

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

**RANDBURG**

In chambers: **Meer AJ**

**CASE NUMBER: LCC 60R/01**

**MAGISTRATE'S COURT CASE NUMBER: 870/01**

Decided on: 15 June 2001

In the review proceedings in the case between:

**CONRADIE, A**

Applicant

and

**GEDULD, D**

1<sup>st</sup> Respondent

**GEDULD, K**

2<sup>nd</sup> Respondent

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## JUDGMENT

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**MEER AJ:**

[1] This is an automatic review in terms of section 19(3) of the Extension of Security of Tenure Act<sup>1</sup> (hereinafter referred to as “the Act”) of an order granted by the Magistrate for the district of Robertson, Western Cape, for the urgent removal of the respondents from the applicant’s farm, Rietvallei no 115 (the “farm”).

[2] The applicant, the person in charge of the farm, caused an urgent application for the eviction of the respondents from the farm to be served upon the respondents by the legal representative of the applicant the day before the matter was to be heard. The application was by way of notice of motion to which is attached an affidavit by the applicant. Section 17(4) of the Act provides that the rules of procedure applicable in civil applications in a High Court apply in respect of any proceedings in a magistrate’s court in terms of the Act, until rules of court for the magistrate’s courts are made in terms

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1 Act 62 of 1997 as amended.

of section 17(3).<sup>2</sup> In keeping with section 17(4) of the Act the application was correctly brought in accordance with the High Court rules. There are, however, procedural difficulties with the form used to bring the application, and I am unable to confirm the order for that reason. These difficulties are explained below.

[3] To begin with, the notice of motion was modelled on the incorrect form, that is form 2 in the first schedule of the High Court rules which is used in *ex parte* applications (which the present one clearly is not), as opposed to the more correct form 2(a). High Court rule 6(5) provides that the notice of motion of all applications other than those brought *ex parte* must be in accordance with form 2(a), whilst High court rule 6(4) provides that *ex parte* applications must be brought on the shorter form 2. There is good reason for this, as is evident from the nature of *ex parte* applications:

“The phrase *ex parte* in the subrule contemplates a situation in which an application is brought without notice to anyone, either because no relief of a final nature is sought against any person, or because it is not necessary to give notice to the respondent.”<sup>3</sup>

Now clearly a section 15 application which seeks an urgent order for the removal of an occupier is not *ex parte*. This is because it seeks relief of a drastic nature and the interests of the respondents are of great relevance, thereby necessitating the giving of notice. Form 2 was clearly the wrong form to have been used in this application, as it failed to inform the respondents of their crucial procedural rights. The correct form would have explained to the respondents what they had to do if they wished to oppose the application.<sup>4</sup> Such explanation becomes particularly important where there are unsophisticated respondents in a case such as this. Perhaps the respondents failed to appear in court precisely because their procedural rights were not explained to them. I note that the use of the wrong form does not necessarily result in the notice of motion being a nullity, and in appropriate cases this may be condoned.<sup>5</sup> However the applicant failed to seek condonation therefor.

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2 Such rules have not as yet been made.

3 Erasmus, *Superior Court Practice*, Service 4 (Juta, Cape Town 1995) at B1-41.

4 For a full discussion on form 2 and form 2(a) see *Van der Merwe v Maduna*, LCC 67R/99, 11 November 1999, internet website <http://www.law.wits.ac.za/lcc/1999/vdmerwessum.html> at paras [2]-[4].

5 Erasmus above n 3 at B1 -43.

[4] I note also that the practice in urgent applications which are not brought *ex parte* is to give a respondent very little and indeed (if the circumstances warrant it), no notice. When this happens form 2(a) must nonetheless be used, but with such adaptations as to notice and service as is warranted by the circumstances of the case.<sup>6</sup> The leave of the court must also be sought to dispense with the procedural requirements relating to notice and service, usually by asking the court to condone the non-compliance with the rules. This was not done in the present case. What also occurs in urgent applications when very little notice, or more especially no notice, is given, is that a temporary order is often granted and a return day is set. The respondent is called upon to show cause on the return day why the order should not be made final. This gives a respondent the time and opportunity to prepare an opposition to the application, and be heard on the return day.

[5] There may well be grounds for the granting of an urgent removal order in terms of section 15 in this case but such an order cannot be granted at this stage in the light of the procedural oversights. The order I intend making will rectify these oversights.

### **ORDER**

[6] A The order given by the Magistrate, Robertson in case 870/01 on 31 May 2001 is hereby set aside and substituted with the rule *nisi* set out in B hereunder.

B A rule *nisi* is hereby issued returnable on 22 June 2001 at 09:00 calling upon Dawid and Kowa Geduld to appear at the Robertson Magistrate's Court personally or through their legal representative, to show cause why an order in the following terms should not be granted:

1 ordering the immediate removal of Dawid and Kowa Geduld from the farm Rietvallei no 115 in terms of section 15 of the Extension of Security of Tenure Act 62 of 1997 pending the finalisation of eviction proceedings in terms of section 9 of the Extension of Security of Tenure Act 62 of 1997;

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6 Erasmus above n 3 at B1-43.

- 2 that the Magistrate, Robertson condone the non-compliance with the provisions of rule 6 of the Uniform Rules of Court;
- 3 that the applicant be granted such further or alternative relief as the Magistrate, Robertson may deem appropriate;

C The applicant is ordered-

- 1 to serve a copy of this judgment and order on Dawid and Kowa Geduld no later than 19 June 2001 to which shall be attached the following:
  - (a) a copy of the order handed down in case 870/01 by the Magistrate, Robertson on 31 May 2001;
  - (b) a notice informing Dawid and Kowa Geduld that the Land Claims Court has issued a further order; and
  - (c) a copy of form 9 of Schedule 1 to the Land Claims Court Rules.<sup>7</sup>
- 2 to serve a copy of this judgment and order on the head of the provincial office of the Department of Land Affairs, Cape Town and on the municipality, Wynland; and
- 3 to file with the clerk of the Magistrate's Court, Robertson by no later than 20 June 2001, proof by way of affidavit or otherwise, that the provisions of C1 and C2 of this Order have been complied with.

D The Magistrate-

- 1 may upon the return date, discharge or change the terms of the order as may be appropriate in the light of evidence presented and submissions made;
- 2 is directed to include in any order directions in respect of the persons on whom and the manner in which such order must be served; and

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<sup>7</sup> Published in Government Gazette 17804, 21 February 1997, as amended by GN 345, Government Gazette 18728, 13 March 1998 and GN 20049, Government Gazette 594, 7 May 1999.

3 is directed to forward any order which may be made against the respondents in terms of section 15 of the Extension of Security of Tenure Act 62 of 1997 forthwith to the Land Claims Court for automatic review under section 19(3) of the Extension of Security of Tenure Act 62 of 1997.

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**ACTING JUDGE Y S MEER**

For the applicant:

*Muller Baard Du Toit Inc, Robertson.*

For the respondents:

*No appearance.*