

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **CAPE TOWN** on 18 May 2001
before **Gildenhuys AJ**

CASE NUMBER: LCC101R/00

Decided on 22 May 2001

In the case between:

NEL KUILDERS	First Appellant
MURIAL BESTER	Second Appellant
CORNELIUS BESTER	Third Appellant
CELIA CORAIZIN	Fourth Appellant
ABRAHAM CORAIZIN	Fifth Appellant
SELMA BRUTUS	Sixth Appellant
PATRICIA BRUTUS	Seventh Appellant
DUANE BRUTUS	Eighth Appellant
TROY BRUTUS	Ninth Appellant
HENDRUK BRUTUS	Tenth Appellant
DOMINIC BRUTUS	Eleventh Appellant
GREEN & ASSOCIATES	Twelfth Appellant
and	
PHARO'S PROPERTIES CC	First Respondent
ROJEGA CC	Second Respondent
PHARO'S FISHERIES (PTY) LTD	Third Respondent

JUDGMENT

GILDENHUYS AJ:

[1] In this matter, twelve people living on the farm Paternoster 1062, colloquially known as Vaalplaas, purported to note an appeal to this Court against “the whole judgement and orders of the learned magistrate Mr Louw Cronje, the Magistrate of Vredenburg Magistrates’ Court, under case number 3381/99 handed down on the 17th November 2000.” The twelve people were respondents in the case before the Magistrate. An application for the eviction of these twelve people (eleven of them are appellants herein) was brought by the erstwhile co-owners of Vaalplaas (the first and second respondents herein) and the present owner (the third respondent herein). The third respondent is in the process of developing a township on Vaalplaas. The houses in which the respondents live, obstruct the township development. The twelfth appellant is Green and Associates, the attorneys for the first eleven appellants. During the proceedings in the Magistrate’s Court, the Magistrate made a cost order *de bonis propriis* against them. The attorneys appeal against that cost order.

[2] The Magistrate granted eviction orders against the second and sixth appellants in terms of the Extension of Security of Tenure Act, No 62 of 1997. The fourth and fifth appellants have resided on Vaalplaas for longer than 10 years and had, at all relevant times, reached the age of sixty years. Because they are entitled to certain protections in terms of section 8(4)(a) of the Act,¹ the Magistrate did not make an eviction order against them, but ordered them to move to a similar renovated house elsewhere on Vaalplaas upon fourteen days’ notice to be given to them by the respondents. The house

1 Section 8(4) reads as follows:

“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.”

which they occupy on Vaalplaas stands in the way of a planned new road. The remaining appellants are family members of appellants who are “occupiers” under the Act.² They derive their rights of residence from those appellants. The effect of the eviction orders, if implemented, would be that they would also have to move away from Vaalplaas.

[3] The orders made by the Magistrate originally came before me on automatic review in terms of section 19(3) of the Act. I took the unusual step of asking for, and hearing argument on the review. On 2 February 2001 I confirmed the eviction orders against the second and sixth appellants, subject to some minor amendments. I determined that the eviction orders may be implemented on 27 February 2001 against the appellants who have not by then moved away. I found that the orders against fourth and fifth appellants are not eviction orders as envisaged in the Act, and that I have no jurisdiction to review the orders.³

[4] On 26 February 2001 the appellants lodged an application with this Court for leave to appeal to the Supreme Court of Appeal. The application was irregular in several respects, and on 22 March 2001, after a formal hearing, I set it aside with costs.

[5] On the same day (22 March 2001) the appellants purported to note an appeal to this Court against the judgment and orders of the Magistrate. The notice of appeal, which also incorporates an application for condonation, was served on respondents’ attorneys and filed with the Clerk of the Civil Court. It was not filed with the Registrar of this Court, although the notice is also addressed to the Registrar of this Court. After setting forth the grounds of appeal, the notice contains the following statement:

2 The Act defines “occupier” as:

“[A] person residing on land which belongs to another person, and who has or [sic] on 4 February 1997 or thereafter had consent or another right in law to do so . . .”

3 I gave a judgment following upon the review proceedings, which is reported at 2001 JOL 7933 (LCC); internet web site <http://www.law.wits.ac.za/lcc/2001/101r00sum.html>.

“**BE PLEASED TO TAKE FURTHER NOTICE** that Appellants herewith intend to apply for condonation for the late filing of this Notice of Appeal. Find annexed hereto the affidavits by S Brutus and M Green in support thereof.”

Attached to the notice are two affidavits in support of the application for condonation.

[6] After service of the notice of appeal, the legal representatives of the parties reached the following agreement, which was confirmed by respondents’ attorney in a letter to the appellants’ attorney dated 4 April 2001. I quote *verbatim* from the letter:

“We confirm that the parties are agreed that this is an urgent matter which should be heard as soon as possible.

To this end, Counsel for the respective parties have agreed to the following proposed timetable in respect of the hearing of both the application for condonation and the appeal:

- 1 That the record be delivered to Respondents and to the Registrar of the Land Claims Court on or before 18 April 2001;
- 2 Appellants Heads of Argument to be delivered by 25 April 2001;
- 3 Respondents Heads of Argument to be delivered by 4 May 2001;
- 4 The hearing of the matter to take place on Friday 18 May 2001.”

I noted the agreed timetable and confirmed with the parties that I would be available for the hearing on 18 May 2001.

[7] Despite the agreement between the legal representatives, no documents relating to an application for condonation or to the appeal were filed with the Registrar of this Court. The matter was, at the request of respondent’s attorneys, called before me on 18 May 2001. Mr Green appeared for the appellants and Mr Breitenbach for the respondents. During argument in Court, I was handed a copy of the Notice of Appeal (dated 22 March 2001) from the Bar by Mr Breitenbach. Mr Breitenbach asked me to dismiss the appeal. I indicated, during argument, that I doubted whether I could do so, the appeal not being properly before me. Mr Breitenbach then applied for an order that the appeal be struck off the roll. He also applied for further relief, aimed mainly at securing the immediate implementation of the Magistrate’s orders. He submitted that the past attempts by the appellants to frustrate the implementation of the Magistrate’s orders by defective notices of appeal constituted an abuse of the judicial process, and more attempts may follow. I am not convinced that another attempt

to embark on an appeal would be an abuse of the judicial process, but if such an attempt is again procedurally defective, the time may well have arrived for further attempts to be curtailed.

[8] An appeal from a magistrate's court to this Court must be noted within a given number of days.⁴ The parties are *ad idem* that the appeal noted on 22 March 2001 was noted out of time. According to rule 71(1) of the Rules of this Court, any party that has appealed against a decision of a magistrates' court over which this Court enjoys appellate jurisdiction, must prosecute such an appeal in this Court, in the same manner as a civil appeal from a magistrate's court to the High Court. Only this Court, not the magistrate's court, can extend the period for the noting of an appeal.⁵ No formal application for extension of the period for the noting of the appeal from the Magistrate's Court, was made to this Court. A substantive application for extension is generally necessary.⁶ The notice of appeal, which contains a reference to an application for condonation, was not filed with the Registrar of this Court. I only got sight of a copy of it when it was handed up to me on 18 May 2001 by Mr Breitenbach during argument.

[9] Mr Green (for the appellants) asked for the matter to be postponed so that he could rectify the procedural deficiencies. He took the blame for the deficiencies upon himself, adducing difficulties he had in obtaining a fidelity fund certificate from the Cape Law Society as the main reason for the defective performance of his duties. The procedural omissions in this case are so prodigious that a postponement would not be appropriate. The correct order for this Court is to strike the appeal from the roll.⁷

[10] Mr Breitenbach submitted that, if the appeal is struck from the roll, the appellants may well launch a fresh appeal against the decision of the Magistrate's Court, and attempt to obtain the necessary

4 Rule 51 of the Magistrates' Court Rules read with rule 71(1) of the Land Claims Court Rules. The Land Claims Court Rules are available on the internet web site <http://www.law.wits.ac.za/lcc>.

5 Section 84 of the Magistrates' Courts Act 32 of 1944 and Rule 60(5) of the Magistrates' Court Rules.

6 Gerling & Beckerling, "Civil Procedure: Magistrates' Courts" in *The Law of South Africa* (Joubert ed), Vol 3 part 2 (first re-issue), par 265.

7 *Dos Santos v Unibank Ltd* 2000 (1) SA 801 (W).

condonation for the late noting. He applied for an order that the appellants be interdicted and restrained from taking any further steps in these proceedings, until they have complied with all outstanding cost orders, and have given security for future costs. It is obvious that the appellants are not people of means, and an order as prayed will restrict their rights because of the ineptitude of their attorney. Although there may come a stage when they will no longer be allowed to raise the dereliction of their attorney to gain condonation for procedural shortcomings, I do not think that stage has yet been reached. But I must warn the appellants that it is fast approaching.

[11] I was told from the Bar that, in practice, the authorities responsible for the execution of a warrant for eviction will not execute the warrant if an appeal has been noted against the eviction order, irrespective of whether it is operative in law. The respondents applied for a declaratory order to address this difficulty. An appeal which has been struck off the roll, is discontinued. Consequently, there is no longer any appeal pending against the orders of the Magistrate, and the operation of his orders is no longer suspended.⁸ I will make such a declaratory order.

[12] An eviction order made by a magistrate under the Act is subject to automatic review by the Land Claims Court.⁹ On review, the magistrate's order may be confirmed, set aside or substituted by a different order. If a party wants to lodge an appeal after the review has taken place, it is unclear whether the appeal lies to the Supreme Court of Appeal or to the Land Claims Court. It is not necessary for me to decide that issue in this judgment, and I refrain from doing so. I will also make no decision on a submission by Mr Breitenbach that, if a party allows review proceedings by the Land Claims Court to proceed, he or she thereby loses the right to appeal to the Land Claims Court.¹⁰

[13] The respondents asked for costs against the appellants, taxed on the scale of attorney and client. I will grant such an order. Although Mr Green is mainly responsible for the appellants' jeopardy, they

8 *Herf v Germani* 1978 (1) SA 440 (T) at 449C-G.

9 Section 19(3) of the Act.

10 The submission is based on section 19(4) of the Act, which provides that if an appeal has been noted against an eviction order, an automatic review of that order falls away.

insisted that he must remain involved with the matter even after they became aware of some of his difficulties. It is also trite law that litigants are responsible for the omissions and mistakes of their attorney.¹¹ In some cases, where it is justified by the circumstances of the case, costs will be awarded against the attorney *de bonis propriis*. The respondents did not ask for such an award, and I do not consider it appropriate in this case. It may become appropriate if, in future proceedings, the attorneys have not mended their offhand approach to their duties.

[14] This Court orders as follows:

- (a) The appeal noted by the appellants in terms of a Notice of Appeal dated 22 March 2001, is struck off the roll;
- (b) It is declared that the orders made in the Magistrate's Court in Vredenburg on 17 November 2000 under case number 3381/99 are no longer suspended by a pending appeal and can, subject to the amendments ordered by the Land Claims Court on 2 February 2001, be implemented forthwith;
- (c) The appellants, jointly and severally, are ordered to pay the costs of the respondents relating to the appeal noted on 22 March 2001, taxed as between attorney and client.

ACTING JUDGE A GILDENHUYS

For the appellants:

Mr M B Green from Green & Associates, Paarl.

For the respondents:

Adv A M Breitenbach instructed by Jan S de Villiers, Cape Town.

¹¹ See *Ntuli and Others v Smit and Another* 1999 (2) SA 540 (LCC); [1999] 2 All SA 1 (LCC).