

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG**

CASE NUMBER: LCC83/98

In the matter between:

DAVID MAHLANGU

Applicant

and

**THE PRESIDING MAGISTRATE IN CASE NO 98/06535 ON 31 JULY 1998
IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF SPRINGS**

First Respondent

THE CITY COUNCIL OF SPRINGS

Second Respondent

JUDGMENT

GILDENHUYS J:

[1] Approximately 450 people occupy land at a settlement on a farm described as Kwa-Thema, No 210, Registration Division IR, Transvaal, within the district of Springs. The applicant is one of those people. The land is owned by the Springs City Council, the Second Respondent in this matter. The Springs City Council requires the land to install bulk services for erven in a proposed township to be established on the farm. The Springs City Council first obtained a rule *nisi* and eventually a final Order in the Magistrate's Court for the District of Springs for the eviction of the approximately 450 occupiers from the settlement. The more important provisions of the final Order, issued against "the occupants of the farm Kwa-Thema", read as follows:

"Having heard Counsel and having read the documents filed of record it is ordered:

1 ...

2 *that the occupation by the Respondents of the proposed township, Kwa-Thema Extension 3, on the farm Kwa-Thema 210, Registration Division IR, Transvaal, situated in Springs ... be declared wrongful and unlawful, and that their right of residence has been terminated;*

3 ...

- 4 *that the Respondents, all those holding under them and all other occupants of the property to vacate the property and restore possession thereof to the Applicant by not later than the 3 AUGUST 1998;*
- 5 *that the Respondents and all those holding under them and all occupants of the property who fail to vacate the property as aforesaid be evicted from the aforesaid property in terms, inter alia, of the provisions of the Act;*
- 6 *that the evicted persons be moved to the waiting area as described in Annexure “F” to the Founding Affidavit;*
- 7 ...
- 8 *that in the event of the Respondents refusing to vacate the property, that the Sheriff or any person appointed by him in terms of the Act is:*
- 8.1 *authorised and directed to evict all persons occupying the property as provided for in the Act, and that such eviction shall be not effected prior to 3 AUGUST 1998;*
- 8.2
- 8.3 *directed to demolish and remove all informal and/or permanent structures erected on the property, alternatively Applicant is authorised to demolish and remove all informal structures, buildings or structures, erected or occupied, present on the property, to the waiting area ...*
- 9 ...”

[2] It is common cause that the Extension of Security of Tenure Act, 1997 (Act No 62 of 1997) (hereinafter “the Act”) applies to the land. The eviction order by the Magistrate’s Court is subject to automatic review by this Court in terms of section 19(3) of the Act.

[3] Before the Magistrate’s Court Order was executed, the applicant lodged an urgent application with this Court against the Magistrate as First Respondent, and against the Springs City Council as Second Respondent, for an order (amongst other relief) that:

“The order made by the first respondent on 31 July 1998 as presiding Magistrate in case no 98/06535 in the Magistrate’s Court for the District of Springs, review of which are sought as set out below, be suspended pending the outcome of the review;”

There was no appearance by the Magistrate at the hearing of the application.

[4] Mr Botha, who appeared for the applicant, attacked the order made by the Magistrate, firstly on the ground that the order purports to be made under section 15 of the Act, while a final order under that section is not competent. Section 15 reads as follows:

“Notwithstanding any other provision of this Act, the owner or person in charge may make urgent application for the removal of any occupier from land pending the outcome of proceedings for a final order, and the court may grant an order for the removal of that occupier if it is satisfied that -

- (a) there is a real and imminent danger of substantial injury or damage to any person or property if the occupier is not forthwith removed from the land;*
- (b) there is no other effective remedy available;*
- (c) the likely hardship to the owner or any other affected person if an order for removal is not granted, exceeds the likely hardship to the occupier against whom the order is sought, if an order for removal is granted; and*
- (d) adequate arrangements have been made for the reinstatement of any person evicted if the final order is not granted.”*

[5] The submission that an order under section 15 can only be granted “pending the outcome of proceedings for a final order” is not without merit. Mr Putter, for the Second Respondent, argued that a final order was permissible under other sections of the Act, but did not identify a section in respect of which he was able to show that all the requirements for an eviction order under such a section were met.

[6] Mr Putter also argued that the moving of the occupiers to a “waiting area” (as provided under par 6 of the Magistrate’s Order) does not constitute an eviction within the meaning of the Act. The Act defines “evict” as follows:

“‘evict’ means to deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of this Act, and ‘eviction’ has a corresponding meaning;”

I find no merit in this argument. If a person is deprived of residence on specific land against his or her will, it does not cease to be an eviction just because alternative land is made available.

[7] Secondly, Mr Botha submitted that it was not proper to cite the approximately 450 occupiers as a group. The members of the group have not been properly defined. Different considerations will apply to each member of the group. The compensation to which each member may be entitled under section 13(1) of the Act will differ. Furthermore, different preconditions to

an eviction order apply under sections 10 or 11 of the Act, depending on whether the member concerned became an occupier before or after 4 February 1997. There is force in these submissions.

[8] Lastly, Mr Botha pointed out that the rule *nisi* was not properly served on the occupiers. It was ordered by the Magistrate that the rule be served, *inter alia* -

“by leaving a true copy ... at every dwelling or structure and any other dwelling or informal structure which the Sheriff may find on the aforesaid land.”

According to the return by the Sheriff, only seventy rule *nisi* orders were served on houses and structures in the area. The Sheriff alleges that, during the service process, his group was totally surrounded by angry residents, some whom were openly displaying weapons, and that until proper protection can be provided, he is unable to serve the processes.

[9] Before the final return date of the rule *nisi*, many of the occupiers whom the Springs City Council was seeking to evict, became aware of the proceedings. They instructed an attorney to represent them. However, the applicant alleges that on the day prior to the final return date, some policemen informed the occupiers to go to the Kwa-Thema police station the next day. They went to the police station, not to the Court. Their attorney went to the Court, but in the absence of instructions, he withdrew from the case. The Magistrate then granted the final order, apparently without any opposition.

[10] Irrespective of whether the rule *nisi* was properly served or not, I am satisfied that the occupiers did not acquiesce in the order which the Springs City Council sought against them. The Applicant has set out facts which, in the absence of contrary evidence, provide sufficient explanation why the occupiers were not present or represented when the Magistrate granted the final Order.

[11] I can see no reason why the Court should not, where interim relief is properly called for, grant interim relief in a review application, even though the Act or the Rules of the Court contain no specific provision therefor.¹

¹ Compare *Safcor Forwarding (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 673H-676H

[12] During argument, I asked Mr Botha whether, if this Court were to grant interim relief by suspending the Magistrate's order, it would not be preferable to suspend the order pending an automatic review by this Court under section 19(3) of the Act, rather than pending a different form of review. Mr Botha responded by asking, as an alternative prayer, for an order suspending the Magistrate's order pending the automatic review thereof by this Court.

[13] In deciding whether to suspend the Magistrate's order pending the review thereof, the Court must, in my view, be led by considerations similar to those which apply for an interlocutory interdict. These considerations are -

- (a) a *prima facie* right or, in the present instance, a reasonable prospect of success;
- (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- (c) a balance of convenience in favour of granting the interim relief; and
- (d) the absence of any other satisfactory remedy.²

[14] In the present matter, the Applicant has shown that there exist a reasonable prospect that the Magistrate's order could be set aside when the review takes place. If the order is not suspended in the interim, the occupiers will suffer severe harm through the demolition of their dwellings and the use of the land for the installation of services: it will be very difficult, if not impossible, to reinstate them fully if the Magistrate's order is set aside on review. It is true that the Springs City Council suffers financial loss by being unable to give their contractors access to the land for the installation of the services. This loss can be reduced if the review of the Magistrate's decision takes place as soon as possible. In weighing up the harm which will befall the occupiers if the Magistrate's Order is not suspended against the financial loss which the Springs City Council will suffer if the order is suspended, the balance clearly favours the occupiers. Also, the occupiers have no other legal remedy to protect themselves from the anticipated harm.

[15] An automatic review in terms of section 19(3) of the Act will be quicker than a different form of review. I have accordingly decided to suspend the Magistrate's order pending the outcome of the automatic review. The Magistrate is requested to submit the papers necessary for

² H J Erasmus, *Superior Court Practice*, E8-9

the automatic review to this Court as soon as possible. Counsel on both sides have indicated that the parties will wish to make oral submissions when the automatic review takes place. The parties will be given an opportunity to do this.

[16] In conclusion, I wish to repeat what I have said in the matter of *Lategan v Koopman and Others*³, namely that, in the absence of special circumstances, it is undesirable for a magistrate to issue an eviction order under the Act which will take effect on a date which does not allow sufficient time for the automatic review process to be completed.

[17] For the reasons set out above, I made the following order on 3 August 1998:

1. The Court dispenses with the Land Claims Court Rules, including those which prescribe forms, service and requirements of the time limits for applications, and grants the relief in par 2 of this Order as a matter of urgency.
2. The order made by the First Respondent on 31 July 1998 as presiding magistrate in case number 98/06535 in the Magistrate's Court for the District of Springs, review of which is sought by the Applicant, is suspended pending the outcome of the review thereof in terms of section 19(3) of the Extension of Security of Tenure Act, 1997 (Act No 62 of 1997).
3. The costs of this application are reserved, to be decided simultaneously with the review of the order of the Magistrate referred to in par 2 of this Order.

JUDGE A GILDENHUYS

Heard on: 3 August 1998

Handed down: 4 August 1998

For the Applicant:

N L J Botha SC instructed by *Nico van Rensburg and Associates*

For the Second Respondent:

L G F Putter instructed by *Davies Theunissen*

³ Land Claims Court cases LCC1R/98, LCC2R/98, LCC3R/98, LCC4R/98 and LCC5R/98, unreported, judgment delivered on 20 February 1998