

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In Chambers: **DODSON J**

CASE NUMBER: LCC14R/99

MAGISTRATE'S COURT CASE NUMBER: 2201/99

In the review proceedings in the case between:

DANIE MALAN

Applicant

and

ANTHONY GORDON

First Respondent

IRIS GORDON

Second Respondent

JUDGMENT

DODSON J:

[1] This matter was referred to the Court for 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”. Section 19(3) provides for the automatic review by this Court of eviction orders made in magistrates’ courts in terms of the ESTA. An order in terms of section 15 of the ESTA for the removal of the first respondent was given in the Paarl Magistrate’s Court on 19 March 1999. Section 15 allows an owner or person in charge of land to apply urgently for the

1 Act 62 of 1997.

removal of an occupier² from the land if certain circumstances are satisfied.³ The order is interlocutory in nature and is made pending the outcome of proceedings for a final order of eviction as contemplated in section 9 of the ESTA.⁴

2 The term “occupier” is defined in the ESTA as follows:

'occupier' means 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 Tenants) 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 or herself 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;

3 Section 15 reads:

“Urgent proceedings for eviction

(1) 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.

(2) The owner or person in charge shall beforehand give reasonable notice of any application in terms of this section to the municipality in whose area of jurisdiction the land in question is situated, and to the head of the relevant provincial office of the Department of Land Affairs for his or her information.”

4 *Mahlangu v Presiding Magistrate (Springs)* [1998] 3 All SA 610 (LCC) at 613g; *Karabo and Others v Kok and Others* 1998 (4) SA 1014 (LCC) at 1021E, [1998] 3 All SA 625 (LCC) at 632d-e; *City Council of Springs v The Occupants of the Farm Kwa-Thema, 210* [1998] 4 All SA 155 (LCC) at 159g; *Uitkyk Farms (Edms) Bpk v Visser and Another*, LCC 60/98, 6 November 1998, internet web site address: <http://www.law>.

Factual background

[2] The facts as alleged by the applicant's farm manager, Mr Van Vuuren, who deposed to the founding affidavit, are as follows. The applicant is the owner of the farm Salamonsvlei-Wes, Paarl. He entered into a written contract of employment with the first respondent on 2 July 1998. At the same time he entered into a separate written lease agreement. In terms of the lease agreement, accommodation is provided to the first respondent, the second respondent (who is the first respondent's wife) and their children. Clause 5 of the lease agreement reads:

“Beskikbaarstelling van diens

- 5.1 Hierdie huurooreenkoms is onderhewig daaraan dat die huurder sy arbeid tot beskikking van die huurders (sic) stel, soos vervat in die huurkontrak.
- 5.2 By wettige ontslag van die werknemer/huurder deur die werkgewer/verhuurder ingevolge die Wet op Arbeidsverhoudinge 66/95, met verwysing van die dienskontrak, sal die werknemer/huurder se huur van die huis dus ook beëindig word met die 30 dae skriftelike kennisgewing.”

[3] In terms of the employment contract between the applicant and the first respondent, the first respondent's first six months of service were on a probationary basis. Clause 13.5 of the contract reads:

“Die werkgewer behou die reg voor om die werknemer na die proefdienstertmyn permanent in diens te neem, al dan nie.”

During December 1998, the first respondent was found guilty at a disciplinary enquiry of being drunk on duty and received a “final written warning”. Subsequently, a decision was taken on 21 December 1998 that his appointment should not be made permanent and he was given thirty days notice of the termination of his employment contract. At the same time, he was given written notice to vacate the premises provided to him along with his family by no later than 22 January 1999. The first respondent believed that the termination of his employment was unfair and referred a dispute to the Commission for Conciliation,

its.ac.za./lcc/1998/uitkyksum.html at para [29.2]; *Kgaphola v Mogashoa*, LCC15R/98, 19 January 1999, [1999] JOL 4424 (LCC), internet web site address: <http://www.law.wits.ac.za/lcc/1998/kgaphulosum.html> at para [2.1]; *Conradie v Fortuin*, LCC19R98, 16 February 1999, [1999] JOL 4478 (LCC), internet web site address: <http://www.law.wits.ac.lcc/1999/conradiesum.html> at para [6].

Mediation and Arbitration in terms of the Labour Relations Act.⁵

[4] The respondents did not heed the notice to vacate the premises by 22 January 1999, but continued to reside there. During February and March 1999, according to affidavit evidence of three witnesses contained in supporting affidavits, the first respondent was involved in the theft of grapes from the applicant's farm. The most recent instance of alleged theft, and that in respect of which the most convincing evidence was presented, allegedly took place on Saturday, 6 March 1999. The first respondent was allegedly caught red-handed by a security guard from a security firm employed by the applicant specifically to deal with the dramatic escalation of theft from the farm during 1999. According to the security guard, who provided one of the supplementary affidavits, the first respondent also threatened to kill him.

[5] An urgent application for the removal of the respondents in terms of section 15 of the ESTA was issued out of the Paarl Magistrate's Court on Thursday, 11 March 1999 and served on the respondent on Friday, 12 March 1999. The application was set down for hearing at 9:00 am on Monday, 15 March 1999. No opposing affidavits were filed by the respondents. When the matter came before the court on 15 March 1999, the respondents were present but were not legally represented. The possibility of giving them an opportunity to secure legal aid was considered by the magistrate, but in the end he decided to allow the application to proceed without doing so, on the basis that the matter was urgent and the order would be provisional only. The matter was in any event later postponed to 17 March 1999 to enable the applicant to file supplementary affidavits dealing with paragraphs (c) and (d) of section 15(1) of the ESTA.⁶ In the supplementary affidavits filed on behalf of the applicant, the urgent relief sought against the second respondent and the children was abandoned and an undertaking given that the first respondent would be re-accommodated with them if the application for a final eviction order failed. The hearing resumed on 17 March 1999. The respondents were again present but unrepresented. The magistrate once again raised the question with the applicant's attorney whether they should not be given the opportunity of obtaining

5 Act 66 of 1995. The form on which the dispute was referred to the Commission describes it as a referral in terms of section 135, although the section which provides specifically for referral of a dispute of this nature is section 191(1).

6 *Supra* n 3.

legal aid. Again, the magistrate was dissuaded from this course of action. The matter was then argued by the applicant's attorney. Judgment was reserved and the matter postponed to 19 March 1999.

[6] When the matter resumed on the morning of 19 March 1999, the first respondent was represented for the first time. The first respondent's attorney indicated at the commencement of proceedings that she had only received an instruction that morning and had not yet had the opportunity of reading the papers. The court indicated that it needed yet another supplementary affidavit to deal with an aspect which it considered not to have been covered adequately in the papers. The matter was then postponed until that afternoon. The subsequent sequence of events is then recorded in the court file as follows:

“Later om 14:00

Mejuffrou Deysel teenwoordig

Meneer Blackburn: handig stukke op beëdigde verklarings van Bester, aanvullende van Van Vuuren Bewysstuk D + E en voeg by kennis kragtens Artikel 9(2)(d) is reeds voorberei en word so spoedig moontlik op respondente beteken. Kennis is oorgehou - slaag dringende aansoek nie, kan ek nie kennis gegee het nie in lig van dispuut in verband met 1ste respondent se ontslag. In lig van **Uitkyk saak** goed gedink vir 'n aansoek kragtens Artikel 15. Versoek bevel toegestaan word.

Mejuffrou Dysel:

Ek het inhoud hoflêer deurgegaan en instruksies gekry by eerste respondent. In die stadium wil ek niks byvoeg nie. (1ste respondent daag op)

Beslissing: (om 14:00)

Op die onbetwiste getuienis **is die Hof oortuig dat:**

- (i) Wesentlike gevaar - (werklik en dreigend) bestaan van besering en skade (verlies druiwe) indien respondent (1) nie verwyder word nie
- (ii) dat daar nie 'n effektiewe alternatiewe remedie bestaan nie
- (iii) die waarskynlike ontbering vir die applikant en werknemers groter is as waarskynlike ontbering vir die 1ste respondent.
- (iv) dat applikant voldoende reëlings getref het vir die herstel van 1ste respondent indien 'n finale bevel nie verleen word nie.

Dit word derhalwe gelas:

- (i) dat die 1ste Respondent onmiddellik die applikant se grond verlaat
- (ii) versuim teen 17:00 op 19 Maart 1999 word die Balju gemagtig om hom te verwyder.

Hierdie bevel tot verwydering is 'n voorlopige bevel wat sal geld tot 'n finale bevel kragtens die Wet verleen of geweier word - die applikant word gelas om binne twee hofdae stappe te doen vir 'n finale bevel. Die aansoek teen die tweede respondent is laat vaar. Die eerste respondent betaal die koste van die aansoek.”

[7] The matter was then referred to this Court by the magistrate on automatic review.⁷ On my initial perusal of the record of proceedings I was concerned about two aspects of the matter. The first was whether the first respondent had been given a proper opportunity to defend himself in the light of the failure to postpone the matter specifically for the purpose of allowing him to obtain legal representation. The second was that no affidavit had been filed by the applicant himself and the only allegation in relation to the question of authority made by Mr Van Vuuren, the farm manager, was the following:

“Ek is 'n meerderjarige manlike persoon en woonagtig en werksaam te Salamonsvlei Wes as Bestuurder vanaf 1991 tot en met die hede en bevoeg om hierdie Verklaring te maak in die dat die feite hierin vervat binne my persoonlike kennis val tensy die teendeel uitdruklik hieruit blyk.”
[my emphasis]

[8] I addressed a letter to the parties' attorneys and the magistrate inviting them to make submissions (and, in the case of the magistrate, to provide reasons) as to whether the magistrate's order should be confirmed or set aside. The letter also provided as follows:

“Die partye en die landdros word spesifiek uitgenooi om in hulle verhoë en redes te handel met nakoming, al dan nie, van -

- 1 die vereiste dat waar 'n agent mosieverrigtinge namens 'n prinsipaal loods, daar 'n bewering in die stukke moet wees dat hy of sy die nodige magtiging van die prinsipaal gekry het;
- 2 die reëls van natuurlike geregtigheid en, meer spesifiek, of die eerste respondent genoegsame geleentheid gegun is om sy saak deur 'n regsverteenwoordiger te stel voordat 'n bevel teen hom gemaak is.”

No response was received from the first respondent's attorney. The applicant's attorney provided written submissions in which he supported the magistrate's order and contended further that -

- (i) the Land Claims Court did not have jurisdiction to review the magistrate's order, as section 19(3) of the ESTA provided for the automatic review of “any order for eviction”, whilst section 15 provided for an urgent application for the “removal of any occupier”, and not for an eviction;

⁷ See paragraph [1] above.

- (ii) given the lenient requirements in respect of proof by an agent that he or she has authority to commence legal proceedings,⁸ the allegations in the founding affidavit were sufficient.

[9] The magistrate expressed the view in his reasons that the first respondent had been given a fair opportunity to state his case through his legal representative. He placed particular reliance on the attitude adopted by the first respondent's attorney on the afternoon of 19 March 1999, when she indicated that she had had the opportunity to inspect the court file and to take instructions and had nothing to add. In regard to the question of authority, he said that proof of this could be inferred from the papers.

[10] I formed the view that there was no merit in the applicant's argument that the Court did not have jurisdiction under section 19(3) to review orders of magistrates in terms of section 15 of the ESTA.⁹ I was not satisfied that proof of authority could be inferred from the papers. I therefore made an order, of my own accord, giving the applicant leave to file affidavit evidence dealing with this issue, together with provision for the filing of answering and replying affidavits. An affidavit was duly filed by the applicant himself confirming that Mr van Vuuren had had the necessary authority from him to bring the section 15 application.

[11] On the last day for the filing of answering affidavits, the first respondent's attorney sent a facsimile to the Registrar of the Land Claims Court indicating that she was not in a position to respond as she could not trace the first respondent for the purposes of taking instructions. She said that, despite repeated attempts, she could not find him at the telephone number which he had left as a contact number. The persons who answered the phone indicated that no such person lived there. I was of the view that it was up to the first respondent to ensure that his attorney could contact him and that he must bear the consequences of his failure to do so. I therefore gave the first respondent's attorney two days to apply for the amendment of the order which specified the time limits, but no such application was forthcoming. On

8 *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1967 (2) SA 347 (C); *Pretoria City Council v Meerlust Investments Ltd* 1962 (1) SA 321 (A) at 325D to E.

9 My reasons for the various decisions taken in the course of the review process are, to the extent necessary, set out below.

14 May 1999, I made an order confirming the magistrate's order. On 17 May 1999, I received a letter from the magistrate in which he said, amongst other things, the following:

- “2. In die saak het die applikant se regsverteenwoordiger die vraag geopper of dringende bevele kragtens Artikel 15 wel hersienbaar is. Na my oordeel maak Artikel 19(3) nie vir die hersiening van bevele kragtens Artikel 15 voorsiening nie.
3. Die hersiening van Artikel 15 bevele lewer ook praktiese probleme op. Dis 'n voorlopige bevel waarvan die keerdatum op enige stadium vervroeg kan word. Ons het tans so 'n saak waar die keerdatum vervroeg is voordat die landdros se bevel op hersiening gestuur kon word. Aan die ander kant kan die vervroeging van die keerdatum meebring dat die aansoek nie aangehoor kon word nie omdat die oorspronklike stukke versend is vir hersiening.
4. Die Grondeishof se beslissing sal waardeer word.”

[12] I now provide reasons for my decisions. In as much as the application was not opposed and no submissions were received from the first respondent in response to the Court's invitation, it is not necessary for me to deal with every aspect of the magistrate's decision in my reasons. Suffice it to say that I am of the view that the magistrate correctly found that the applicant had made out a case as contemplated in section 15 of the ESTA.¹⁰ In this judgment I will deal only with the contentious points raised by the Court, the magistrate and the applicant's attorney.

Jurisdiction

[13] As the applicant's attorney pointed out, there is a difference between the terminology used in section 19(3) of the ESTA, which refers to orders for “eviction”, and section 15, which refers to orders for “removal”. In deciding whether or not any significance is to be attached to this difference, one must have regard to the purpose of section 19(3) in the context of the ESTA as a whole. The overall purpose of the ESTA is apparent from its preamble, which reads;

“WHEREAS many South Africans do not have secure tenure of their homes and the land which they use and are therefore vulnerable to unfair eviction;

WHEREAS unfair evictions lead to great hardship, conflict and social instability;

WHEREAS this situation is in part the result of past discriminatory laws and practices;

¹⁰ Section 15 is quoted in n 3 above.

AND WHEREAS it is desirable that the law should promote the achievement of long-term security of tenure for occupiers of land, where possible through the joint efforts of occupiers, land owners, and government bodies; that the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners; that the law should regulate the eviction of vulnerable occupiers from land in a fair manner, while recognising the right of land owners to apply to court for an eviction order in appropriate circumstances; to ensure that occupiers are not further prejudiced; . . .”.

[14] In broad terms the ESTA seeks to promote security of tenure of a certain category of tenants on rural land. Generally speaking, these are persons who earn below R5000,00 per month, who are not labour tenants and who do not intend to use the land they occupy for industrial, mining or commercial purposes.¹¹ A central component of secure tenure is protection against arbitrary or unlawful eviction. This Court exercises a broad supervisory jurisdiction over the magistrates’ courts in respect of cases where those courts are called on to interpret or apply the ESTA.¹² Section 19(3) is one of the provisions conferring this jurisdiction. It reads:

“Any order for eviction by a magistrate’s court in terms of this Act, in respect of proceedings instituted on or before 31 December 1999, 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.”

[15] The purpose of the provision appears to be to provide for blanket scrutiny by this Court of the decisions of magistrates’ courts resulting in evictions for a limited period after the Act’s promulgation. This must be to ensure that errors in the magistrates’ courts, in the initial phase of the implementation of the ESTA, do not go unchecked simply because the person evicted does not, or is not able to, take a matter on review or appeal. If such errors went unchecked, persons could be evicted unlawfully. There seems to me to be as much (and probably more) room for such errors in the context of an urgent removal order under section 15 as there is in the context of proceedings for a final eviction order under section 9. Both

11 See the definition of “occupier” quoted in n 2 above.

12 *Skhosana and Others v Roos T/A Roos se Oord and Others* LCC 50/99, 10 May 1999, internet web site address: [http:// www.law.wits.ac.za/lcc/1999/skhosanasum.html](http://www.law.wits.ac.za/lcc/1999/skhosanasum.html) at para [14].

may lead to a person, possibly with their entire family, being forced to vacate his or her accommodation. In the context of a section 15 order, the occupier may receive little warning of the contemplated proceedings, compared with section 9, which contemplates at least two months' notice to the occupier of the hearing of any eviction proceedings.¹³ There is also greater room for error when a court is required to make a decision on an urgent basis.¹⁴ The decision in section 15 proceedings is also likely to be made in most circumstances on the basis of affidavit evidence which has not been tested in cross examination. If an order is granted under section 15, but it is later found that the land owner was not entitled to a final order for eviction, a grave injustice will have been done. Indeed, before the arrival of section 15, the high courts had expressed their disapproval of interim proceedings for eviction, because of the inherent danger of an injustice being done.¹⁵ Viewed from the perspective of the purpose of section 19(3), the case for an interpretation which includes the review of section 15 orders is thus compelling.

[16] The following aspects of the wording of section 15 also suggest that no special significance was necessarily intended by the use of the word “removal”, as opposed to “eviction”:

- (i) The heading to section 15 refers to “[u]rgent proceedings for eviction”, not removal. The heading of the chapter in which section 15 falls is “Termination of right of residence and eviction”. Headings are a recognised aid to interpretation.¹⁶
- (ii) Section 15 refers to “proceedings for a final order”, without saying expressly what type of final order is envisaged. The words which indicate what type of “final order” is contemplated, must be read in. The structure of the introductory part of section implies that the words which must be read in immediately after “a final order”, are “for the removal of that occupier”. This is because there is an earlier reference in the same sentence to an “urgent application for the removal of any occupier” and a later reference in the same sentence to “an order for the removal of that occupier”.

13 See the proviso to section 9(2)(d). Section 9 is quoted in para [27] below.

14 Prest *The Law and Practice of Interdicts* 1st ed (Juta, Cape Town 1996) at 6, 58 to 60.

15 See, for example, *Jordan and Another v Penmill Investments CC and Another* 1991 (2) SA 430 (E) at 438B.

16 See, for example, Devenish *Interpretation of Statutes* 1st ed (Juta, Cape Town 1992) at 107 to 109.

To have repeated the formulation a third time would have been unnecessary and grammatically inelegant. Once one reads in these words, it appears that, in section 15, the concept of “removal” is used in the context of both a final order and an urgent interim order.

[17] There is also authority for interpreting “removal” to mean “eviction”. In the matter of *Van der Walt v Lang and Others*,¹⁷ this Court was concerned with section 15 of the Land Reform (Labour Tenants) Act¹⁸ which is in almost identical terms to section 15 of the ESTA and which performs an identical purpose in the context of the regulation of the eviction of labour tenants. It reads:

“15 Urgent proceedings for eviction

Notwithstanding the other provisions of this Chapter, an owner or lessee may make urgent application for the removal of any person from the farm pending the outcome of proceedings for a final order, and the Court may grant an order for the removal of that person if it is satisfied that -

- (a) there is a real and imminent danger of substantial damage to the owner or lessee or his or her property if the person concerned is not removed from the farm;
- (b) there is no other effective remedy available to the owner or lessee; and
- (c) the likely harm to the owner or lessee if an order for removal is not granted, exceeds the likely harm to the person against whom the order is sought, if an order for removal is granted.”

[18] In interpreting this section, this Court held as follows:

“‘Removal from the farm’ is not necessarily the same as eviction. However, in the heading of the clause, the word ‘eviction’ is used, and I think that is what was intended.”¹⁹

The two Acts, the Land Reform (Labour Tenants) Act and the ESTA, are related. Both flow from the government’s policy of promoting security of tenure amongst rural tenants. The ESTA followed the Land

17 1999 (1) SA 189 (LCC).

18 Act 3 of 1996.

19 Supra n 17 at 197F to G. The point made by the Court is supported by the following reference in the corresponding footnote:

“In cases of doubt, a heading may be a pointer to legislative intent. See Kellaway, *Principles of Legal Interpretation* (Butterworths, Durban 1995) at 263-265, and the cases referred to therein.”

Reform (Labour Tenants) Act and I am sure that the legislature based section 15 of the former on the corresponding provision in the latter. It is therefore likely that the word “removal” in section 15 of the ESTA was intended to have a similar meaning to the word “removal” in section 15 of the Land Reform (Labour Tenants) Act. Those cases where this Court has already assumed jurisdiction and reviewed section 15 orders in terms of section 19(3) are also authority for this Court’s having jurisdiction in this case, although the jurisdictional point has never previously been taken.²⁰

[19] The proper approach to the interpretation of section 15 is not to try to attach an artificial significance to the term “removal”, but rather to have regard to the words “Notwithstanding any other provisions of this Act, . . .”. It is clear from those words that section 15 overrides other provisions of the Act where these are not compatible with the procedure and the relief contemplated by section 15. It is on the basis of this compatibility or otherwise that it must be decided whether or not section 19(3) is meant to include a review of section 15 orders by magistrates’ courts.

[20] In this regard, the magistrate raised a concern that section 15 orders were not final and that the return day could be anticipated before the order could be sent on review or while the review process was under way.²¹ The applicant’s attorney made the same point and also argued that the fact that the magistrate could vary the order provided a suitable alternative remedy to automatic review. The magistrate also referred to a practical difficulty where, after the original court file has been sent to this Court on automatic review, there is an application which seeks to anticipate the return day of a rule nisi granted under section 15 and

20 See the cases referred to in n 4 supra, save for *Karabo and Others v Kok and Others* which was not a review of a section 15 order.

21 If one is to read into the magistrate’s comments (regarding anticipation of a return day) that orders in terms of section 15 are usually given on the basis of a rule nisi, it must be emphasised that that would only be an acceptable practice if -

- (i) the person whose urgent removal is sought, has been served and has had a proper opportunity in the circumstances of defending the application before the rule nisi is granted; or
- (ii) the rule nisi is not itself accompanied by an order of removal, but only calls on the respondent to show cause why an order of removal should not be granted in terms of section 15 after the return day.

A rule nisi, accompanied by a removal order having effect before the return day, should not be granted on an ex parte basis, save in the most exceptional circumstances.

the magistrate is then left without the original court file.

[21] There are answers to these concerns which illustrate that section 15 is in fact compatible with the section 19(3) review procedure:

- (i) A rule nisi in itself does not give rise to a removal order, so there is no need to send it on review. It merely calls on the respondent to show cause on the return day why an order of removal should not be granted. The matter should therefore only be sent to this Court on review after the return day, and then only if the magistrate decides to confirm the rule. If the respondent chooses to anticipate the return day, there will be no difficulty as the matter will still be before the magistrate and the court file will still be with the magistrate's court.
- (ii) Even if a removal order is granted simultaneously with the rule nisi, pending the return day, the removal order only becomes fully effective on the return day (assuming the rule is confirmed) and the matter should not be sent to this Court on automatic review before then. Rule 35A(1)(b) of the Land Claims Court Rules must be interpreted accordingly.²²
- (iii) To the extent that an order in terms of section 15 is not final, the concept of a review of proceedings of an inferior court before they have reached finality is not unknown to our jurisprudence in the context of ordinary review (as opposed to automatic review), even though the circumstances in which it will be allowed are qualified.²³ In the case of an ordinary review before finality has been reached, the same difficulties as those identified by the magistrate and the applicant's attorney in relation to this case could arise. Yet this has not prevented the high courts from finding that they have jurisdiction. The high courts have intervened on review specifically in the context of an interim eviction order under the common law before final proceedings had been

22 The rule provides that a magistrate making an order for eviction under the ESTA must "forthwith transmit to the Court the record of the proceedings and his or her reasons for the order; . . .".

23 *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A).

concluded.²⁴ There can therefore be no problem in principle with a review before finality has been reached.

(iv) The difficulties envisaged by the magistrate may arise where one of the parties applies to the magistrate's court to vary an order of removal made in terms of section 15 -

* after a rule nisi has been confirmed; or

* which was not granted in the form of a rule nisi (as was the case here)

while the matter is before this Court on automatic review. Such an application to vary would appear to be permissible because of the interim nature of a section 15 order.²⁵ The difficulties raised by the magistrate would however be catered for if the following procedure was followed by magistrates:

a When an order in terms of section 15 is sent on review, the magistrate could retain a certified copy of the court file and its contents.

b If an application to vary is brought in the magistrate's court while the matter is before the Land Claims Court on review, the magistrate could immediately telephone the Registrar of the Land Claims Court to inform her of developments.

c The magistrate could then proceed to deal with the application to vary.

d Once the magistrate has dealt with the application, he or she could then transmit all the

24 *Jordan and Another v Penmill Investments CC and Another* supra n 15. This case predated the Land Reform (Labour Tenants) Act and the ESTA.

25 This would be in accordance with the principle referred to above regarding the interpretation of statutes in harmony with the existing law. This principle is also expressed in the form of the presumption that a statute is not intended to alter the existing law more than is necessary. Devenish *Interpretation of Statutes* supra n 16. At common law, an interlocutory order may be varied by the court which made it.

new documentation and any amended order to this Court, once again retaining certified copies.

[22] Based on all the above considerations, I was satisfied that this Court had the necessary jurisdiction in terms of section 19(3) of the ESTA in this case.

Rules of natural justice

[23] Whilst the initial reluctance of the magistrate to allow the first respondent the opportunity to apply for legal aid to oppose the application is open to criticism, any injustice which there might have been was remedied by the sequence of events on 19 March 1999. The record shows that the first respondent's attorney had a full morning during which she could consider the papers and take instructions from the first respondent. It is clear from the record that, when proceedings resumed at 14.00, the attorney had the opportunity of applying for a postponement in order to oppose the application, but did not do so. She simply stated that she had been through the court file, taken instructions from her client and had nothing further to say. The inference which must be drawn on a balance of probabilities is that the first respondent made a considered decision, on the basis of his attorney's advice, not to oppose the application. His attorney also had the opportunity of raising any perceived injustice in the procedure followed by the magistrate when invited by this Court to make submissions specifically in regard to this point. Again she chose not to do so. In the circumstances, I am satisfied that the first respondent had an adequate opportunity to oppose the case with the assistance of a legal representative, had he chosen to do so.

Proof of authority

[24] The applicant provided satisfactory proof that he had given his farm manager, Mr van Vuuren, the necessary authority to bring the section 15 application. The applicant did so by way of the affidavit filed in the course of the automatic review before this Court.²⁶ It is therefore not necessary for me to deal with the submissions of the applicant and the magistrate to the effect that the papers (as they stood before this Court allowed additional evidence) provided the necessary proof of authority. I do, however, consider it necessary to say why I took the unusual step of allowing further evidence at the automatic review stage of proceedings. In the matter of *De Kock v Juggels*,²⁷ the Court held as follows:

“the Court should not permit the parties to adduce new evidence in review proceedings, save in those circumstances where the interests of justice require it and where there cannot be prejudice to any of the parties in doing so.”²⁸

In this matter, I decided to allow new evidence for the following reasons:

- (i) Generally, the matter was dealt with on an unopposed basis at both the application and review stages of the proceedings.
- (ii) The first respondent had left the farm by the time the matter came before this Court on review. The Court was not faced with the situation where the execution of an eviction order was imminent.²⁹ This allowed time for a process where the first respondent at least had the opportunity to file answering affidavits (although his failure to leave a contact telephone number with his attorney prevented him from making use of this opportunity). There was no prejudice to him.

26 See paragraph [10] above.

27 LCC 7R/99, 11 March 1999, internet web site address: <http://www.law.wits.ac.za/lcc/1999/dekocksum.html>.

28 Ibid at para [17]. The Court said that its authority for admitting new evidence in these circumstances was correctly identified in the case of *City Council of Springs v Occupants of the Farm Kwa-Thema 210* supra n 4 as being that part of section 20(1) of the ESTA which provides that the Land Claims Court “shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act”.

29 This is the situation which is often confronted when an eviction order in terms of section 9 of the ESTA comes before the Court on automatic review.

- (iii) The failure to make the necessary allegation regarding authority was a technical rather than a substantial defect in the applicant's papers. It was in the interests of justice that the applicant be given the opportunity of adducing evidence in the review proceedings rather than having to start proceedings afresh after the order had been set aside. This circumstances were exceptional in that there was uncontradicted evidence that the first respondent was stealing grapes from the applicant on a substantial scale. The setting aside of the order would have allowed him back onto the farm.

Proceedings for a final order

[25] The magistrate included in his order a requirement that the applicant take steps within two days of the date of his order towards the obtaining of a final order. In doing so, the magistrate was applying the decisions of this Court which have held that final relief cannot be granted in terms of section 15 and that there must be evidence that there are already pending proceedings for a final order or that these are imminent.³⁰ In one of the supplementary affidavits, the applicant indicated that he intended complying with this requirement by proceeding immediately (alternatively, simultaneously with service of a warrant of removal) to serve on the respondents notices in terms of section 9(2)(d) of the ESTA. In this case the applicant may face a difficulty. The first respondent had referred a dispute regarding the termination of his employment to the Commission for Conciliation, Mediation and Arbitration.³¹ The relevant paragraph of the founding affidavit provides as follows:

“In opvolging hierop is ’n dispuut deur die Respondent verklaar ’n afskrif waarvan ek hierby aanheg gemerk Aanhangsel K. Tot op datum is geen verdere stappe geneem om hierdie dispuut tot finaliteit te bring nie en is dit onseker of die Respondent aan al die vereistes met betrekking tot die verwysing daarvan na die CCMA voldoen het. In die verband verwys ek die hof daarop dat daar nog geen konsilliasie hierin plaasgevind het nie.”

[26] Sections 8(2) and (3) and section 9 of the ESTA are relevant to this situation. Section 8 deals with the termination of the right of residence of an occupier. The relevant subsections read as follows:

30 Supra n 4.

31 See para [3] above.

- “(2) 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.
- (3) Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act.”
[my emphasis]

Subsection (3) is not all that clearly worded in that the first reference to “the termination” in the portion which I have emphasised could refer either to the termination of employment or the termination of the right of residence. The matter is clarified by reference to the immediate context of subsection (3). Section 8 as a whole deals with the termination of the right of residence. Subsection (2) deals specifically with the situation where the right of residence arises from an employment contract. It provides, amongst other things, for the termination of the right of residence if a person is dismissed. That creates a difficulty in that there may be a dispute over the fairness of the dismissal which could take some time to resolve in terms of the Labour Relations Act and which could result in the dismissal being nullified by an order of reinstatement or re-employment.³² The purpose of subsection (3) is to regulate the situation where there is such a dispute. However, subsection (3) must be there to regulate the matters with which the ESTA is concerned ie residence on rural land, and not with matters with which the Labour Relations Act is concerned, ie the termination of employment. To interpret the first reference to “the termination” in subsection (3) as “the termination of employment” would have the effect of intruding on the area regulated by the latter Act. It would move the effective date of the dismissal and could conceivably give rise to a claim for wages after the dismissal, notwithstanding that the dismissal may be found to have been fair. That would be an absurd result which would conflict with the Labour Relations Act. The words under consideration must therefore be interpreted to mean “the termination of the right of residence”. Subsections (2) and (3) then have the effect of protecting the occupier’s residence while the labour dispute is dealt with (unless, of course, a case is made out in terms of section 15 for urgent removal).³³

32 Section 193(1)(a) and (b) of the Labour Relations Act.

33 See also *Karabo and Others v Kok and Others* supra n 4 at 1022Cto H.

[27] Section 9 of the ESTA reads as follows:

“9 **Limitation on eviction**

- (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; 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, 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.”

[my emphasis]

[28] The combined effect of sections 8(2) and (3) and section 9(2)(d) of the ESTA on this matter is that, if the dispute over the termination of the first respondent's employment has not yet been “determined in accordance the provisions of th[e Labour Relations] Act”,³⁴ the applicant cannot give the notices referred to in section 9(2)(d), or commence proceedings as contemplated in the proviso to section 9(2)(d), because termination of the occupier's right of residence is a prerequisite.

[29] Despite this, I confirmed the magistrate's order in this matter on 14 May 1999 without any

34 Section 8(3) of the ESTA.

qualification because the applicant supported the magistrate's order in its entirety in his submissions. The applicant may have adopted this attitude because there was information available to him and not in the papers which would allow for an argument that the dispute regarding the termination had been determined as contemplated in section 8(3) of the ESTA. If this is not the case, as the papers would seem to suggest, then the applicant would have acted prematurely in serving the notices in terms of section 9(2)(d) within two days of the date of the magistrate's order, even though he was doing so in compliance with that order. The applicant will then have to reissue the notices in terms of section 9(2)(d) once the dispute regarding the termination of employment has in fact finally been determined in terms of section 8(3) of the ESTA.

[30] For the future guidance of magistrates, where there is a pending labour dispute, an order requiring an applicant to commence proceedings for a final order should stipulate that he or she must do so within a fixed period after the termination of the right of residence becomes effective in terms of section 8(3) of the ESTA.

JUDGE A DODSON

Handed down on: 18 June 1999

For the applicant:

Mr Blackburn of Basson Blackburn Inc, Paarl

For the respondent:

Ms Deysel of Vorster & Partners, Paarl