

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG**

CASE NUMBER: LCC 17R/98

In the review proceedings in the matter between

KANHYM (PTY) LTD

Applicant

and

SIMON BOTHA MASHILOANE

Respondent

JUDGMENT

DODSON J:

[1] This matter came to the Court by way of automatic review in terms of section 19(3) of the Extension of Security of Tenure Act.¹ I will refer to it as “the ESTA”. The matter was referred together with another matter, namely *Kanhym (Pty) Ltd v Shabangu*² the facts of which are in many respects identical to the present matter. Judgment has already been handed down in that matter.³ Both matters were applications for eviction brought in the Middelburg Magistrate’s Court. In both cases an order for eviction was granted. The dates set in terms of section 12(1)(a) and (b) were 11 and 12 January 1999 respectively in both matters.⁴

¹ Act 62 of 1997.

² LCC16R/98, 10 December 1998, as yet unreported.

³ The decision was that of my colleague, Moloto J.

⁴ The magistrate is to be commended for setting dates which allowed for the automatic review process to be dealt with properly. See the Court’s comments in *Karabo and others v Kok and others* [1998] 3 All SA 625 (LCC) at 631h-632a; *Lategan v Koopman and others* 1998 (3) SA 457 (LCC) at 465F-466A; *Roux v Lekekiso*, LCC13R/98, 16 November 1998, as yet unreported, at par 8 and 9.

Sections 12(1) and (2) read as follows:

“12 Further provisions regarding eviction

(1) A court that orders the eviction of an occupier shall-

(a) determine a just and equitable date on which the occupier shall vacate the land; and

[2] After judgment was handed down in *Kanhym (Pty) Ltd v Shabangu*⁵ setting aside the magistrate's eviction order, the attorney for the applicant enquired why the applicant had not been given the opportunity to make submissions before the judgment was handed down. In fact, the Court is no longer obliged to receive submissions from the parties before reviewing an order in terms of section 19(3) of the ESTA. This is because section 28 of the Land Affairs General Amendment Act⁶ deleted the proviso to section 19(3) which previously accorded such a right. However, it is my view that the Court retains the discretion to receive submissions before reviewing an order in terms of section 19(3) of the ESTA.⁷ In the light of the concerns raised in relation to the other matter, I afforded the parties an opportunity of making legal submissions (and the magistrate the opportunity of furnishing reasons) as to why the order should not be set aside. Only the applicant's attorney⁸ availed himself of this opportunity. The magistrate indicated that he was unable to do so because the original court file had been forwarded to this Court.⁹

[3] The case sought to be made out by the applicant was set out in the founding and replying affidavits prepared by one George Von Wuldfuge Eybers. He testifies that "he is the Manager, Manpower of Kanhym Estate, a Division of Foodcorp Operations Limited with place of business at Driehoek Farm, Middelburg district, Mpumalanga." He states that the respondent was employed by the applicant from 1 August 1976 until 31 December 1996. After that his employment with the applicant was terminated and he commenced employment with Imperial

(b) determine the date on which an eviction order may be carried out if the occupier has not vacated the land on the date contemplated in paragraph (a).

(2) In determining a just and equitable date the court shall have regard to all relevant factors, including-

- (a) the fairness of the terms of any agreement between the parties;
- (b) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land; and
- (c) the period that the occupier has resided on the land in question."

⁵ Supra n2.

⁶ Act 61 of 1998.

⁷ It may also be that in certain circumstances the right to administrative justice in section 33 of the Constitution of the Republic of South Africa, Act 108 of 1996, would oblige the Court to receive submissions. It is not necessary for me to express any final view on the matter however.

⁸ I refer to the "applicant's attorney" as a matter of convenience, despite the fact that I find in this judgment that the person who purported to bring the application on behalf of the applicant and instruct the attorney was not properly authorised to do so.

⁹ The magistrate's original eviction order was not accompanied by reasons. There was a transcript of the argument presented in the matter when it was argued in the magistrate's court.

Truck Systems, a contractor to the applicant. As an employee of Imperial Truck Systems, he retained his right to occupy the house which had previously been made available to him by the applicant. This was subject to the further condition that if his employment with Imperial Truck Systems was terminated, he was obliged to vacate the premises within 30 days after such termination.

[4] The respondent was retrenched by Imperial Truck Systems on 27 June 1997 and was given written notice on 17 July 1997 to vacate the house within 30 days. This the respondent failed to do, despite an additional written demand given on 5 February 1998. Mr Eybers says that the applicant needs the house occupied by the respondent in order to provide housing for another employee. Mr Eybers claims that the applicant has complied with all the requirements for the grant of an order of eviction in terms of the ESTA.

[5] The respondent, in his answering affidavit, admits that he was employed by the applicant and thereafter Imperial Truck Systems, that he was retrenched, that it was a condition of his employment that he forfeited the right to occupy one of the applicant's houses if his employment was terminated by the applicant or a contractor and that, following such termination, there was a duty to vacate the house within 30 days. However, he raised the following defences:

- (a) He disputed that the applicant had properly proved authority.
- (b) He said that he did not have alternative accommodation for himself and his family and that the ESTA required that the comparative hardship which he would suffer if evicted needed to be taken into account by the court as a matter of justice and fairness before an eviction order was granted.
- (c) He also pointed out that his son was still employed by the applicant, that his son had applied to the applicant for permission to occupy the house, that the respondent's son on the applicant's own version had the right to reside in the house and that the respondent and his family, including the son, should be left to continue to reside in the house.
- (d) He also attempted to argue that he intended referring his retrenchment to the Commission for Conciliation, Mediation and Arbitration established in terms of the Labour Relation Act¹⁰ on the basis that it was unfair and that to the extent that the referral would be seriously late, he would apply for condonation. However this defence was not seriously persisted in and I have no regard to it.

[6] There are two primary concerns which I have with the magistrate's order in this matter. In the letter inviting submissions from the parties, these were referred to as follows:

“The parties and the presiding magistrate are accordingly given the opportunity to make written submissions why the order in the above matter should not be set aside. In this regard the parties are invited to make submissions on the following points (apart from any other points on which they wish to make submissions):

¹⁰ Section 112 of Act 60 of 1995.

- 1 Whether or not there was the necessary proof that Mr G Eybers had authority to depose to his affidavits and to bring the application on behalf of Kanhym (Pty) Ltd;
- 2 Whether or not the facts as alleged in the affidavit were sufficient to prove compliance with Section 10(3)(c) of the Extension of Security of Tenure Act.”

In relation to the first of these points, it is trite that where an application is brought by an artificial person, the agent who brings the application on the company’s behalf must show that he or she is duly authorised to do so. Watermeyer JP, with De Villiers and Ogilvie Thompson JJ concurring, said the following in this regard in *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Beperk* :

“In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purported to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution, but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf.”¹¹

[7] As was found to be the case in the *Shabangu* matter¹² no facts are contained in the founding or replying papers to prove that Mr Eybers had the necessary authority as contemplated in the *Mall* decision¹³ to bring these proceedings on the behalf of the applicant, ie Kanhym (Pty) Ltd. The following comments of my colleague, Moloto J, in the *Shabangu* matter are equally applicable to this matter:

“[4] Mr Eybers does not say in his affidavit how he is associated with the applicant, if at all. Therefore, it is not clear whether he has any authority to depose on behalf of applicant. All he says is that he is ‘the manager, manpower of Kanhym Estate, a division of Foodcorp Operations Limited with place of business at Driehoek Farm, Middelburg district, Mpumalanga’ and that he is ‘properly authorised to make this affidavit ...’

[5] Nowhere are we told how Kanhym Estates or Foodcorp Operations Limited is associated with Kanhym (Pty) Ltd. Less still are we told what the relevance of Kanhym Estates or Foodcorp Operations Limited to these proceedings is. In reply to respondent’s challenge to his authority to prosecute this case on behalf of applicant, Mr Eybers annexed a document to his replying affidavit which he called a resolution by the Board of Directors authorising him to bring this application on behalf of the applicant. The document bears no relation to the applicant. It is headed : ‘Foodcorp (Proprietary) Limited (Registration number 98/03563/07)’. It is not a resolution of Kanhym (Pty) Ltd.

[6] The purported resolution does not authorise Mr Eybers to prosecute this case, neither does it authorise him to depose to affidavits in this case. It reads :

¹¹ 1957 (2) SA 347 (C) at 351H to 352A.

¹² *Kanhym (Pty) Ltd v Shabangu* supra n2.

¹³ Supra n11.

‘That George Von Wuldfluge Eybers in his capacity as Human Resources Manager of Kanhym Estates be and he is hereby empowered to sign all eviction orders and related documents for the removal of people from Thokoza Township on behalf of the company.’

Of importance is that the resolution does not authorise Mr Eybers to do anything connected with the prosecution of this case, because it is not passed by the applicant i e Kanhym (Pty) Ltd.”¹⁴

The same resolution was referred to in both cases and the wording of the founding affidavits in both cases was identical where they refer to the capacity in which Mr Eybers brings the application.

[8] In his submissions, the applicant’s attorney argued that the necessary authority was proved. He claims that Mr Eybers in his founding affidavit states that he “is the Manager Manpower of *Kanhym (Pty) Ltd*, which Company is a division of Foodcorp Operations Limited” and that the relationship between the applicant and Foodcorp Operations Limited is therefore properly explained. However this is simply incorrect. Mr Eybers states in his affidavit that he is “the Manager Manpower of *Kanhym Estate*”. In the absence of any explanation, I cannot simply read “Kanhym (Pty) Ltd” for “Kanhym Estate”. Nor does the fact that the respondent admits that Mr Eybers is the Manager Manpower of Kanhym Estate assist the applicant in proving that Mr Eybers was properly authorised by Kanhym (Pty) Ltd.

[9] The applicant’s attorney goes on to say that:

“Kanhym is a division of Foodcorp Operations Limited (Registration number 55/01198/06). Kanhym is accordingly not a separate business entity from Foodcorp Operations Limited. It is pointed out to the Court that the description of the Applicant as Kanhym (Pty) Ltd is an unfortunate mistake. The correct description of the Applicant should be Foodcorp Limited t/a Kanhym Estate. This correct description is reflected on all the attached correspondence typed on the Kanhym letterhead.”

However, this does not assist the applicant. Firstly, there was never any application to amend the citation of the applicant and in the absence of such an application to amend, the matter must be decided on the basis that the true applicant is Kanhym (Pty) Ltd. Secondly, this extract from the applicant’s attorney’s submissions suggests that the true applicant should have been Foodcorp Operations Ltd (Registration Number 55/01198/06). However, the resolution annexed to the replying affidavit did not authorise Mr Eybers to institute proceedings on behalf of that company either. The resolution was passed by Foodcorp (Proprietary) Ltd (Registration Number 98/03563/07). From its registration number and description, this is clearly a different entity.

[10] The applicant thus failed to show that Mr Eybers was properly authorised. This is so even though I accept the applicant’s attorney’s contention that the standard of proof in showing the necessary authority is not a particularly exacting one. The judgment stands to be set aside on this ground alone.

¹⁴

Kanhym (Pty) Ltd v Shabangu supra n2 at paragraphs 4 to 6.

[11] I now turn to the second of my primary concerns with the magistrate's order.¹⁵ Before an order for eviction can be granted, section 9(2)(c) of the ESTA requires that, in the case of a person in the respondent's position,¹⁶ the conditions for an order of eviction in terms of section 10 have been complied with. The order could not be justified in terms of section 10(1) as the applicant did not show on the papers that there was suitable alternative accommodation available to the respondent as contemplated by section 10(2). Therefore the applicant had to prove that the requirements of section 10(3) were satisfied. Section 10(3) reads:

“(3) If-

- (a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;
- (b) the owner or person in charge provided the dwelling occupied by the occupier; and
- (c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,

a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to-

- (i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and
- (ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted.”

[12] The only facts alleged by applicant to show compliance with section 10(3)(c) were that the house was needed in order to provide accommodation for another employee. On this basis, the applicant's attorney argued that it could be inferred that the applicant would be seriously prejudiced because it would always have to build new houses whenever an employee refused to vacate a house after termination of his employment. The Court was then, in effect, asked to take judicial notice of the costs of building additional accommodation. I have some difficulty in following this reasoning. In any event, I do not agree that a mere averment that the house is needed for another employee justifies the inference that *the efficient carrying on of any operation of the applicant* would be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the applicant. It was necessary that the applicant set out details of the serious prejudice which one or more of its operations would suffer and to identify those operations. The enquiry is specific to that particular occupier (the respondent in this

¹⁵ The transcript of the argument also shows that this was an aspect which troubled the magistrate, at least at that stage of the proceedings.

¹ Section 10 must be complied with where the person whose eviction is sought was already an occupier as contemplated by the ESTA on 4 February 1997. Section 11 must be complied with where the person became an occupier after 4 February 1997.

instance) and the particular house which he or she occupies. A causal connection must be shown between the unavailability of that particular dwelling and the serious prejudice which the owner's operation or operations will suffer. No such proof was offered by the applicant.

[13] The non-compliance with section 10(3)(c) is a further ground for the setting aside of the magistrate's order. In the circumstances it is not necessary for me to have regard to any of the other matters raised in the papers and the written submissions. I accordingly make the following order:

- (1) The whole of the order given by the magistrate on 14 October 1998 is set aside;
- (2) The following order is substituted for the magistrate's order:
"The application is dismissed with costs".

JUDGE A DODSON

Handed down on: 7 January 1999

For the applicant:

Mr J Floor instructed by *Pienaar, Swart & Nkaiseng*, Vanderbijlpark

The respondent was not represented in the review proceedings.