

**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG**

CASE NO: LCC 126/2014

Before: The Honourable Mpshe AJ

Heard on: 30.03.2016

Delivered on:

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
..... DATE SIGNATURE

In the matter between:

JULY JOSEPH MAGUBANE

First Applicant

GWEJE KHUMALO

Second Applicant

and

TWIN CITY DEVELOPERS (PTY) LTD

First Respondent

WETLANDS COUNTRY RETREAT (PTY) LTD

Second Respondent

PIXLEY KA SEME LOCAL MUNICIPALITY

Third Respondent

**HEAD OF THE MPUMALANGA PROVINCIAL
OFFICE OF THE DEPARTMENT OF RURAL
DEVELOPMENT AND LAND REFORM**

Fourth Respondent

**HEAD OF THE KWAZULU-NATAL PROVINCIAL
OFFICE OF THE DEPARTMENT OF RURAL
DEVELOPMENT AND LAND REFORM**

Fifth Respondent

In re:

TWIN CITY DEVELOPERS (PTY) LTD

First Applicant

WETLANDS COUNTRY RETREAT (PTY) LTD

Second Applicant

and

JULY JOSEPH MAGUBANE

First Respondent

GWEJE KHUMALO

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PIXLEY KA SEME LOCAL MUNICIPALITY

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Fifth Respondent

JUDGEMENT

INTRODUCTION

[1] This is an application for leave to appeal against the order and judgement of this Court handed down on 13 January 2016.

[2] A total of eleven (11) grounds of appeal were filed with this Court.

[3] However, on the hearing of this application being 30 March 2016, all other grounds were abandoned save grounds 1, 2 and 3 to the application.

[4] The salient grounds read as follows:

- "1. Another court might reasonably determine that the Honourable Court was precluded from ordering the eviction of the Applicants without a probation officers report in terms of section 9(3) of the Extension of Security of Tenure Act, 1997 having been requested by the court.*
- 2. Another court might reasonably determine that the Honourable Court was precluded from ordering the eviction of the Applicants without a probation officers report in terms of section 9(3) of the Extension of Security of Tenure Act, 1997 having been submitted for the consideration of the court prior to the court making its determination; alternatively*
- 3. Another court might reasonably determine that the Honourable Court was precluded from ordering the eviction of the Applicants without a probation officers report in terms of section 9(3) of the Extension of Security of Tenure Act, 1997 having been considered by the court prior to the court making its determination."*

[5] Application is opposed by First and Second Respondents.

BACKGROUND

[6] First and Second Applicants were First and Second Respondents in an eviction application before this Court.

[7] Respondents in this application were Applicants in the eviction matter.

[8] Parties will be referred to as in this application.

[9] An eviction order was granted by this Court in the judgement handed down on 13 January 2016.¹ Eviction order is in accordance with section 10(1) to the Act.

ISSUES TO BE DETERMINED

[10] Consideration of the three grounds of appeal reveals two issues to be determined by the Supreme Court of Appeal (SCA).

[11] These are:

(a) Is it obligatory or peremptory for the trial court to request a probation report in terms of section 9(3) of the Extension of Security of Tenure Act 62 of 1997 (“the Act”), alternatively

In determining its judgement in an eviction matter, can the Court finalise its determination without having had insight in the contents of the section 9(3) report.

[12] I have decided to allow this application for leave to appeal for the reasons below.

REQUESTING FOR THE REPORT BY TRIAL COURT

[13] Section 9(3) provides as follows:

¹ Judgement page 10 par 37

- “(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; ...*
- (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 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.”*

CASE LAW

- [14] In the review case of *Glen Elgin Trust v Titus, J and Another*,² Meer J states that the acquiring of the 9(3) report is mandatory.

² 2001 JDR 0002 (LCC) case LCC 81/R/00 at paragraph 4

- [15] In this judgement the learned Judge agrees with the decision of Moloto, AJ in the matter of *Valley Packers Co-operative v Dietloff and Another*³ wherein Moloto, AJ states:

“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 a factor which a court must consider for the purposes of section 26(3) of the Constitution. 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 ... 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.”

- [16] On the other hand in the case of *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons*⁴ . Gildenhuys J held that an eviction under section 10(1) of the Act did not require the court to consider the issue of alternative accommodation or the hardship that may be caused by the eviction. Further that if the requirements under section 10(1) are being met, the court must not refuse to grant the eviction order.

- [17] Counsel for the Applicant, Mr Whittington submits that there is contradiction on the issue of a section 9(3) report.

³ LCC 84R/00

⁴ 2001 (1) SA 1017 at par 7 and 8 p 1020

[18] Given the differing judgement as indicated herein, I am of the opinion that reasonable prospects of success on appeal do exist.

[19] I consequently order as follows:

(a) Condonation application is granted.

(b) Application for leave to appeal only regarding section 9(3) is granted.

(c) Costs to be costs in the appeal.

Mpshe M J

Acting Judge of the Land Claims Court