Molteno Primary school in grade 3 (presumably close to the farm), their second child born, in March 1997, is not yet at school, and the second respondent is pregnant with their third child. The report concludes that should they be evicted they will be exposed to the elements. The probation officer testified at the hearing in response to questions by applicant's attorney, that the report was based solely on his consultation with the respondents and that he had not ascertained applicant's perspective on the matter. He conceded also that he had not investigated the availability of alternative accommodation in Ceres, the first respondent's home town.

[5] The report in my view does not pass muster. It has clearly failed to consider fully the question of alternative accommodation as is required by section 9(3)(a), which it ought to have. A report on the questions of alternative accommodation and hardship¹¹ is, I believe, a requirement in respect of occupiers evicted in terms of section 10(1) (due to fault on their part, as in the present case where the first respondent's eviction stems from breach of a material and fair term of the employment relationship).¹² In this regard I am in agreement with the views expressed by Moloto AJ in *Valley Packers Co-Operative Limited v Dietloff and Another*¹³ to the effect that a section 9(3) report is required in such instances. The learned Judge states as follows:

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. Section 9(3) is

10 The Minister has yet to prescribe any other matters.

11 As required by section 9(3)(c).

12 This view can be distinguished from that expressed in *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons and Another* [2000] 3 All SA 279 (LCC) where Gildenhuys AJ said that the evicting court need not consider the availability of alternative accommodation and the hardship which an eviction order might cause before an eviction order is granted in a section 10(1) situation.

13 LCC 84R/00, 12 December 2000 as yet unreported.

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. ... I am also not in agreement that hardship need not be considered in a section 10(1) eviction case..... In a section 10(1) case 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.”¹⁴

[6] Another difficulty I have with the report is that pertinently, it fails to address the constitutional rights of any person affected by the eviction. Section 9(3)(b) requires a report to be submitted “indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education” Whilst the report touches on the rights of the occupiers and their children, it is completely silent on the constitutional rights of the landowner, which invariably must feature in any eviction. The constitutional rights of any occupier affected by an eviction must include the right to housing,¹⁵ the right of the minor children of the occupier to education¹⁶ and shelter,¹⁷ and arguably even the right to life,¹⁸ whilst that of the affected landowner must be the right to property.¹⁹ Evictions under the Act cannot but highlight the tension between these rights. The extent to which these rights

14 *Valley Packers* above n 13 at paras [7] - [8].

15 Section 26 of the Constitution of the Republic of South Africa, Act 108 of 1996 reads as follows:

- “(1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this of this right.
- (3) 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.”

16 Section 29(1)(a) of the Constitution states: “Everyone has the right to a basic education including adult basic education;”

17 Section 28(1)(c) of the Constitution states: “Every child has the right to basic nutrition, shelter, basic health care services, and social services;”

18 The right to life has been widely interpreted by the Indian Supreme Court in a number of innovative decisions so as to include not only the right to physical life, but also the right to a life of quality. Towards this end the right to life incorporates also certain socio-economic rights. See eg. *Tellis v. Bombay Municipal Corporation* (1986) AIR 180 (SCR), which recognised the right to livelihood as part of the right to life, *M C Mehta(1) v The Union of India* (1985) AIR 652 (SC) which acknowledged the right to be protected from industrial hazards as part of the right to life, and *Bandhua Mukti Morcha v Union of India and Others* (1986) 4 SCC 106 which recognised the right to be free from exploitation as part of the fundamental right to life and liberty.

19 Section 25 of the Constitution deals with the right not to be deprived of property.

operate, and against whom is determined by the nature of the rights and the nature of the duties they impose.²⁰

“The nature of the duty imposed by a right will be an important consideration in determining suitability. It would seem that in some instances the duty imposed by a right would be particularly onerous on a private person. For example the nature of the duty contemplated at section 26(2) namely to take reasonable measures to give everyone access to housing may, quite apart from the implications of the text, militate against imposing the duty upon private parties.”²¹

Some of these rights are binding on the State alone, whilst others bind both the State and private individuals. The constitutional rights of occupiers affected by an eviction fall within the genre of socio-economic rights. These rights impose a duty primarily on the State for their fulfillment.

“An analysis in terms of section 8(2) suggests that these rights are not rights that are infringed by private persons. They are rights that flow from a social democratic vision of the role of the state- that the state should provide basic facilities and services to ensure a basic equality of its citizenry in order to properly participate in the democratic process that the Constitution structures and protects.”²²

[7] With regard to the right to housing sections 26(1) and (2) clearly impose a duty upon the State to take measures towards the realisation of everyone’s right to adequate housing, whilst section 26 (3), which specifies the duty not to evict or demolish homes without an order of Court applies horizontally

20 Section 8(1) of the Constitution provides that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. Section 8 (2) reads:

“A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

In Cheadle and Davis “The Application of the 1996 Constitution in the Private Sphere” (1997) 13 *SA Journal on Human Rights* at 57-58 the authors argue that the word “applicable” in section 8(2) of the Constitution is used in the sense of capable and suitable. They state “The nature of the right may reveal that it is a right capable of being applied to private persons” and the examples given include “the right to dignity (injuria, defamation).... right to property and children’s rights.” Davis et al “Application” in *Fundamental Rights in the Constitution* (Juta, Cape Town, 1997) have the following to say at 46: “The court will need to examine whether the purpose of the right in question is not only to protect the right bearer against the government but also against individuals.”

21 Cheadle and Davis above n 16.

22 Cheadle and Davis above n 16 at 59-60.

as well.²³ The right of children to basic shelter features in section 28(1)(c) of the Constitution together with the rights of children to basic nutrition, basic health care services, and social services. Whilst the primary onus must be on the State to deliver such services, these rights can apply horizontally as well especially when subsumed under the right to parental care contained in section 28(1)(b) of the Constitution.²⁴ Similarly section 29(1)(b) imposes a primary obligation upon the State to ensure a basic education, whilst the right may also be capable of horizontal application vis-a-vis parents, guardians and others who may bear this duty. The protection of property rights of landowners embodied in section 25 of the Constitution clearly imposes duties on both the State and private persons. Section 25(1) which prevents the arbitrary deprivation of property except in terms of law of general application talks to the State and private persons alike, whilst sections 25(2) to (9)²⁵ talk to the State.

[8] Whilst the Act requires these respective rights to be considered, and imposes complex procedural and substantive obstacles for landowners to overcome before they can evict occupiers, it should, of course, not be construed to suggest that the constitutional rights of the occupier stand to be enforced against the land owner. For clearly they cannot and indeed ought not to be so enforced lest the ludicrous situation arises whereby land owners are expected to take over the State's responsibility to provide housing to occupiers and education to their children.

[9] The importance of a section 9(3)(b) report is that it ensures that the constitutional rights inherent in any eviction are not overlooked. The section is of particular significance to unrepresented occupiers and occupiers who fail to attend eviction hearings, as their constitutional rights must nonetheless be considered. No doubt the Legislature sought to highlight constitutional rights in an attempt to address the

23 "The application of this right between private parties will mainly be mediated through common law rules which must be applied or, where necessary, developed and through which the right may be limited as envisaged in s 8 (3)." S Liebenberg "Housing" in *Fundamental Rights* above n 16 at p353. The article provides a useful analysis on the right to Housing in terms of section 26 of the Constitution.

24 See *The Government of the Republic of South Africa and Others v Grootboom and Others*, CCT 11/00, 4 October 2000, website <http://www.concourt.gov.za/summaries/2000/grootboom/sum.html>.

25 Sub-sections 25(2) and (3) and (4) deal with the expropriation of property, s 25(5) relates to measures by the state to enable citizens to gain equitable access to land; s 25(6) and (9) instructs Parliament to legislate for secure tenure for those whose tenure is insecure as a result of apartheid; s 25(7) instructs Parliament to legislate for restitution of rights in land for those dispossessed under apartheid legislation; s 25(8) pertains to legislative measures by the state to achieve land, water and related reform.

hardship and instability caused by evictions and to ensure that they are conducted with a measure of compassion, or even delayed with as little resultant disruption to constitutional rights as possible.

[10] Laudable though this may be it does not detract from the harsh reality that the enumerating of constitutional rights of those affected by evictions can provide cold comfort to occupiers, given the serious housing crisis in the country. This is of course a crisis about which judicial notice can be taken, and for which a report detailing the effect of an eviction on constitutional rights is not strictly speaking necessary. Some might go so far as to also say that “compassionate evictions” fall within the ambit of considerations of justice and equity for which the Act already provides, and for which a reflection on constitutional rights is not necessary.²⁶

[11] The effect of a report on constitutional rights is moreover not unproblematic. Firstly it adds yet another requirement to the cumbersome list of procedural and substantive hurdles that must be overcome before an eviction order can be obtained. Secondly it gives the courts the difficult task of deciding how to reconcile eviction orders with the troubling scenarios which invariably emerge from reports of this nature and then reconciling them with the dearth of measures in place by the State to deliver on socio-economic constitutional rights of occupiers. The task of the Courts is possibly easier in evictions where the land owner is the State against whom socio-economic rights of occupiers are enforceable. These difficulties aside, the Act requires a report within a reasonable period, in respect of the matters stipulated in section 9(3)(b).

[12] Given the problems alluded to above and its avowed one-sided nature,²⁷ the report in this case, whilst informative, is of little value. These shortcomings could possibly be attributed to the fact that instructions were received to prepare the report a mere three days before the hearing, an unfortunate practice and one to be avoided if such reports are to be of assistance. On account of the failure to deal

26 The criterion of what is just and equitable pervades the Act. See sections 3(2)(b), 8(1), 10(3), 11(1), 11(2), 11(3), 12(1)(a), 12(2), 13(1)(a), 13(2), 14(4)(b).

27 The author of the report consulted with the respondents only.

adequately with all the matters stipulated in section 9(3), a fuller report must be commissioned in this case and I am unable to confirm the eviction until this is obtained.

[13] I offer the following comments on section 9 reports generally in the hope that they will be of assistance to authors of such reports in future. Reports must emanate from full investigations with all relevant parties. They ought to clearly set out the constitutional rights of both owner and occupier and avoid the perception of being one-sided. The questions of alternative accommodation and hardships should similarly be considered with regard to the respective positions of owners and occupiers alike. It must be borne in mind that the Act seeks not only to regulate the eviction of vulnerable occupiers in a fair manner, but also recognises the right of land owners to apply to court for an eviction order under appropriate circumstances.²⁸

[14] I am unable to confirm the eviction order for another reason, namely that pertaining to applicant's standing as a trust. It is a well-established principle of our law that in legal proceedings brought by a trust all trustees are required to sue jointly unless one trustee has the authority to act for the others.²⁹ If legal proceedings are brought in the name of a trustee representing the trust, a resolution of all trustees authorising that trustee to act for the trust is required. The representative trustee is cited as being *nomine officio* ("NO").

"A trust is not a legal persona but a legal institution, *sui generis*. The assets and liabilities of a trust vest in the trustee or trustees. The trustee is the owner of the trust property for purposes of administration of the trust, but qua trustee he has no beneficial interest therein. . . . Unless one of the trustees is authorised by the remaining trustee or trustees, all the trustees must be joined in suing and all must be joined when action is instituted against a trust. . . . In legal proceedings trustees must act *nomine officii* and cannot act in their private capacities."³⁰

28 See the preamble to the Act.

29 Honoré's *South African Law of Trusts* 4th ed (Juta, Cape Town 1992) at 266; *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (T) at 127C; *Cupido v Kings Lodge Hotel* 1999 (4) SA 257 (R) at 263F-G.

30 *Mariola and others v Kaye-Eddie NO and others* 1995 (2) SA 728 (W) at 731C-F. Cited with approval in *Cupido* above n 10 at 126H-J.

[15] The afore-mentioned well-established principle pertaining to trusts has not been adhered to by the applicant trust in the present case. There is no authorisation by all or any of the trustees. Moreover it is not clear whether the deponent to the founding affidavit, one Charles Morgan, is a trustee, nor is it clear why the applicant trust is suing in its own name. Finally there appears to be confusion as to precisely who the applicant trust is. The citation refers to the applicant as the Glen Elgin Trust, whilst the founding affidavit states that the applicant is the Molteno Brothers Trust.³¹ Given the unsatisfactory nature of these very important issues of citation, standing and authorisation,³² no order should have emanated in this case.

Order

[16] I make the following order:

- (a) the order for the eviction of the defendant granted by default in the Magistrate's Court, Grabouw on 15 September 2000 under case 510/00 is set aside in its entirety;
- (b) the magistrate is directed to request a more comprehensive report in terms of section 9(3).
- (c) the applicant is given leave to approach the court for an eviction order on the same papers suitably amended;
- (d) the parties are directed to behave towards each other without hostility pending the resolution of this matter.

31 On amendment of the citation of a party see *Durban City Council v Jailani Café* 1978 (1) 151 (D) at 159H.

32 For a general discussion on *locus standi* and authorisation see *Rix v Arnold and Others*, LCC 59R/99, 16 November 1999, internet address <http://www.law.wits.ac.za/lcc/1999/rixsum.html>.

ACTING JUDGE YS MEER

For the applicant:

BN Wyngaard instructed by Wyngaard Attorneys, Grabouw.

For the respondents:

Unrepresented.