

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 23 June 1999
before **DODSON J**

CASE NUMBER: 73/99

In the case of

GRAND VALLEY ESTATES (EDMS) BPK

Applicant

and

NYONDANI JOSEPH DLAMINI NKOSI

Respondent

JUDGMENT

DODSON J:

Introductory

[1] The applicant is the owner of several farms in Mpumalanga. The respondent is living in a kraal on one of the farms, namely Portion 4 (a portion of Portion 2) of the farm Boekenhoudrand Nr 722, Registration Division JT, Mpumulanga. I will refer to it as “the farm”. He has several of his children and grandchildren living with him. He also has numerous head of livestock and several dogs on the farm. The applicant seeks the eviction of the respondent from the farm in terms of section 15 of the Extension of Security Act.¹ I will refer to it as “the ESTA”. 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;

1 Act 62 of 1997.

- (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.”

[2] The application was brought on an urgent basis. The notice of motion was prepared in accordance with directions given by the Court in terms of rule 34(3)(b) of the Land Claims Court Rules.² Service of the application was effected on the respondent on Thursday, 17 June 1999. The respondent was required to file a notice of appearance and opposing affidavits by Monday, 21 June 1999. He did not do so. As recorded in the notice of motion, the matter was set down for hearing on Wednesday, 23 June 1999 at 10:00. Only the applicant appeared at Court when proceedings commenced at 10:00. The matter proceeded in the absence of the respondent. The Court required clarification in relation to certain items in the founding affidavit and required the deponent, Mr Marx, to give oral evidence in this regard. While he was testifying, the respondent arrived at Court. He sought an adjournment while his attorney was tracked down. His attorney was traced to Swaziland, but arrangements were made for the attorney’s correspondent in Pretoria to appear on behalf of the respondent. On his arrival, the attorney sought a postponement of the matter, which was refused. However, the respondent was given leave to oppose the application and to lead oral evidence in support of his opposition to the application. The applicant had no objection to this arrangement.

2 Rule 34(3) provides:

- “(3) The applicant may, through the Registrar -
- (a) approach the President for the appointment of a presiding judge; and
 - (b) approach the presiding judge for directions on the form of the notice of motion, the service thereof, the time limits for delivery of answering and replying affidavits, the time, date and venue or venues for the hearing and the service or delivery of a notice of set down.”

Evidence was then lead late into the night of Wednesday, 23 June 1999 and argument heard. Judgment was reserved until Friday, 25 June 1999.

Factual background

[3] The facts which emerge from the affidavits filed by the applicant and the oral testimony are as follows. The respondent has lived on the farm since 1952. His late wife and some of his children and grandchildren are buried on the farm. He was formerly employed by the applicant. During 1994, there were labour disputes between the applicant and some of its employees who resided on the farm, including the respondent. Those resulted in the termination of the respondent's employment (on 30 May 1994), and, it seems, some of his fellow employees. In the letter advising him of the termination of his employment, the respondent was given one month to vacate the farm. He did not do so. There followed negotiations between the applicant's representatives and the respondent and other persons who were living on the farm with a view to persuading them to leave the farm but these failed.

[4] The applicant then instructed Mr Marx, the deponent to the founding affidavit and the applicant's attorney of many years' standing, to bring an application for their eviction in the Carolina Magistrate's Court.³ It appears that these proceedings were brought during the first part of 1995. Eviction orders were obtained against the respondent and others, warrants of eviction were issued and some of the residents were evicted. These events resulted in the intervention of the regional office of the African National Congress. A meeting was then held between the respondent and other residents on the farm affected by the evictions, a Mr Potgieter (then the managing director of the applicant, who has since died), representatives of the African National Congress and government representatives. It was agreed between the parties that none of them would be legally represented at the meeting. The meeting resulted in a written agreement in terms of which the applicant donates approximately fifty hectares of land to five donees, one of whom is the respondent. The agreement

3 The applicant was not represented by Mr Marx's firm in these proceedings.

was signed by Mr Potgieter on behalf of the applicant and by the five donees. It is dated 7 June 1995.

The terms of the agreement are as follows:

- “1. The Donor hereby give (sic) and donate to the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents as a donation all the rights, title and interest in and to certain immovable property, namely;
- Certain piece of triangle shaped land on the right hand side of the road to Tjakastad and situated on the Farm Theeboom No. 729.
- Upon the following conditions:-
- 1.1 The Donor shall at first at its own expense procure the necessary surveys and sub-divisions into six equal parts in such a manner as to make each of such equal parts easily identifiable (sic).
- 1.2 All expenses incidental to the preparation and registration of the transfer shall be borne by the Doner (sic).
- 1.3 For purposes of the payment of transfer duty and such other payments as may be necessary the Doner (sic) places the value of donated property to be the sum of R (sic)
2. As from the date of registration of the donated property to each of the Donees, then each donated property shall be for the benefit and sole risk and loss of the particular Donee involved.
3. The 1st, 2nd, 3rd, 4th, 5th and 6th Donees respectively declare grateful (sic) to accept the donation made to each of them individually.”

The applicant contends that the donation was specifically entered into for the purpose of enabling the respondent and the others who lived on the farm to relocate voluntarily without the need for any further eviction proceedings. Relocation by the donees is not, however, expressly provided for in the agreement. Mr Marx says that it was clear from the context of the agreement, with evictions looming or threatened, and from the intervention by the authorities, sparked off by the evictions, that relocation was contemplated. This would make it a tacit term of the agreement. The ineptitude of the agreement he ascribes to the decision not to involve legal representatives in the negotiation meeting and in the drafting of the deed of donation.

[5] The respondent admits that he attended the meeting and that his signature is appended to the agreement. However, he claims that he never agreed to the donation, cannot read, and understood himself to be signing an attendance register for the meeting. Even if the Court finds that the

respondent did enter into the agreement, he disputes that the donation was made in return for relocation onto the donated land.

[6] What exactly transpired between the signature of the agreement on 7 June 1995 and approximately May 1999 is not entirely clear. At some stage, the applicant decided to establish a game reserve on the farm and other farms owned by it. The point in time when this was decided is not clear. According to Mr Marx, this was the intention “from the onset”, including, it would seem, at the time of the donation agreement. This intention was manifested by the commencement of the erection of a game fence requiring the investment of a very substantial amount of money. Mr Marx was, again, not able to say when the erection of the fence commenced but also described this as being “from the onset”. The process of erecting the fence took approximately two years. The respondent places the commencement date of the erection of the fence at a later stage of the proceedings, but also did not pinpoint a particular date. During this time, Mr Potgieter died. However, according to Mr Marx, the applicant’s board of directors decided to continue with the game reserve project.

[7] It is common cause that, notwithstanding the donation agreement and the erection of the game fence, the respondent did not vacate the land. Of the other four donees, Mr Zulu relocated to the donated land. Mr Lukhele left the farm after continuing to reside there for some time,⁴ but did not relocate to the donated land. Mr Masina has remained on the farm but is employed by the applicant as a warden and is living in single quarters elsewhere on the farm. Mr Malaza remained on the farm with the respondent but has very recently relocated to the donated land, having just erected a home there. The donated land has yet to be transferred to the donees. Mr Marx ascribes the passage of time with little progress to ongoing efforts to persuade the donees to move to the donated land voluntarily. He says that the applicant’s preference was and remains to proceed with the project without resorting to evictions. The applicant considers the game reserve project to be in the interests of both the applicants and the donees and wants it to proceed without unnecessary confrontation with them.

4 The exact time when he left the farm is, again, not clear from the evidence.

[8] The respondent's version of events since the signature of the agreement is different. He says that after he refused to accept the donation he, together with a certain Chief Makhosetive, met with Mr Potgieter on two occasions and had various telephonic discussions with him. The outcome of these, he says, was that Mr Potgieter agreed to allocate land to him on the farm around his kraal. He says the land was fenced off, but that the applicant's servants subsequently removed the fence, although the fence posts remain.

[9] More recently, the efforts to finalise matters with the donees and to persuade those still on the farm to relocate, intensified. Once again, quite when the renewed efforts began is unclear. The applicant requested a Mr Vusi Sibeko from the Department of Land Affairs to act as a facilitator. According to Mr Sibeko's affidavit, he was approached during March 1998. He says he has been involved in attempts to persuade the respondent and the other donees to relocate for several months. Mr Marx refers to extended negotiations which have taken place in which he represented the applicant and an attorney, Mr Ntuli, represented the donees, including the respondent. The only meetings which are pinpointed to a date are a series of meetings on 14 and 15 May and 21 and 22 May 1999. Mr Marx avers that these meetings culminated in an agreement reached between Mr Ntuli as agent for the donees and himself as agent for the applicant in terms of which the respondent, Mr Lukhele and Mr Malaza agreed to relocate to the donated land and that all their dogs would be removed from the farm during the week of 23 to 29 May 1999. According to Mr Marx, the reason for the agreement regarding the dogs is that the respondent has some 13 dogs on the farm which are not confined. These, says Mr Marx, have already caused damage to the wild animals on the farm and prevent the introduction of more game onto the farm. The reason for this is firstly the threat of injury or death to the game and secondly a risk of transmission of contagious diseases from the dogs to the game. The agreement reached was recorded separately in letters addressed by the respective attorneys to each other. The letter from Mr Marx to Mr Ntuli was dated 1 June 1999 and reads as follows:

“GRAND VALLEY

Skrywer verwys na voormelde aangeleentheid sowel as ons twee vergaderings gedurende 14 en 15 en 21 en 22 Mei te Badplaas.

Ons bevestig dat daar in beginsel ooreengekom is dat al die okkupeerders van Grand Valley die plaas sal verlaat.

Ons bevestig voorts dat hulle gedurende die week van 23 tot 29 Mei 1999 alle honde, van die eiendom sal verwyder.

U sou skakel met Mnr. Strydom om ’n aanbod te maak om sy eiendom te koop en sou u na skrywer terug kom op 31 Mei 1999.

Soos u weet is hierdie aangeleentheid uiters sensitief en baie dringend en sal ons u baie dringende samewerking hierin waardeer.

Ons bevestig weereens dat ons ingestem het om u redelike en billike verskyningskoste te betaal en verneem ons nou van u.”

The letter from Mr Ntuli to Mr Marx was dated 4 June 1999 and reads as follows:

“Re: GRAND VALLEY ESTATE/RELOCATION OF THREE FAMILIES

We confirm that in the meetings held on 15 May 1999 and 23 May 1999 it was agreed in principle that the three families namely, Nkosi, Lukhele and Malaza would relocate on phases (sic). A meeting of all the Stakeholders was proposed to look into how best the process of relocation can be pursued.

We suggest that such a meeting be held on 07 June 1999 at 14h00 at Badplaas.”

[10] The applicant included in its papers a supporting affidavit from Mr Sibeko in which he stated the following:

“Die respondent het deurentyd die vergaderings bygewoon en te kenne gegee dat hy sal inval met die hervestiging.”

Later in his affidavit he says:

“Die respondent het ook ooreengekom dat hy al sy honde van die eiendom sou verwyder het gedurende die week van die 23ste tot die 28ste Mei 1999.”

[11] Apparently on the basis of the agreement regarding relocation and the removal of the dogs, game of a substantial value⁵ was purchased to be introduced onto the farm. However, after the agreed period for the removal of the dogs had passed, a warden noticed that the dogs were still there and the operation to introduce the game was put on hold. According to the applicant, the game is now being kept in a “boma” in undesirable and stressful conditions and a number of animals have already died. This resulted in the applicant receiving a letter dated 31 May 1995 from the Cloverbank Development Trust (I will refer to it as “the Trust”), which is the financier of the applicant’s game reserve project, in which the Trust threatens to withdraw from the project. It is this threat which, according to Mr Marx, has lead to the particular urgency of the matter. The letter reads as follows:

“RE: UNLAWFUL OCCUPATION OF LAND

I refer to our various meetings and telephonic discussions regarding Dlamini and Malaza.

The total investment in this project will soon amount to more than 20 million rand. Already 6,3 million has been committed and it is important for us to see some return on this investment. For this reason, we have employed 48 people, purchased machinery and equipment and game.

It is not possible to introduce rare and expensive game on the farm because Dlamini has 13 dogs that have not been injected for Rabies. These dogs are untrained and roam free. In addition the security and game is compromised because his children and friends who make holes in the fences, dicpite (sic) the fact that we have a gate.

Due to the fact that an agreement was made between the occupiers and yourself that they will leave this property, and an undertaking made that the dogs would be removed, we purchased in excess of 1 million rands worth of game.

Due to the fact that these undertaking (sic) were breached, our investors are loosing (sic) confidence in this project and have informed us that should this matter not be resolved in the next 20 days, they will be forced to withdraw.

It would be a sad day, when the action of one person could be the course (sic) of 48 people losing their jobs and an entire community the benefit of such a large investment.

When we were informed that Dlamini and Malaza have undertaken to remove all dogs by the 29 May and leave the property game was purchased. The game season is almost over and we are anxious to get the project viable under various strict time constraints. However the actions of Dlamini (Nkosi) has forced us to keep the animals in a boma under very stressful circumstances, already a couple of animals have died.

5 In the affidavit of Mr Sibeko, the value is given as half a million rand, but clearly on the basis of hearsay. The amount is described as being in excess of a million rand in the letter referred to later in this paragraph.

I trust that you see the urgency of the above and urge you to resolve the situation before irreversible damage has been suffered by our investors.”

[12] According to Mr Marx, a meeting was then held on 7 June 1999 with Mr Ntuli. Mr Sibeko was also present. Mr Ntuli excused himself from the meeting to go and find the respondent. Later he returned and informed the other persons attending that he was not able to obtain instructions from the respondent and was no longer acting for him. Mr Sibeko also says in his affidavit that the last occasion on which he spoke to the respondent was 7 June 1999. On that occasion the respondent informed him that he refused to leave the farm and was also not willing to remove his stock and dogs.

[13] Mr Ntuli then returned to the meeting. At that meeting, Mr Ntuli, on behalf of the other four donees, entered into an agreement with the applicant, represented by Mr Marx, finally regulating their relocation. This agreement provides in respect of Mr Malaza that the applicant will contribute R35 000,00 in total towards the costs of erecting a house on the donated land. The applicant undertakes to build a house for Mr Masina on the donated land and allows him to reside on the farm until 1 December 1999.⁶ In the case of Mr Zulu, who has already relocated to the donated land, an ex gratia payment of R15 000,00 is made to assist with his re-establishment. In the case of Mr Lukhele, his rights in terms of the donation are acknowledged. In the agreement, the applicant acknowledges, for the purposes of settlement, in respect of each donee that the donee has rights in the farm. According to Mr Marx, a similar offer to those which formed the basis of the agreement with the other donees (in terms of a contribution towards re-establishment costs) was made to the respondent but was rejected. In the absence of any agreement with the respondent, the applicant then considered it had no option but to bring these proceedings.

[14] The respondent’s version of the events during May and June, 1999 differs. He admits that he was called on to attend certain meetings at which Mr Ntuli was present, but denies that he was represented at those meetings by Mr Ntuli. He denies further that any agreements were reached in so far as he was concerned at those meetings in relation either to his relocation or the removal of his

6 According to Mr Marx his continued residence on the farm will be in the single quarters referred to above.

dogs, of which he says he has only six and they are harmless. He says that he insisted throughout that he was not prepared to move to the donated land. He says that the last meeting which he attended concluded on the basis that there was another farm for sale which would be investigated by himself and Mr Ntuli as possible alternative land for him. Since then he has not heard anything. In this regard, it must be noted that the respondent's testimony may well be corroborated by the fourth paragraph of the letter from Mr Marx to Mr Ntuli where it is recorded that Mr Ntuli will contact a Mr Strydom to make an offer to buy his property.⁷

[15] In general the respondent says that he is opposed to the relocation because of the size of the donated land, in which he will only have an entitlement to ten hectares, which he says is not comparable with his current arrangement. In his current arrangement he has adequate grazing for his 35 cattle, twenty calves and more than fifty goats. He also has ten hectares for ploughing although he conceded in cross-examination that he last ploughed the land in 1995/6. He has not done so since, he says, because of problems with his truck and other difficulties.

[16] In response the applicant says that the respondent only had the right to keep fifteen cattle when he was employed and has had no such rights since. It is denied that he ever had any ploughing rights. The applicant charges that the respondent is reneging on the agreements to relocate because he wishes to conduct a farming operation which is far bigger than anything he has ever been entitled to conduct in the past. The applicant says that the donated land complies with the definition of "suitable alternative land" in the ESTA.⁸ Mr Sibeko concludes his affidavit by saying that the Department of

7 See paragraph [9] above.

8 The definition reads:

“‘suitable alternative accommodation’ means alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to-

- (a) the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services;
- (b) their joint earning abilities; and

Land Affairs is no longer able to act as facilitator between the applicant and the respondent. He expresses the opinion that the applicant has acted more than reasonably towards the respondent and that the arrangements for alternative accommodation which have been made by the applicant are fair.

[17] That much by way of factual background. There are further factual details which are relevant, but I will refer to these in relation to the specific requirements for an order in terms of section 15. These are set out in paragraphs (a) to (d) of section 15(1) of the ESTA.⁹ An analysis of these requirements in relation to the facts of this case follows. What emerges is that it is not necessary for the decision of this matter to resolve the factual disputes which I have identified above. These may well be relevant to the proceedings for a final order to which any order in terms of section 15 will be linked.

Section 15(1)(a): Real and imminent danger of substantial injury or damage

[18] This paragraph requires that the Court must be satisfied that there is a real and imminent danger of substantial injury or damage to any person or property if the respondent is not forthwith removed from the farm. The applicant contends that the presence of the respondent's dogs presents a real threat of damage to the existing game and any game which might be introduced for the reasons given above. It is also contended that the respondent and his family face the risk of injury if they remain on the farm and the game is introduced. Some of the game, such as the buffalo and rhino, is dangerous. In addition, the game fence is to be electrified when the game is introduced and the applicant says that this presents a danger of substantial injury to the respondent's children.

[19] There is no suggestion by the respondent that the applicant is not entitled to introduce the game onto the farm. However, the respondent counters the applicant's assertions by saying that his dogs are docile and have not caused any harm. However, even if I was to accept the applicant's version,

(c) the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active;

9 See paragraph [1] above.

it does not deal with the problem of the potential spread of contagious diseases from the dogs to the game. The respondent's statement that he is not concerned about his safety and that he can ensure that his children do not go near the fence is also not an adequate response. The Court can take judicial notice of the danger that would be presented to the respondent and his family by animals such as buffalo and rhino. I am accordingly satisfied that the applicant has shown compliance with the requirements of section 15(1)(a) of the ESTA. There is therefore no need for me to consider the applicant's further argument that the applicant's property is threatened in that it faces financial ruin if the Trust withdraws from the project because of the respondent's presence on the land.

Section 15(1)(b): No other effective remedy available

[20] This paragraph requires that the Court must be satisfied that there is no other effective remedy available. It was argued on behalf of the respondent that the applicant had an alternative remedy. It could cause a warrant of eviction based on the order of eviction granted against the respondent in the Carolina Magistrate's Court in 1995 to be reissued and executed. There is no substance in this argument. Firstly, as was pointed out by the applicant's attorney, section 9(1) of the ESTA provides that -

“Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.”

It was not disputed by the respondent that he is an occupier as defined in the ESTA.¹⁰ That means that an eviction order or warrant issued against an occupier before the promulgation of the ESTA could no longer form the basis for an eviction of an occupier.

[21] A reference to section 14 of the ESTA supports my view that section 9(1) would have the effect of invalidating any warrants or orders issued or made before the commencement of the ESTA. It is clear from sections 14(2)(b) and 14(4) that the ESTA was intended to impact on existing process. Those provisions refer expressly to process and orders of a court before the Act was promulgated.¹¹ Moreover it is implicit in section 14(2)(b) that process emanating from before the

10 An occupier is defined 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;”

The prescribed amount is R5 000,00 per month. See GN R1632 (GG 19587) of 12 December 1998.

11 Section 14 provides:

“Restoration of residence and use of land and payment of damages

- (1) A person who has been evicted contrary to the provisions of this Act may institute proceedings in a court for an order in terms of subsection (3).
- (2) A person who-
 - (a) would have had a right to reside on land in terms of section 6 if the provisions of this Act had been in force on 4 February 1997; and
 - (b) was evicted for any reason or by any process between 4 February 1997 and the commencement of this Act,
 may institute proceedings in a court for an order in terms of subsection (3).
- (3) In proceedings in terms of subsection (1) or (2) the court may, subject to the conditions that

ESTA would no longer be valid after its commencement. It would be absurd if a person evicted in terms of pre-ESTA process a day after its commencement was left without a remedy, whereas a person who fortuitously was evicted in terms of such process a day before the commencement of ESTA would have a remedy in terms of section 14(1)(b). Specific provision had to be made in section 14(2)(b) only for evictions executed before the commencement date because any execution of such a warrant after that would be contrary to section 9(1) of the ESTA. I am therefore satisfied that a warrant pursuant to the eviction order in the Carolina Magistrate's Court can no longer be issued or executed against the respondent.

it may impose, make an order-

- (a) for the restoration of residence on and use of land by the person concerned, on such terms as it deems just;
 - (b) for the repair, reconstruction or replacement of any building, structure, installation or thing that was peacefully occupied or used by the person immediately prior to his or her eviction, in so far as it was damaged, demolished or destroyed during or after such eviction;
 - (c) for the restoration of any services to which the person had a right in terms of section 6;
 - (d) for the payment of compensation contemplated in section 13;
 - (e) for the payment of damages, including but not limited to damages for suffering or inconvenience caused by the eviction; and
 - (f) for costs.
- (4) Where the person contemplated in subsection (2) was evicted in terms of an order of a court-
- (a) the proceedings contemplated in subsection (1) shall be instituted within one year of the commencement of this Act; and
 - (b) the court shall in addition to any other factor which it deems just and equitable, take into account-
 - (i) whether the order of eviction would have been granted if the proceedings had been instituted after the commencement of this Act; and
 - (ii) whether the person ordered to be evicted was effectively represented in those proceedings, either by himself or herself or by another person.”

[22] Secondly, even if such a warrant could still be executed, it would not be a suitable alternative remedy. It would in fact be a far more severe remedy because such a warrant would allow for the permanent eviction of the respondent. An order in terms of section 15 of the Act, on the other hand, is interim in nature and terminates once proceedings for a final order have been finalised. Such a remedy is the most appropriate one in the circumstances, if a case can be made out for it. I am therefore satisfied that there is compliance with section 15(1)(b).

Section 15(1)(c): Hardship to the respective parties

[23] This paragraph requires that the Court must be satisfied that the likely hardship which the applicant (or any other affected person) will suffer if the application is refused exceeds the likely hardship which the respondent will suffer if the application is granted. The applicant's case in this regard is that it is already suffering substantial damage as a result of the respondent's refusal to relocate. Apart from the damage already caused by his dogs, the applicant is suffering ongoing severe losses as a result of having to keep the game which it has purchased elsewhere at considerable expense. Grazing which is needed during the winter months for the game is available on the farm but cannot be used because of the respondent's presence. The game is not being kept in ideal conditions and some animals have already died. The main thrust of the applicant's case in relation to the hardship is that the financier of the project, the Trust, has threatened to withdraw if the impasse arising from the respondent's presence on the land is not resolved. Mr Marx says that if the Trust withdraws, the applicant will have to be liquidated to repay those who have invested in the project and the project would have to be abandoned. If this were to be the case, the 48 persons who are employed in the project would lose their employment. The donated land has not yet been transferred and, I am asked to infer, that asset too would be realised in the process of winding up the applicant, with the result that all the donees would lose their rights in the land. All that the applicant and the surrounding community stood to gain from the game reserve project would be lost. The threat of a withdrawal by the Trust was emphasised in Mr Marx's oral testimony. He said that he had a meeting with the role players scheduled for the morning of Thursday, 24 June 1999 at which the first item on the agenda was the possible cancellation of the agreement between the Trust and the applicant.

[24] This evidence was not really challenged in any way by the respondent, save to the extent that it was argued that the case made out by the applicant pointed to the threat to the project coming from the respondent's dogs and not from the respondent's continued presence on the land or from his livestock. It is implicit in this argument that an order removing the respondent's dogs only would provide adequate relief. However, such an order would leave the respondent and his family exposed to the dangers of wild animals and the electric fence. The applicant would also risk a damages claim against it if the respondent or any of his family were injured by one of the wild animals.

[25] The hardship to the respondent if he is removed in terms of a section 15 order is that he and his family members living with him would be forced at short notice to leave the kraal where the respondent has lived since 1952. He would be separated from the graves of family members on the farm. There is no home for him to move into on the donated land. It would also not make sense for him to erect homes on the donated land if there is the possibility that he may be reinstated in his present home when a final order is granted. The applicant has, however, undertaken to provide temporary accommodation on the donated land, probably in the form of tents, in the event of the Court granting an order. Being forced to live in tents would certainly constitute a hardship, particularly during the middle of winter.

[26] The respondent also complains that the land available to him for grazing and ploughing would be seriously diminished if he were to be removed to the donated land. He points out that in terms of the donation, each donee is to receive only ten hectares which is far less land than he currently has access to. The applicant's response to this is that despite the provision in the donation for the subdivision of ten hectare plots for each of the donees, this has not yet taken place and the other donees have since expressed a preference for communal ownership which is being investigated. It is common cause that there are currently at most a few livestock on the donated land, which is rich agriculturally. The applicant therefore argues that the respondent would be adequately provided for purposes of grazing. At least until the land is transferred, the respondent will have access to the full extent of the donated land. The respondent contends that the other donees do have cattle elsewhere

which they could bring onto the land. However, he conceded in cross-examination that he could get by on the donated land, although not comfortably.

[27] What also needs to be factored into the comparison envisaged by section 15(1)(c) is that the respondent is not dependant entirely on his farming activities for survival. He has a shop of his own. The donated land is closer to his shop than where his kraal is at the moment. His ability to earn an income from his shop would therefore not be affected. The land is also not far from where he lives now. The applicant has also undertaken that it will allow the respondent to visit the graves of his family members with a warden at any reasonable time and has also undertaken, on request, to either fence off the graves or to relocate them at its expense. Comparing the applicant's and the respondent's position as traders, it becomes apparent that the applicant will, on the uncontested evidence of Mr Marx, be forced to stop trading if the removal order is refused, whereas the respondent will be able to continue to trade.

[28] A factor which needs to be borne in mind in applying section 15(1)(c) is the fact that if the respondent succeeds in the main action for a final order, and he is reinstated, a very severe hardship will have been done to him if he is ultimately found to have been deprived by the interim order of what turns out to be his rightful occupation of the farm. In this matter, it is not at all easy to assess which party has the better prospects of success in the envisaged proceedings for a final order, nor is it necessary for me to do so. However, the following observations must be made:

- (i) It could surely not have been intended that interim relief should be granted where there were no prospects of success in the contemplated proceedings for final relief. In this regard, I am satisfied on the evidence before me that there is at least a serious question to be tried¹² in the main action which is contemplated in this matter.

12 The concept of a serious question to be tried, as applied by this court in applications for interim relief, is dealt with in *Chief Nchabeleng v Chief Phasha* 1998 (3) SA 578 (LCC) at 583D-588F; [1997] 4 All SA 158 (LCC) at 161e to 166c.

- (ii) That said, the outcome of the proceedings for a final order can certainly not be said to be a foregone conclusion in this matter and there is the possibility that the proceedings may ultimately be decided in favour of the respondent. In saying this I take into account that the applicant will, it seems to me, have to show that its original termination of the right of residence in 1994 remains effective for purposes of section 9(2)(a).¹³ There will also be a factual dispute about whether or not the donated land and the offer of assistance with re-establishment constituted suitable alternative accommodation as that term is defined in the ESTA.¹⁴

[29] Taking into account the respective positions of the applicant, other persons affected by the matter (particularly the 48 persons employed in the game reserve project and the other donees) and the respondent and his family, I have come to the conclusion, on the basis of the evidence before me, that the likely hardship faced by the applicant and the other persons affected if the order is refused is substantially greater than that faced by the respondent if the order is granted.

Section 15(1)(d): Adequate arrangements for reinstatement

[30] This paragraph requires that the Court must be satisfied that adequate arrangements have been made for the reinstatement of the respondent if the final order is not granted. In this regard, Mr Marx says that the respondent can be reinstated in his kraal and undertakes on behalf of the applicant that the respondent's structures on the farm will not be destroyed. I raised with Mr van Strijp, who

13 Section 9(2)(a) reads:

“(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;”.

14 Section 9(2)(c) requires that before a court may evict an occupier, “the conditions for an order for eviction in terms of section 10 or 11 have been complied with”. Section 10 applies in this case because the respondent was already an occupier on 4 February 1997. The applicant has indicated that it will rely on section 10(2) of the ESTA which allows the eviction of an occupier if the court is satisfied that suitable alternative accommodation is available to the occupier concerned. For the definition of suitable alternative accommodation, see footnote 8 above.

appeared for the applicant, whether this was not a hollow undertaking in that the farm would by then be inhabited by dangerous wild animals. He conceded that the respondent would have to be placed in the exactly the same position as that which he was in before implementation of any interim order and that that would include, if necessary, the erection of a fence to protect him and his family from any dangerous animals introduced onto the farm. I am accordingly satisfied that there is compliance with section 15(1)(d).

Section 15(2)

[31] This subsection requires that reasonable notice of any application in terms of section 15 be given to the relevant municipality and the relevant provincial office of the Department of Land Affairs.¹⁵ The letters annexed to Mr Marx's affidavit show that such notice was indeed given on 15 June 1999.

Order

[32] I have decided that the applicant is entitled to an order in terms of section 15 of the ESTA. In formulating an order, the following must be considered:

- (i) The most immediate threat posed to the applicant's game reserve project is the respondent's dogs.
- (ii) The applicant's papers do not provide any clarity as to the implications for the project of the presence of the respondent's livestock on the farm. The applicant does seek the removal of the livestock. What can be inferred is that any herding or other work requiring the presence on the farm of any person will subject such a person to the danger of wild animals.

15 Section 15 is quoted in paragraph [1] above.

- (iii) Whatever may ultimately be found in relation to the respondent's alleged culpability in refusing to relocate to the donated land, he has been on the farm since 1952. He has a number of family members staying with him. He has a large number of stock. It will not be easy for him to vacate the land at short notice. I canvassed this aspect with Mr Marx in the course of his testimony and suggested to him, in the event of an order being granted, that it might be appropriate to order the immediate removal of the dogs but allow the respondent a month to vacate the farm. His response was that this would be likely still to lead to the withdrawal of the Trust from the project, but that a period of a week he thought might be acceptable. However, this statement was not supported by any statement by any representative of the Trust, save in so far as the impatience of the Trust is reflected in the letter quoted in paragraph [11].
- (iv) Given that this is an interim order, either party is entitled to apply to the Court for its variation.¹⁶
- (v) In the event of an order being granted, the applicant has undertaken either to provide temporary accommodation or, if the respondent prefers to erect his own structures, to meet the cost of re-instating him on the farm if the proceedings for a final order are finally concluded in the respondent's favour.
- (vi) If the respondent and his family are to be housed in tents, the cold of winter will pose a greater threat than if they remain where they are now. Being in tents may also mean that they will have to leave some of their possessions at the kraal on the farm and visit there regularly, not only for the purposes of visiting the graves.

16 *Malan v Gordon and Another* LCC 14R/99, 18 June 1999, as yet unreported at paragraph [21](iv).

- (vii) In terms of section 20(1) of the ESTA, this Court has “all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act . . .”. In my view this allows the Court in exercising its powers in terms of section 15 of the ESTA, to fashion an order which seeks as far as possible to achieve a fair result.
- (viii) It is my view that there is still a prospect that negotiation and mediation between the parties might result in the overall resolution of the entire matter. Failing that, it may at least facilitate the implementation of the order which I intend making in this matter.
- (ix) This Court has indicated what its approach is to costs in matters under the ESTA in various decisions.¹⁷ In the light of those decisions, I have come to the view that it would not be appropriate to make a costs order in this case.

It must be noted that the order which I intend giving in this matter is peculiar to the facts of this matter and is, where appropriate, based on the undertakings given by the applicant.

[33] I accordingly make the following order, pending the outcome of proceedings for a final order of eviction in terms of the Extension of Security of Tenure Act:

- (i) The applicant must cause this order to be served on the respondent by the deputy sheriff and translated to him in isiZulu or siSwati.
- (ii) The respondent must remove his dogs from the areas enclosed by the game fence or fences on the farms listed in paragraph 5 of the affidavit of Mr Marx annexed to the

¹⁷ See, for example, *Ngcobo and Another v Van Rensburg and Others* [1997] 4 All SA 537 (LCC) at 548b-h; *Mlifi v Klingenberg* [1998] 3 All SA 636 (LCC) at 664c; *Hlatswayo and Others v Hein* [1997] 4 All SA 630 (LCC) at 639e-644c; *Serole and Another v Pienaar*, [1999] 1 All SA 562 (LCC) at 570.

notice of motion in this application (the area so enclosed is referred to in this order as “the farms”) within 24 hours of service of this order.

- (iii) The respondent must prevent his dogs from returning to the farms.
- (iv) In the event of the respondent failing to comply with paragraphs (ii) or (iii) above, the deputy sheriff is authorised to remove the dogs immediately upon such failure.
- (v) The respondent and all those persons residing with him must vacate the farms, together with their livestock, poultry and any other animals -
 - i. within 10 court days of service of this order; or
 - ii. such longer period as may be agreed between the applicant and the respondent in the proceedings referred to in paragraph (xiii) below.
- (vi) In the event of the respondent or any of the persons residing with him failing to comply with paragraph (v), the deputy sheriff is authorised to remove the said persons and animals on the day following the date determined in terms of subparagraph i or ii, as the case may be.
- (vii) The applicant must provide the respondent and those residing with him on the farms with temporary accommodation in the form of tents or other suitable structures and with such additional blankets as may be necessary to ensure that their health is not threatened.
- (viii) The applicant must provide the respondent and those residing with him with the transport needed to comply with paragraph (v) above.
- (ix) The applicant must allow the respondent and those residing with him reasonable access to the kraal and the graves of their family members in the company of a warden

at any reasonable time on at least two hours' notice to the most senior person on the farm or a person designated by him or her.

- (x) The applicant must ensure the safe custody of any possessions of the respondent or those living with him which are left in the kraal after its vacation.
- (xi) The applicant must commence proceedings for a final order against the respondent and those residing with him within ten court days of the date of this order.
- (xii) In the event of the proceedings referred to in paragraph (xi) concluding in the respondent's favour, the applicant is ordered to reinstate the respondent and those residing with him on the farms on the same basis as that which applied on the date of their vacation of the farms or on such terms as the court hearing the proceedings may determine.
- (xiii) The parties are directed in terms of section 35A of the Restitution of Land Rights Act to attempt to settle all the issues in dispute between them through a process of negotiation and mediation. The parties must appear before a mediator to be appointed by the Court for purposes of such negotiation and mediation. The first meeting in that process must be held by no later than Friday, 2 July 1999 at a time and at a venue in the vicinity of the farms which will be determined by the mediator.

JUDGE A DODSON

Heard on: 23 June 1999

Handed down on: 25 June 1999

For the applicant:

Mr Van Strijp of Noltes Attorneys, Ermelo

For the respondent:

Mr Moshoana of Mohlaba & Moshoana Inc, Pretoria