

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 25 April 2001
before **Moloto AJ**

CASE NUMBER: LCC 29R/01
MAGISTRATE'S COURT CASE NUMBER:1045/00

Decided on: 6 July 2001

In the matter between:

MAGODI, P First Applicant

MAHUNGELA, E Second Applicant

MUDZUSI, E M Third Applicant

RASHAVHA, M Fourth Applicant

and

VAN RENSBURG, H J Respondent

JUDGMENT

MOLOTO AJ:

[1] This is an application for leave to appeal to the Supreme Court of Appeal against an order¹ of this Court, confirming on automatic review in terms of section 19(3) of the Extension of Security of Tenure Act² (“the Act”), an order of the Magistrate’s Court, Soutpansberg, evicting the applicants from the farm, Portion 1 of the farm Sandfontein 232 MT, Northern Province (“the farm”).

[2] The application for leave to appeal was out of time by one day and was not served on the respondent’s attorneys until a further 10 days had passed. An application for condonation of the late

1 *Van Rensburg v Magodi and Others*, LCC 29R/01, 1 March 2001, internet web site <http://www.law.wits.ac.za/lcc/2001/29r01sum.html>.

2 Act 62 of 1997, as amended.

application for leave to appeal was lodged. In the light of the conclusion I come to and the order I make the application for leave to appeal and the application for condonation of late noting of the appeal are irrelevant.

[3] The respondent runs a business known as Sandfontein Farming on the farm. He leases the farm from the owner, one Hans Jurgens Lombard.³ The respondent resides on the farm. As the lessee of the farm the respondent is the person in charge⁴ as defined in the Act. The applicants reside on the farm and were previously employed by the respondent. The respondent states that he terminated their rights of residence when he retrenched them in October 1998. The retrenchment was undertaken because the respondent was downsizing his workforce. When the applicants did not vacate the farm the respondent obtained an order of ejectment from the magistrate's court on the grounds that the applicants' right of residence arose solely from their employment. The magistrate's order was confirmed on automatic review by this Court. It is against such confirmation order that the appeal is sought. There were originally four respondents in the application before the magistrate. I did not confirm the magistrate's order with respect to the fourth respondent. I referred the matter back to the magistrate for further attention. In the meantime leave to appeal was sought for the first, second and third applicants. On the day of hearing argument for leave to appeal, the magistrate had already responded with regard to the fourth applicant and his response was ready to be reviewed. The parties agreed to await the outcome of the review before proceeding with the application for leave to appeal. I reviewed the magistrate's response and confirmed the eviction of the fourth applicant. The fourth applicant was then joined with the other three in the application for leave to appeal.

To which court does the appeal lie?

[4] This is the first time that an appeal is noted against an order of this Court reviewing a magistrate's order. The legislation on appeals in this Court is silent on the point, as will appear below. The question that arises is whether the appeal in this matter lies to the Supreme Court of Appeal or the full bench of

3 Hans Jurgens Lombard holds the farm in terms of deed of transfer number T34762/1948.

4 See section 1 of the Act.

this Court. I raised the question with the parties' counsel and the Court is indebted to them for their submissions. In order to determine the appropriate forum I consider hereunder the legislation on appeals in this Court and the practice of our courts.

The relevant legislation:

[5] Section 37 of the Restitution of Land Rights Act⁵ ("Restitution Act") provides the following:

- "(1) No appeal shall lie against a judgment or order of the Court except with leave of the Court or, where such leave has been refused, with leave of the Supreme Court of Appeal.
- (2) An appeal from a judgment or order of the Court shall be heard by the Supreme Court of Appeal."

[6] On the other hand section 19 of the Act provides that:

- "(2) Civil appeals from magistrates' courts in terms of this Act shall lie to the Land Claims Court.
- (3) Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in the Gazette, shall be subject to automatic review by the Land Claims Court, which may -
 - (a) confirm such order in whole or in part;
 - (b) set aside such order in whole or in part;
 - (c) substitute such order in whole or in part; or
 - (d) remit the case to the magistrate's court with directions to deal with any matter in such manner as the Land Claims Court may think fit.
- (4) The provisions of subsection (3) shall not apply to a case in which an appeal has been noted by an occupier."

[7] Quite clearly the legislation stipulates that an appeal against the judgment or order of this Court lies to the Supreme Court of Appeal. This enactment⁶ preceded the Act and no review of a lower court's judgment or order was contemplated when the Restitution Act was passed. Indeed, the only

5 Act 22 of 1994, as amended.

6 The Restitution Act.

review contemplated therein is of decisions of the Commission.⁷ On the other hand the appeal provisions of the Act are silent on the question of an appeal from this Court.

[8] In analysing an appeal from this Court in terms of section 37(2) of the Restitution Act, the following possibilities become apparent:

- (i) Where the Land Claims Court substitutes the order of the magistrate, the latter's order no longer exists. The Land Claims Court will give reasons for its decision. In such a case it seems appropriate that the appeal should lie to the Supreme Court of Appeal in terms of section 37(2) of the Restitution of Land Rights Act. The Supreme Court of Appeal should be in a position to deal with the appeal as it will have the reasons of this Court.
- (ii) Where the Land Claims Court confirms the order of the magistrate's court, the situation is somewhat different. The magistrate's order is intact, only confirmed with or without minor amendments. The Land Claims Court does not usually furnish reasons for the confirmations. Sometimes there are no reasons from the magistrate either. It appears the dissatisfied party may have a choice between directing its appeal against the magistrate's order (in which case the appeal would be to the Land Claims Court in terms of section 19(2) of the Act) and directing the appeal against the confirmation order by the Land Claims Court (in which case the appeal would lie to the Supreme Court of Appeal in terms of section 37(2) of the Restitution Act). In the latter case the Supreme Court of Appeal would have to determine whether the Land Claims Court performed its function properly (which function is of a much narrower ambit than an appeal)⁸ and leave of the Land Claims Court would be necessary.

7 Section 36 of the Restitution Act.

8 *Lategan v Koopman en Andere* 1998 (3) SA 457 (LCC); [1998] 3 All SA 603 (LCC) at para [11] and *Pharo's Properties CC v Kuilders and Others* 2001 (2) SA 1180 (LCC); [2001] 2 All SA 309 (LCC) at para [9].

[9] The above scenario is confusing and unacceptable. It is inappropriate that under similar circumstances an appeal must lie to either of two possible fora, dependent only on whether an order was confirmed or not. It is necessary that there must be consistency and certainty about the forum to which an appeal should lie irrespective of the outcome in the case. I therefore look to the practice of our courts for guidance.

The practice of our Courts:

- (i) The ordinary hierarchy of appeals is from a magistrate's court to a High Court to the Supreme Court of Appeal. It is better to maintain this hierarchy through full successive appeals, rather than to require the Supreme Court of Appeal to reconsider the limited automatic review function which the Land Claims Court performed.
- (ii) If the first appeal is to the Land Claims Court, the Land Claims Court will give reasons for its decision on that appeal. The Supreme Court of Appeal will have the benefit of those reasons, if there is a further appeal. It is undesirable that the Supreme Court of Appeal be put into the position of having to decide an appeal without the reasons from the Land Claims Court, and possibly also without reasons by the Magistrate.
- (iii) There are precedents in criminal matters⁹ where the High Court entertained an appeal against a conviction of a magistrate's court after such conviction had already been reviewed by a High Court judge. See *R v Mokwena*¹⁰ and *S v Scout*.¹¹ The circumstances under which these two decisions were given, are somewhat unusual, in that in both cases the aspect of the case appealed against had not been dealt with by the reviewing judge.

9 To my knowledge there are no such precedents in civil law. However see *Lategan* above n 8 at par [11].

10 1953 (4) SA 133 (T).

11 1969 (1) SA 545 (E).

[10] Be that as it may, the practice in the High Court is that a review is done by one judge only if he/she confirms the magistrate's order, but that where such order is to be set aside, it is done by two judges. I am mindful of the fact that this practice in the High Court has its genesis in the Criminal Procedure Act.¹² It seems this is the only field of law where some legislation exists regulating procedure for reviews. I can conceive of no reason why the procedure cannot be adapted to and adopted in civil matters.

[11] In the Land Claims Court the review, whether confirming or setting aside, is done by one judge. (There are so few judges in the Land Claims Court that even if there may be a desire to follow the High Court practice it would be impractical). Given that appeals are much fewer than reviews in the Land Claims Court, it may be more practical to get two judges to adjudicate an appeal than a review. This way, it appears, the Land Claims Court may evolve a practice similar to that of the High Court within the former's limited human resources. What would be achieved is that before a case goes on appeal to the Supreme Court of Appeal where a magistrate's order had been reviewed, it would be after an appeal to the Land Claims Court, thereby eliminating some, if not all, of the inadequacies of a quick single judge review.¹³ There will be reasons for judgment that the Supreme Court of Appeal can consider.

[12] It is my view that where a party appeals against an order of this Court on automatic review in terms of section 19(3) of the Act, such appeal must lie to the Land Claims Court. The President of the Land Claims Court would decide on the constitution of the appellate Court. I say so because a reviewed decision by a Land Claims Court judge is either a "confirmation", a "setting aside" or a "substitution" of a magistrate's order. Following an alternative approach, it might be argued that none of that is a "judgment" or "order" by the Land Claims Court as contemplated in the Restitution Act, but a *sui generis* function which the Court performs. Only "judgments" and "orders" of the Land Claims Court are subject to appeal to the Supreme Court of Appeal. The "confirmed" or "substituted" order

12 Act 51 of 1977 as amended, sections 302 - 304.

13 See *Lategan's* case n 8 above.

of the magistrate remains a magistrate's order, and an appeal against it must therefore be to the Land Claims Court.

[13] I intend extending the time within which the applicants may note the appeal because the law was unclear on the point and there are prospects that the appeal will succeed.

Order

Accordingly I make the following order:

- (i) The application for leave to appeal to the Supreme Court of Appeal is refused.
- (ii) The period within which to note an appeal to the Land Claims Court is extended by 30 (thirty) days from the date of this order.
- (iii) The applicants may, if they so wish, appeal to this Court within the period stipulated in paragraph (ii) above.

ACTING JUDGE J MOLOTO

For the applicants:

Adv T A N Makhubele instructed by *Nkuzi Land Rights Legal Unit, Pietersburg.*

For the respondents:

Adv T P Krüger instructed by *Coxwell, Steyn, Vise & Naude Attorneys, Louis Trichardt.*