

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In chambers: **DODSON J**

LAND CLAIMS COURT CASE NUMBER: LCC46R/99

MAGISTRATE'S COURT CASE NUMBER: 1234/99

SLALEY FARMS (PTY) LTD

Applicant

and

ISAK ADAMS

First Respondent

WINELANDS DISTRICT COUNCIL

Second Respondent

DEPARTMENT OF LAND AFFAIRS: WESTERN CAPE

Third Respondent

LAND CLAIMS COURT CASE NUMBER: LCC47R/99

MAGISTRATE'S COURT CASE NUMBER: 1232/99

SLALEY FARMS (PTY) LTD

Applicant

and

CORUM JACOBS

First Respondent

WINELANDS DISTRICT COUNCIL

Second Respondent

DEPARTMENT OF LAND AFFAIRS: WESTERN CAPE

Third Respondent

LAND CLAIMS COURT CASE NUMBER: LCC48R/99

MAGISTRATE'S COURT CASE NUMBER: 1233/99

SLALEY FARMS (PTY) LTD

Applicant

and

KERNEELS NOVEMBER

First Respondent

WINELANDS DISTRICT COUNCIL

Second Respondent

DEPARTMENT OF LAND AFFAIRS: WESTERN CAPE

Third Respondent

JUDGMENT

DODSON J:

[1] These matters were referred to the Land Claims Court on automatic review in terms of section 19(3) of the Extension of Security of Tenure Act.¹ I will refer to this Act as "ESTA".

¹ Act 62 of 1997, as amended.

[2] The applicant in each case is the same. It is the owner of land in the Stellenbosch district, which I will refer to as “the land”. A company known as Cape Viticultural Holdings (Pty) Ltd farms the land. I will refer to the company as “CVH”. The first respondent in each of the cases was formerly employed by CVH and was allowed to reside in a labourer’s cottage on the land pursuant to a contract of employment. In the cases of Mr Jacobs (first respondent in case no 47R/99) and Mr November (first respondent in case no 48R/99), they had continued to reside on the land after the termination of their employment agreements because they were married to women who were also employed by CVH and continued to be so employed. The second and third respondents in each case are the local authority in whose area of jurisdiction the land falls (the Winelands District Council) and the Department of Land Affairs respectively. Because they are only joined on account of a statutory notice requirement,² on which this decision does not turn, it is not necessary for me to refer to them again in this judgment. I will therefore refer to all the first respondents in the cases under consideration collectively as “the respondents”.

[3] On 17 March 1999, the applicant launched urgent applications against the respondents for their removal from the land in terms of section 15 of ESTA. Service was effected on 19 March 1999 and the matters were heard on 24 March 1999. Section 15 reads as follows:

“ 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.”

2 In terms of section 15(2) of ESTA.

[4] The applications were based on the propensity of the respondents to commit acts of serious violence against their fellow occupiers³ on the farm. In the cases of Mr Jacobs and Mr November, the founding affidavits are replete with incidents, up until the time of the applications, of serious acts of violence by the respondents, including acts of violence against their wives, amongst others. In the case of Mr Adams, the case is based on a single, but vicious incident of an aggravated assault against a fellow occupier. The applications were not opposed and removal orders in the following terms were granted against the respondents on 24 and 25 March 1999:

- “1 That the First Respondent be immediately removed from Applicant’s property pending the outcome of proceedings for a final order of eviction against First Respondent.
- 2 That First Respondent pay the costs of this Application.”

[5] The respondents either left the farms or were evicted pursuant to the orders. On 5 August 1999, more than four months after the orders were granted, the magistrate, Stellenbosch, referred the matters to this court under cover of a letter which read as follows:

“The above cases are hereby submitted for review i.t.o. Sect. 19(3).

The matters were brought by way of applications which applications were granted, pending the outcome of proceedings for a final orders.(sic)

After numerous enquiries it now seems certain that the applicant is not going to proceed for final orders.”

[6] I addressed a letter to the parties and the magistrate inviting written submissions and affidavit evidence⁴ in relation to various matters which concerned me,⁵ including the delay in referring the matter and the magistrate’s comment that the applicant was not going to proceed with final orders. The response to this letter by the applicant and its attorney confirms that no proceedings

3 The term “occupier” is defined in section 1 of ESTA. Nothing turns on the definition in this case. Suffice it to say that a tenant must generally comply with the requirements contained in the definition for the protection afforded by ESTA to apply to him or her and I am satisfied that the respondents so qualify.

4 On the admissibility of new evidence at the review stage, see *City Council of Springs v Occupants of the Farm Kwa-Thema 210* [1998] 4 All SA 155 (LCC) at 163f-164e; cf *De Kock v Juggels and Another*, LCC7R/99, 11 March 1999, internet web site: <http://www.law.wits.ac.za/lcc/1999/dekocksum.html> at paras [13] to [17] and *Malan v Gordon and Another* [1999] 3 All SA 389 (LCC) at 401d-402b

5 I deal with these in paragraphs [8] to [13] below.

for a final order have been instituted (save for notices which were given to the respondents and others in terms of section 9(2)(d) of ESTA⁶). The applicant says it has not commenced such proceedings because the respondents' whereabouts are unknown. The applicant also has the attitude that the absence of any obligation in ESTA to commence proceedings for a final order within a particular time means that it can do so when it pleases. I will assume in applicant's favour that the interlocutory removal orders have not lapsed on account of the failure to secure a final order of eviction.

[7] In so far as paragraphs (a) to (d) of section 15 are concerned, these prerequisites for the granting of an order in terms of section 15 were satisfied, at least sufficiently for the purposes of default judgment, in the cases of Mr Jacobs and Mr November. In the case of Mr Adams, there was compliance with paragraph (d). As far as the remaining requirements (a) to (c) are concerned, it is open to debate whether a single serious incident of assault is a sufficient basis for compliance with those paragraphs. As I am of the opinion that the orders stand to be set aside for other reasons, it is not necessary for me to decide that issue. I am also satisfied that there was compliance with section 15(2) in respect of all three applications. The difficulties which I have with the orders relate to other matters and I now deal with them.

Delay in the submission of the orders for automatic review in terms of section 19(3)

[8] This Court has emphasised in previous judgments that matters must be submitted for automatic review in terms of section 19(3) without delay.⁷ Although it was not in force at the time, there is also now a new rule 35A of the Land Claims Court Rules which requires the magistrate, amongst other things, to -

6 Below n 11.

7 See *Mthembu v Tango* and *Mthembu v Motha*, LCC25R/99, 12 July 1999, [1999] JOL 5123 (LCC), internet web site: <http://www.law.wits.ac.za/lcc/1999/mthembusum.html> at para [2]; *Otto v Kolobe and Others*, LC44R/99, 11 August 1999, as yet unreported, internet web site: <http://www.law.wits.ac.za/lcc/1999/otto2sum.html> at para [4].

“forthwith transmit to the Court the record of the proceedings and his or her reasons for the order”.⁸

[9] The magistrate explained the delay in the submission of the orders for review on the basis that he had previously believed that “removal” orders in terms of section 15 did not constitute “order[s] for eviction” which section 19(3) requires to be reviewed. This court dealt with that issue in *Malan v Gordon and Another*⁹ and held that orders in terms of section 15 are subject to review and that no significance could be attached for review purposes to the distinction between the words “removal” and “eviction”. I will not repeat the reasoning set out in that judgment. A further indication that no significance is to be attached to the distinction is that the word “evicted” is used in section 15(1)(d) referring to a person removed in terms of a section 15 order. Clearly the terms are used interchangeably.

Proceedings for a final order

[10] This Court has, on numerous occasions, pointed out that relief in terms of section 15 is interlocutory in nature.¹⁰ It does not excuse the applicant from securing the final eviction of the respondent in accordance with the requirements of section 9(2) of ESTA.¹¹ Now it is so that the

8 Rule 35A was inserted by Government Notice No 594 contained in Government Gazette No 20049 (7 May 1999).

9 Above n 4.

10 See, for example, *Karabo and Others v Kok and Others* 1998 (4) SA 1014 (LCC) at 1021E; [1998] 3 All SA 625 (LCC) at 632d-e; *Malan v Gordon and Another* above n 4 at 391d.

11 Section 9 reads:

“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

applicant had, in this case, served notices in terms of section 9(2)(d) of ESTA at the same time that these applications were served. Such notices are a statutorily required first step in proceedings for a final order. However, nothing further has been done. The applicant's excuse that the respondents whereabouts are not known is not forcefully made. No details are given of any efforts which have been made to trace the respondents. In the case of two of the respondents, their wives continue to be employed by CVH. It is most unlikely that they would not know the whereabouts of their husbands. The applicant also suggests that it was up to the respondents to make contact with the applicant or its attorneys and, in the absence of their having done so, the applicant was entitled not to pursue proceedings for final orders. This is a preposterous suggestion. The probabilities are that once the removal orders were obtained in terms of section 15, the applicant felt that it had dealt with its problem and decided not to do anything more.

[11] The facts of this matter illustrate the danger of section 15 of ESTA enabling land owners to circumvent the provisions of section 9(2) if the proceedings are not properly treated as interlocutory proceedings and the magistrate's order fashioned accordingly.¹² The repetition in the orders in this matter of the words from section 15, "pending the outcome of proceedings for a final order of eviction", clearly did not have the desired effect. In *Hoekstra Fruit Farms (Pty) Ltd v Cornelus*¹³ the magistrate gave an order in terms of section 15 in the following terms:

"Dit word beveel dat respondent dringend verwyder word van die grond (Plaas Môreilig) [sic] soos gevra hangende die uitslag by 'n finale uitsettingsbevel aansoek ooreenkomstig ESTA."¹⁴

Gildenhuis J held as follows in regard to this order:

"Die tweede fout, myns insiens, is dat die Landdros dit as 'n vereiste moes gestel het dat die aansoek vir 'n finale uitsettingsbevel voor 'n bepaalde datum aanhangig gemaak moet word, en dat dit behoorlik

information purposes,
not less than two calendar months' written notice"

12 *Uitkyk Farm Estates (Edms) Bpk v Visser and Another* LCC60/98, 06 November 1998, as yet unreported, internet web site: <http://www.law.wits.ac.za/lcc/1998/uitkyksum.html> at para [29].

13 LCC52R/99, 2 September 1999, internet web site: <http://www.law.wits.ac.za/lcc/1999/hoekstrasum.html>.

14 *Hoekstra* above n 13 at para [4].

voortgesit moet word, by gebreke waaraan die respondent geregtig moet wees om aansoek te doen vir tersydestelling van die tussentydse bevel.”¹⁵

Gildenhuis J, acting in terms of section 19(3)(c), went on to substitute the magistrate’s order with the following order:

“Dit word beveel dat die respondent van die plaas Môrewag, geleë in Noorder-Paarl, verwyder word, hangende die uitslag van geregtelike verrigtinge vir ‘n finale uitsettingsbevel kragtens artikel 9(2) van die Wet op Uitbreiding van Sekerheid van Verblyfreg, 62 van 1997. Applikant moet sodanige verrigtinge teen nie later as 1 November 1999 aanhangig maak en dit behoorlik voortsit, by gebreke waaraan die respondent aansoek mag doen vir die opheffing van hierdie bevel. Koste van hierdie aansoek staan oor vir beslissing in die verrigtinge vir die finale uitsettingsbevel.”¹⁶

In my view, the magistrate in this case should have included similar provisions in the orders which he made in terms of section 15 of ESTA.

Costs

[12] This Court has already indicated that costs orders should not be made as a general rule in matters under ESTA.¹⁷ Moreover, Prest in his work *The Law and Practice of Interdicts*¹⁸ says the following regarding costs in regard to interim interdicts (of which section 15 orders are a statutory form):

“There are sound reasons for not granting costs of an interdict pendente lite to a successful applicant in the absence of exceptional circumstances. While it can be said that an applicant who has obtained such an order has achieved substantial success, such success is of a limited and temporary nature and often based upon a balance of convenience. It is implicit in an order granting a temporary interdict that such an order, and the relief consequent thereof, will fall away should the applicant be unsuccessful at the trial. It would, in such case, be unjust to compel the defendant in the trial to bear the costs of an interdict to which the plaintiff may subsequently be shown not to have been entitled. Included in the reasons why costs should be reserved for decision at the trial when an interdict is granted pending action is that some defence or some unconscionable conduct, or some other fact which might affect the decision of the court, might be disclosed at the trial. While it is usual in granting an interdict pending action to order costs to be costs in the cause or costs to stand over, this is not a rigid rule, and a judge could, in the exercise of his discretion, make a different order. Where such an order is given with costs and the judge has

15 *Hoekstra* above n 13 at para [10].

16 *Hoekstra* above n 13 at para [11].

17 See, for example, *Serole and Another v Pienaar* [1999] 1 All SA 562 (LCC) at 570h; *Skhosana and Others v Roos T/A Roos se Oord* [1999] 2 All SA 652 (LCC) at 666c-e.

18 1ed (Juta, Cape Town 1996).

exercised the proper discretion in arriving at such an order, the appeal court will not interfere with the discretion of the judge in the court *a quo*.”¹⁹

[13] This case illustrates the difficulty with a costs order in interlocutory proceedings. The respondents have been saddled with a costs order in relation to a matter which the applicant has not even chosen to pursue. Costs in relation to section 15 orders, if any are to be ordered, should stand over for determination at the hearing of the proceedings relating to the final eviction order, save in exceptional circumstances. The magistrate’s discretion was not properly exercised and the orders were thus also defective in this respect.

Appropriate order

[14] Subject to what I have said about the application relating to Mr Adams, ordinarily, where the only faults with the magistrate’s order were those identified in paragraphs [8], [9] and [11] to [13] above, I would have substituted his order with a more appropriate order as my colleague did in the *Hoekstra Fruit Farms* case.²⁰ The difference here is that there is no immediate prospect that the applicant will pursue the proceedings for a final order. In those circumstances, the proper approach is to set aside the orders and to give the applicant leave to renew the applications on the same papers, duly supplemented. I accordingly make the following order in terms of section 19(3)(b) and (c) of ESTA:

- (i) the orders granted by the magistrate, Stellenbosch, in the above matters on 24 and 25 March 1999 in terms of section 15 of the Extension of Security of Tenure Act are set aside in their entirety;
- (ii) the applicant is given leave to renew the applications on the same papers, supplemented by such further affidavits as the cases may require.

JUDGE A DODSON

19 Above n 18 at 381-82.

20 Above n 13.

Handed down on: 06 October 1999

For the applicant:

Mr D L Cronje from *Hofmeyer Herbststein Gihwala Cluver & Walker Inc*, Stellenbosch

For the first, second and third respondents:

Unrepresented