

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG**

**CASE NUMBER: 22/98**

In the case of

**PE MATSHWAYO AND OTHERS**

Applicants

and

**NU-WAY INVESTMENTS (PTY) LTD**

Respondent

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## JUDGMENT

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### **DODSON J:**

[1] This is an application for an interim interdict preventing the sheriff of Witbank from carrying out an eviction order granted in the Transvaal High Court in favour of the respondent against the applicants on 5 March 1998. The matter was not opposed in the High Court, despite service having been duly effected on the applicants. The sheriff intends carrying out the order later this morning. This application was heard late on the night of 11 May 1995 into the early hours of today, 12 May 1995. The applicants include a community of some 1000 people, including men, women and children. The founding affidavit was deposed to by the applicants' attorney. The reasons have of necessity been prepared in some haste.

[2] The applicants allege that they are occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 ("the Act") and as such protected from eviction, except in terms of the strict requirements of that Act. The interim relief is sought pending a final interdict and a declarator as to the alleged status of the applicants as occupiers.

[3] The respondent challenged the jurisdiction of this Court to grant relief and also suggested that the application was not urgent, or if it was, the urgency was of the applicants' own making in that they had failed to respond to the notice of eviction and subsequent process until the last minute. I need not decide these issues (with one exception) and will assume that they must be decided in favour of the applicants. The exception is this: The applicants, in terms of their original notice of motion, sought a stay of the High Court proceedings pending an application for rescission in that Court. Applicants argued that in terms of the various provisions of Chapter 5 of the Act, this Court has exclusive jurisdiction to grant an interlocutory order in relation to High Court proceedings in these circumstances. I disagree. It is clear to me on a proper reading of section 20(1) of the Act that this Court only has the power to grant interlocutory relief where this is ancillary to the performance of **its** functions, not those of the High Court. The amendment of the applicants' notice of motion so as to seek relief pending proceedings in this Court cured this defect.

[4] The criteria on the basis of which this Court will consider the grant of an interim interdict were set out in the matter of *Nchabeleng v Phasha*<sup>1</sup> and need not be repeated here.

[5] Dealing first with the applicants' ultimate prospects of success, these are difficult to evaluate on the evidence available to the Court, namely a hastily prepared affidavit by the applicants' attorney summarising a consultation he had with representatives of the community which the applicants make up. From that, as well as the respondent's founding affidavit in the High Court proceedings, it is clear that respondents cannot dispute that the Act applies to the area concerned. Applicants are assisted in this regard by the presumption in section 2(2) of the Act.

[6] To qualify as occupiers in terms of the Act, the applicants must also "ha[ve] or on 4 February 1997 or thereafter [have] had consent or another right in law" to reside on the land.<sup>2</sup> Here the allegations are sketchy, but the respondent has not filed an affidavit in these proceedings to contest the applicants' claim that they have occupied the land undisturbed for many years. The respondent's founding affidavit in the High Court proceedings alleges that there was no consent, but it is as sketchy, if not more sketchy, than the applicants' founding affidavit in this respect. Despite the paucity of evidence, there is in my view a serious question to be tried at the end of the day.

[7] As far as the balance of convenience is concerned, this strongly favours the applicants. There is snow on the Drakensberg. Conditions are extremely cold and the allegation that there are children and babies affected is uncontested. It is not suggested that the applicants have anywhere else to go to.

[8] That brings me to the discretion which I must exercise. Here the applicants face two fundamental difficulties. In exercising my discretion, I must consider the availability of alternative remedies. In this regard it is my view that the applicants ought to have approached the High Court for urgent interim relief. I can see no bar to this course of action and, indeed, if they "pull out all the stops" they may still be able to do so.

[9] The second difficulty is this. I must also consider the public interest in exercising my discretion. If I grant interim relief, my order will conflict directly with that of the Transvaal High Court. That order includes an order compelling the sheriff "to do all things necessary to give effect to this order", including securing the vacation of the property by the applicants. If the sheriff were to ignore my order, he or she would be in contempt of this Court. If he or she were to obey my order, he or she would be in contempt of the High Court order. This situation of conflicting orders cannot be in the public interest. Moreover as was stated in *Deputy-Sheriff, Cape Town v South African Railways and Harbours and Others*:

"A writ is however an absolute justification to the Sheriff or Deputy-Sheriff for what is done in pursuance of it, even though the judgment on which it is founded may be afterwards set aside (see Halsbury, *Laws*

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<sup>1</sup> [1997] 4 All SA 158 (LCC).

<sup>2</sup> See the definition of "occupier" in section 1(x) of the Act.

*of England*, 3rd ed., vol. 34, para. 1206)<sup>3</sup>

[10] I have also considered the question of whether or not this Court might be able simply to ignore the judgment of the High Court and treat it as a nullity. There is precedent for this.<sup>4</sup> However the difficulty I find here is that on the papers before the learned judge it is difficult to fault his reasoning. All he had to go on were respondent's papers which presented the applicants as land invaders who had never enjoyed consent to be on the land. This too points to the need for applicants to pursue their remedy further in that Court, at least for the moment.

[11] I must therefore, with great reluctance, refuse applicants the interim relief they seek. I do so reluctantly because I have great sympathy for their situation. Whilst I can understand respondent's frustration at delays in progress, I do not share its indignation at the applicants' reluctance to move. There is an acute shortage of housing in this country and the applicants are victims of that shortage. They handed the notices and process served on them to their political representatives who have not succeeded in finding a solution for them. Moreover, looking at the photographs which were handed in by the respondent, the applicants occupy a small portion of the farm. The respondent's proposed development includes housing for the lower end of the market. Why not incorporate the applicants in their development plans, or at least investigate that option?

[12] There is also the real possibility that the applicants may enjoy rights under the Act and the enforcement of the eviction order may deny them the opportunity of asserting those rights because of circumstances which were not entirely of their own making.

[13] In the circumstances, the Court strongly urges the Respondent at this late stage to reconsider its stance and make a further effort to find a negotiated solution to this manifestation of a social problem.

[14] The court makes the following order:

- 1 The interim application is dismissed.
- 2 If the applicants wish to persist in this application, they must file their supplementary affidavits, if any, within 10 court days.
- 3 The respondent must file its opposing affidavits within 10 court days after that.
- 4 The applicants must file their replying affidavits within 10 days after that.
- 5 Thereafter the matter will be dealt with in terms of the Land Claims Court Rules.
- 6 The matter of costs will be determined at the hearing of the application for final

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<sup>3</sup> 1976 (2) SA 391 (C) at 396C-D.

<sup>4</sup> See for example *Suid Afrikaanse Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren and Others and the Taxing Master* 1964 (1) SA 162 (O).

relief. If the applicant elects not to proceed, the respondent may apply in terms of the rules of the Land Claims Court for a date to argue costs.

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**JUDGE A DODSON**

**Heard on:** 11 -12 May 1998

**Handed down on:** 12 May 1998

For the applicants:

*O Ntuli of Ntuli, Noble and Spoor*

For the respondent:

*T S Fletcher of Cliffe Dekker & Todd Inc*