

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG
In Chambers: **Dodson J**

LAND CLAIMS COURT CASE NUMBER: LCC49R/99
MAGISTRATE'S COURT CASE NUMBER: 459/99

SLALEY FARMS (PTY) LTD

Applicant

and

LENA SWARTS

Respondent

JUDGMENT

DODSON J:

Introduction

[1] This matter was 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”. The matter was referred along with three similar applications which are dealt with in a separate judgment.² I will refer to the separate judgment as the *Adams* judgment. I have dealt with this matter separately as events took a different course.

[2] The applicant is the same company as in the matters dealt with in the *Adams* judgment. 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”. Unlike the respondents in the *Adams* judgment, the respondent in this case was never employed by CVH or the applicant. However, she occupied a labourer’s cottage on the land. The circumstances in which she came to do so are dealt with below.

1 Act 62 of 1997, as amended.

2 *Slaley Farms (Pty) Ltd v Adams and Others and two similar cases*, LCC46R/99 to LCC48R/99, 6 October 1999.

[3] On 4 February 1999, the applicant launched an urgent application against the respondent for her removal from the land in terms of section 15 of ESTA.³ The notice of motion was framed as an application for a rule nisi, but it included a prayer that the rule operate as an interim order for immediate removal. Service was effected on the same day at 15:00. Notice was given to the relevant authorities in terms of section 15(2). The matter was set down for hearing the next morning at 08:00. The respondent did not oppose the application. This was not surprising, given the extraordinarily short period of notice which she received. I will return to this issue below. An order was duly granted in terms of the notice of motion, with the return day of the rule nisi fixed for 19 February 1999. On 19 February 1999 the respondent attended court. The matter was postponed to 3 March 1999 to enable her to finalise an application for legal aid. Her application for legal aid was successful. Opposing and replying affidavits were filed and the matter was argued on 3 March 1999. The matter was decided against the respondent and the rule nisi was confirmed. As was the case in the matters referred to in the *Adams* judgment, the matter was only referred to this Court on automatic review on 5 August 1999. This was done under cover of the letter which is referred to in paragraph [5] of that judgment. The letter reads 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.”

[4] In response to my query regarding the prosecution of proceedings for a final order, the applicant’s attorney filed an affidavit to which was annexed correspondence addressed by himself to the respondent’s attorney. It appears that he telephoned the respondent’s attorney during May 1999 and enquired whether she intended returning to the farm in order to establish whether or not it was necessary to proceed for a final order. The respondent’s attorney said that he would take instructions from his client and revert. To date, the applicant’s attorney has had no response from

3 The section is quoted in paragraph [13].

the respondent's attorney and for this reason the applicant has not pursued the proceedings for a final order.

Factual background

[5] The facts of this application are largely common cause. The respondent's father was formerly employed by CVH but had to retire on account of old age and poor health. The applicant and CVH have agreed to allow him to continue to live on the land in one of the labourers' cottages for the rest of his life. He is now quite seriously disabled and in need of constant care. For this reason, the applicant consented to the respondent's coming to live on the land with her father in order to care for him. She signed a written agreement with the applicant in this regard on 20 October 1998.

[6] On 19 January 1999, there was an altercation between the respondent and Christina Booysen, who lives in the same cottage, over a pair of shoes which the latter wanted the former to move as she was sweeping the house. A fight ensued between the two of them in which the respondent appears to have got the upper hand. This was ascribed to the fact that the respondent was considerably heavier than Ms Booysen, who also suffers from TB and epilepsy. In the course of the fight, Ms Booysen managed to strike a few blows and a bite. The respondent struck Ms Booysen with a plank. Its dimensions are disputed. Also in dispute is who struck the first blow. The respondent says Ms Booysen started the fight by pushing her with the result that her head struck a wall. Ms Booysen denies this, saying that the respondent started the fight.

[7] After the fight, Ms Booysen went to another cottage in the settlement, no doubt to discuss what had taken place. The respondent followed her. The fight resumed. It ended when the respondent threw Ms Booysen onto the ground outside this cottage and her dress was torn. There is no evidence that any serious injury was inflicted on Ms Booysen. She did not see a doctor afterwards.

[8] On her way back from this cottage, there was an exchange between the respondent and a Ms Ellie Wildschut which started when the latter confronted the former about what she had done to

Ms Booyesen. At some point during this or another exchange, there may have been a threat by the respondent to Ms Wildschut that if the respondent was evicted because of a report from them about the incident, “die bloed sal loop” or words to that effect. I should immediately say that the evidence regarding the threat is extremely vague. It emerges from a transcript of an enquiry into the incident conducted by the managing director of the applicant and is the product of extremely leading questions. However, the respondent in her opposing affidavit says:

“Ek kan nie ontken dat ek haar gedreig het nie, en selfs al sou ek haar gedreig het, was dit omdat ek woedend was, en sou ek nie uitvoering gee aan die dreigement nie.”

[9] The enquiry to which I have referred took place on 25 January 1999. The respondent was found “guilty” and told that she had lost her right to the cottage and that CVH would secure her eviction. Despite this and the interim removal order on 5 February 1999, she continued to live in the same cottage with Ms Booyesen until the last week in February when she eventually left. It is common cause that there were no further incidents involving the respondent during this time.

Procedural defects

[10] The proceedings before the magistrate were flawed in several different respects. They suffer the same shortcomings as those identified in respect of the three similar applications in the *Adams* judgment regarding the costs order and the form of the order. However, it is my view that an order should, in any event, not have been granted.

[11] The procedure whereby the original interim removal order was granted represented a most serious injustice against the respondent. There was no foundation for the bringing of an application for her immediate removal on the basis of service which, practically speaking, gave her no time to oppose the application. It was served at 15:00 and required her to try to muster a defence by 08:00 the next morning. This was an invasion of her fundamental right not to have an order made against her, seriously affecting her rights, without an opportunity to answer the

case which the applicant sought to make against her.⁴ By that time she had continued to live with Ms Booysen and the other occupiers in the settlement for some 16 days without incident with the knowledge that eviction proceedings were to be brought against her. Moreover, the subsequent sequence of events shows that she did, indeed, have a defence to the application. In *Serfontein v Molo and Others*⁵ and *Malan v Gordon*⁶ this Court cautioned against the bringing of applications for removal orders with little or no notice to the respondent. This case illustrates well the dangers of such proceedings.

[12] It is clear on the facts that the respondent's father is an occupier as contemplated in section 8(4) of ESTA.⁷ Such an occupier has a particularly strong right in that he or she may remain on the land concerned permanently until his or her death, unless he or she is guilty of what amounts to a fundamental breach of the terms of the tenancy. One of the respondent's father's rights as an occupier is "the right to a family life in accordance with the culture of that family".⁸ I have no doubt that in any culture that includes the right, if one is disabled, to have a family member living with one to provide care. The eviction order seriously impacted on that right. Now it may be that

4 See *S v Malindi And Others* 1990 (1) SA 962 (A) where Corbett CJ held:

"The rule of fairness expressed in the maxim *audi alteram partem* . . . which is so often invoked in the realm of administrative law is virtually axiomatic in the proceedings of a court of law."

5 LCC53R/99, 7 September 1999, as yet unreported, internet web site: <http://www.law.wits.ac.za/1999/serfonteinsum.html> at para [11].

6 [1999] 3 All SA 389 (LCC) at 399h-i

7 Section 8(4) of ESTA provides:

"(4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and-

- (a) has reached the age of 60 years; or
- (b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge,

may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach."

8 Section 6(2)(d) of ESTA.

that right must be balanced against other rights of the owners and fellow occupiers,⁹ but, at the very least, the respondent's father was entitled to be joined in the proceedings so that he could be heard in that regard.¹⁰ The failure to join him was a further fatal flaw in the proceedings.

Substantive defects

[13] The magistrate, commendably, gave a reasoned judgment when confirming the rule nisi. However, analysis of the judgment reveals further flaws in the proceedings. Section 15 of ESTA reads as follows.

“(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.”

9 Contra, however, *Conradie v Hanekom* [1999] 2 All SA 525 (LCC) where the spouse of an occupier could not be evicted because of the occupiers's right to family life, despite the spouse's record of far more extreme and persistent assaults than those perpetrated by the respondent in this matter.

10 See Erasmus, *Superior Court Practice* Service 4 (Juta & Co Ltd, Cape Town 1995) at B1-94:

“The rule is that any person who has a direct and substantial interest in any order the court might make, is a necessary party and should be joined.”

See, for example, *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659-60; *Associated Manganese Mines of SA Ltd v Claassens* 1954 (3) SA 768 (A) at 776G.

[14] It is clear that compliance with every one of paragraphs (a) to (d) of subsection (1) is required and that the magistrate would have to apply his mind to whether or not the evidence made out a case in relation to each requirement. Yet the magistrate in his judgment makes no express reference to any of these paragraphs. By implication, he referred to paragraph (a). I am also satisfied on the evidence that paragraph (d) was complied with. However paragraphs (b) and (c) were crucial to the adjudication of this issue and they are not dealt with at all. This failure alone makes the removal order reviewable. Moreover, had the magistrate applied his mind to them properly, he ought to have concluded that the applicant had not satisfied the onus of proving these criteria on a balance of probabilities. As far as an alternative remedy was concerned [see paragraph (b)], I do not accept the argument which the applicant's attorney presented, to the effect that the applicant could not persuade Ms Booysen to lay a criminal charge. In my view that was another potentially effective remedy which existed. The test relates to the availability of an alternative remedy. The fact that Ms Booysen did not wish to make use of that remedy does not mean it was not available. The same applies to Ms Ellie Wildschut. Moreover, the contract which was entered into between the applicant and the respondent suggested an appropriate alternative remedy. It includes under the section entitled "REËLS", the following:

"Let wel: Onaanvaarbare gedrag sluit in - maar is nie beperk tot - bakleiery, enige leed aan mede-kollegas, opsetlike beskadiging van eiendom, uitermatige geraas en al die bogenoemde gevalle wat vererger word deur alkohol- en dwelmgebruik."

The contract later concludes with the following:

"Indien die verantwoordelike persoon enige van die reëls verbreek, of toelaat dat familie, vriende of enige ander persone die reëls verbreek, sal die volgende gebeur:

1 ste oortreding	:	Skriftelike Waarskuwing	6 maande geldig
2 de oortreding	:	Finale Waarskuwing	9 maande geldig
3 de oortreding	:	Uitsetting van hele familie"	

[15] This assault must be treated, together with the threat, as a single incident of fighting, given that it constituted a single sequence of events. In the circumstances, the correct contractual remedy was a written warning. Indeed, at one stage of the proceedings, the applicant's own representative in the enquiry into the respondent's conduct, Mr D Brits, made the following submission:

“Ek dink mens moet haar trompop ’n waarskuwing gee en . . . na die polisie gaan en ’n aanranding saak maak”

[16] Regarding paragraph (c) of section 15(1), there ought to have been a very careful weighing up of the interests of the respective parties, given the extreme hardship which the respondent was to suffer if an eviction order was granted. The enquiry is also linked to that relating to paragraph (a) of section 15(1). The magistrate ought to have found, on the particular facts of this matter, that the potential hardship to the respondent, if the order was granted, outweighed the potential hardship to the owner and other occupiers if it was refused.

[17] Regarding paragraph (a) of section 15(1), the magistrate did enquire into this but arrived at the wrong conclusions. His focus was largely on establishing whether or not the respondent was guilty of an assault. Yet the respondent made no attempt to deny the assault. Her evidence was completely frank in this regard. What she contested was that there was “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.” To the extent that the magistrate’s judgment can be read as finding that there was compliance with paragraph (a), he erred in the following respects:

- (i) he failed to take into account the fact that there was no evidence on oath by Ms Booysen to contradict the respondent’s version that the incident was started by Ms Booysen. This was important because the question whether the first assault had been provoked or not was a relevant fact in deciding whether or not there was the potential for a repeat of the assault;
- (ii) he failed to take into account the fact that by the time the matter was argued, the respondent had lived in the cottage in the settlement with Ms Booysen for a month without a single incident. The eviction had taken place without any violent reaction from the respondent. This evidence was directly relevant to the enquiry envisaged by paragraph (a) of section 15(1);

- (iii) he failed to take into account the evidence of Ms Booysen and of Ms Wildschut at the enquiry, which suggested that they were not frightened or intimidated by the respondent's threats and did not treat them seriously;
- (iv) he relied on a general observation that, in his experience in the area generally, threats had sometimes led to violence, instead of enquiring whether the applicant had shown on a balance of probabilities in this matter that there was the real and imminent danger required by paragraph (a) of section 15(1);
- (v) he failed to take into account the absence of evidence suggesting that Ms Booysen was seriously injured.

[18] Finally, the magistrate's decision was flawed in so far as he did not enquire into the prospects of the applicant's succeeding in securing a final order of eviction. The applicant argues that, in as much as this requirement is not referred to expressly in section 15, it is not at all relevant to this enquiry. I disagree. That enquiry is required by paragraph (c) of section 15(1). The potential hardship for an occupier of an order under section 15 is substantially enhanced if the prospects of success in the proceedings for a final order are weighted in his or her favour.¹¹ The magistrate did not make any enquiry into the applicant's prospects of success in proceedings for a final order. For this reason alone, the decision is reviewable and it is not necessary for the enquiry into prospects of success to be made here. I confine myself to the observation that such an enquiry would have to have taken into account the fact that the appropriate sanction in terms of the contract between the applicant and the respondent was a warning and not eviction.

[19] In the circumstances, both the magistrate's orders granting and confirming the rule nisi must be set aside. The sequence of events here has been most unfortunate. It has resulted in an eviction wrongfully ordered. Because of the delay in referring the matter to this Court on review, the remedy comes at such a late stage that it may not be of any benefit to the respondent or her father. Nonetheless, it goes without saying that the respondent is entitled, as a consequence of my order in this matter, to return to the farm if she so wishes and to occupy the cottage from

11 See *Grand Valley Estates (Pty) Ltd v Nkosi* [1999] 3 All SA 435 (LCC) at 448f-449a.

which she was evicted. In terms of section 20(1) of ESTA, this Court has “all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act”. I am accordingly satisfied that I have the power to fashion the order in a manner which will facilitate her return.

Costs

[20] In so far as costs are concerned, the general approach of the Land Claims Court in matters under ESTA has been not to make costs orders unless there are special circumstances present.¹² I have given some thought to the possibility of nonetheless making an adverse costs order against the applicant because of the initial bringing of the application on practically no notice. However, given the novelty of these provisions and procedures, I would rather issue a general warning to litigants that in future such practices may well lead to an adverse costs order.

Order

[21] I accordingly order that:

- (i) the magistrate’s orders on 5 February 1999, granting a rule nisi, and on 3 March 1999, confirming the rule nisi, are set aside in their entirety, including the order obliging respondent to pay the applicant’s costs;
- (ii) the magistrate’s orders are substituted with the following order:
 - i. the application is dismissed;
 - ii. no order is made as to costs;
- (iii) upon the respondent’s return, the applicant must restore to the respondent residence of

12 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.

the cottage which she occupied before she was evicted on the same terms and conditions as before the eviction.

JUDGE A DODSON

Handed down on: 08 October 1999

For the applicant:

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

For the respondent:

Mr L Fortuin, Paarl