IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – GRAHAMSTOWN)

CASE NO:3753/2013
DATE HEARD:30/01/2014
DATE DELIVERED: 27/02/2014

In the matter between

MANTOMBI BOTYA	**1ST APPLICANT**
NOMBULELO BOTYA	**2ND APPLICANT**
NOMSIMBITHI BOTYA	**3RD APPLICANT**
MLUNGISI LUDU MAKAPELA	**4TH APPLICANT**
NOMHI THANDEKA MAKAPELA	**5TH APPLICANT**
NOTHEMBA QAMBATA	**6TH APPLICANT**
ENOCH GIBA	**7TH APPLICANT**
SIZWE QAMBATA	**8TH APPLICANT**
ZWELINZIMA ELLIOT MAKAPELA	**9TH APPLICANT**
NKOSINATHI BOTYA	**10TH APPLICANT**
NANDIPHA MADYUNGU	**11TH APPLICANT**
MTUTU ZAMANI NOCANDA	**12TH APPLICANT**
KHOLEKILE VIRGINIA MAKAPELA	**13TH APPLICANT**
LULAMA MAGAWU	**14TH APPLICANT**

and

SOCIETY OF THE CATHOLIC APOSTOLATE

OF SOUTH AFRICA **1ST RESPONDENT**

KOBUS KURATHI **2ND RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] On 15 November 2013, Lindoor AJ granted the following order:

> "1. THAT the usual forms and service be abridged and that the application be heard on the basis of urgency.
>
> 2. THAT a *rule nisi* do issue calling upon the Respondents to show cause, if any at 10h00 on Thursday 28th November 2013 why an order should not issue in the following terms:
>
> 2.1 That the Respondents be interdicted and restrained from evicting Applicants from Palloti Spiritual Retreat Farm pending their granting of Applicants an effective opportunity to make representations before a final decision to evict Applicants is made.
>
> 2.2 That the Respondents forthwith do all things necessary to cause the electricity supply to the cottages occupied by Applicants at Palloti Spiritual Retreat Farm, Queenstown to be reconnected and restored.
>
> 2.3 That the Respondents forthwith do all things necessary to allow cattle belonging to Applicants back to Palloti Spiritual Retreat Farm.
>
> 2.4 That it be declared that it is unlawful for the Respondents to interfere with, harass or disrupt the occupation of Applicants' cottages at Palloti Spiritual Retreat Farm.
>
> 2.5 That the Respondents pay the costs of this application on a scale as between attorney and client.
>
> 3. THAT paragraphs 2.1, 2.2 and 2.3 above operate as an interim interdict with immediate effect.

4. THAT the service of this order be effected on Respondents' attorneys, Messrs ZE Sontshi & Associates at 4-6 Robinson Road, Queenstown per facsimile transmission to 086 536 8314 and e-mail to sontshi@webmail.co.za.

5. THAT failing compliance with this order the Applicants are granted leave to approach this court on the same papers, amplified as necessary, for further relief including that:

   5.1 The Respondents be declared to be in contempt of court.

6. THAT the costs of this application be reserved for decision."

[2] The order followed an urgent application and was granted without an answering affidavit having been filed. Answering and replying affidavits were in due course filed and the matter was argued before me on 30 January 2014. After the order was granted it was discovered that there is no such person as Kobus Kurathi and I shall refer to the first respondent as the respondent.

[3] The applicants reside on the farm known as Palloti Spiritual Retreat Farm, in Queenstown (the farm), which is owned by the respondent and presently leased to a private person. It is common cause that the applicants are all former employees of the respondent.

[4] The first applicant deposed to the founding and replying affidavits. According to her most of the applicants are pensioners who have continued to live on the farm after their employment ended. Some of the applicants worked on the farm from as early as 1960 and others were born on the farm.

[5] The applicants received a letter from the respondent dated 22 March 2013 in which they were informed that following their retrenchment they would have to vacate the farm. They were requested to remove their cattle from the farm and were given one month's notice to vacate the farm. They were warned that failure to vacate would have "legal consequences". The applicants sought advice from an official of the African National Congress who convened a meeting between the applicants and representatives of the respondent. The applicants were also referred to the Department of Rural Development and Land Reform (the DRDLR) who convened a meeting between the applicants and Father Edward Tratseart, who undertook to take the matter up with the respondent and revert.

[6] The applicants heard nothing further until they received a letter dated 18 September 2013 from the respondent's attorneys, giving them 60 days to vacate the farm. They received this letter on 11 October 2013. In this letter it was pointed out that the basis for their occupation was that they were previously employed by the respondent, but the position had now changed because they had retired. The letter also mentioned that they had been retrenched. The letter concluded by warning them that if they remained in unlawful occupation the respondent would seek a court order to evict them from the farm.

[7] In the meantime their electricity supply was disconnected, their cattle were driven from the farm, and the portion of the farm on which their cattle grazed had been burned. They again sought the assistance of the DRDLR who arranged

legal representation for them. The applicants' attorneys wrote to the respondent's attorneys drawing their attention to the provisions of the Extension of Security of Tenure Act 62 of 1997 (ESTA) with regard to eviction proceedings, and informed them that unless the cattle were returned action would be taken.

[8] On 5 November 2013 the respondent's attorneys faxed a letter to the applicant's attorneys in which they stated that the respondent would proceed with an application for eviction on the basis of the applicants' alleged misconduct and unlawful activities, and the need for the cottages currently occupied by the applicants. In the letter it was specifically denied that the applicants' cattle had been driven from the farm. It was stated that the cattle had to be moved to make way for the annual burning of the area where they grazed, and that the applicants had been offered alternative grazing land but had declined to accept it. The letter mentioned that the relationship between the parties was deteriorating, that some of the applicants were engaging in criminal activity, and that they had declined to accept an offer of employment by the lessee.

[9] According to the first applicant, the disconnection of the electricity supply, the driving out of the cattle, and the burning of the grazing land, constituted harassment of the applicants by the respondent, and was conduct designed to drive the applicants off the farm, thereby unlawfully evicting them. She was also of the view that the letter of 5 November 2013 was evidence that the respondent

was going ahead with an unlawful eviction, with the result that the applicants would be rendered homeless. Urgent proceedings were accordingly launched.

[10] The first applicant complained that prior to the decision to terminate the applicants' right of residence, they were not given an opportunity to make representations. This is one of the factors mentioned in s 8 of ESTA to which a court should have regard in deciding whether or not the termination of a right of residence is just and equitable. The applicants therefore required such an opportunity before a decision to terminate their right of residence is made. The first applicant also mentioned that some of the applicants have resided on the farm for more than 10 years and have reached the age of 60 years, and referred to the provisions of ESTA dealing with the grounds for the eviction of such persons.

[11] The answering affidavit was deposed to by Barry Reabow, a priest who is in charge of the farm. He recounted some history of the farm and the applicants' occupation. The farm was purchased in 1960 by the respondent and was initially occupied by priests as a retreat. In 1969, the first and seventh applicants were employed to perform domestic work and, over time, some of the applicants were employed to assist in the respondent's farming operations. The respondent built houses for the applicants on the farm. At a later stage the respondent built houses for the applicants in Queenstown, because they resided on the farm

during the week while working, and left the farm at weekends and during holidays. The applicants were also allowed to keep cattle.

[12] During 2012 the respondent decided that its farming operations were not profitable and that, for economic reasons, the farm should be leased. Part of the economic problems was the incidence of theft of livestock and farming implements. At the time all the applicants were employees, and consultation was undertaken with them in accordance with the provisions of the Labour Relations Act 66 of 1995. After this process the applicants voluntarily accepted severance packages. They were offered employment by the lessee but refused such offer. It was agreed with the applicants that once the retrenchment process was finalised, they would have to vacate the farm together with their livestock. The lessee required the houses for his employees.

[13] The retrenchment process was completed in March 2013 in respect of all the applicants, with the exception of the first applicant who had already retired. They were paid their severance packages but refused to vacate the farm, although the seventh and twelfth respondents have since vacated the farm. The respondent disconnected the electricity supply because the applicants were no longer employees and it had no further obligation towards them. Their right of residence arose from the employment agreement. According to Reabow the applicants only reside on the farm during the week and at weekends go to their houses in Queenstown which were built for them by the respondent. Reabow

also alleged that the applicants had committed misconduct in the form of arson, intimidation, and theft.

[14] The respondent was left with no alternative but to take legal steps to evict the applicants and it was always intended that the eviction would be sought in terms of ESTA. The letter dated 18 September 2013 was consequently sent to them. It was always intended too that the rights of those applicants over the age of 60 years would be observed by the respondent. According to Reabow, only the first, third and seventh applicants have reached the age of 60 years, and he disagreed that most of the applicants were pensioners.

[15] With regard to the applicants' cattle, Reabow said that the lessee had decided that before the rainy season started, certain portions of the camps on the farm should be burned in order to allow for the generation of new grass following the rain. The applicants were advised to move their cattle to another camp on the farm and thereafter the portion where their cattle had grazed was burned for this purpose. The applicants' cattle are still on the farm, in another camp.

[16] Before the respondent could take further steps in the eviction process, the present application was launched.

[17] In her replying affidavit the first applicant disputed most of what was stated by Reabow, with the result that disputes of fact emerged concerning the following

issues: the period of occupation of those applicants who first occupied the farm; whether or not houses were built for the applicants in Queenstown; whether or not the proper procedure had been followed in terms of the Labour Relations Act; whether or not the applicants had committed crimes; whether or not the applicants had agreed to vacate the farm; and the reason why the applicants' cattle were moved and the grazing area burned. In regard to the cattle issue, the first applicant stated that no alternative grazing land was provided and that the applicants were never informed that the area where their cattle grazed had to be burned in anticipation of the rainy season. She did not deny that the cattle were still on the farm.

[18] Before dealing with the merits, I need to deal with two points *in limine* raised by the applicants. The first was that Reabow was not authorised to depose to the answering affidavit. Reabow stated in his affidavit that he was authorised to depose to the affidavit. No foundation was laid for the allegation that he was not so authorised and the point cannot succeed.

[19] The second point was that the respondent was first required to purge its contempt before it could be heard. The first applicant alleged in her replying affidavit that the respondent had failed to comply with Lindoor AJ's order in that it had not restored the electricity supply to the applicants. I was given conflicting statements from the bar, Mr. Poswa for the applicants saying that it had not been restored, and Mr. Nobatana for the respondent saying that it had been restored.

Even if it had not been restored, I am of the view that in the circumstances of the case, the respondent was entitled to be heard..

[20] In *Byliefeldt v Redpath* 1982 (1) SA 702 (AD) at 714F-G the court referred with approval to what was said by Denning LJ in *Hadkinson v Hadkinson* (1952) 2 All ER 567 at 575B-C:

> "…….. I am of opinion that the fact that a party to a cause has disobeyed an order of the Court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may make, then the Court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

[21] In the present case, if there was disobedience of the order, in my view it has not impeded the course of justice. After the grant of the rule *nisi*, answering and replying affidavits were filed and the matter was argued in the normal course. The applicants were not prevented from presenting their case fully and the court was not prevented from considering all the evidence presented to it in order to reach a decision. The second point in *limine* therefore cannot succeed.

[22] In my view the only dispute of fact which is relevant to these proceedings is the one concerning the cattle. It must be remembered that the applicants are seeking to interdict an unlawful eviction. The other disputes of fact are relevant to an application for eviction in terms of ESTA, which is not before this court.

[23] The respondent's explanation for the removal of the cattle from the grazing area is in my view not far fetched or untenable. The first applicant did not say where the cattle presently are and did not deny that they are still on the farm. The dispute is one which cannot be decided on the papers and I must accept the version of the respondent on this issue. This means that I cannot conclude that the respondent's conduct in relation to the cattle was unlawful.

[24] The respondent has admitted that the electricity supply was disconnected. In seeking to restore the electricity supply, the applicants, as former employees, did not state the basis on which they are entitled to the electricity supply. S 6 of ESTA deals with the rights and duties of occupiers. S 6 (1) provides:

> "Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly."

S 6 (2)(e) provides that an occupier has the right not to be deprived of access to water but there is no provision in s 6 for a right not to be deprived of access to electricity. In *Prentjies and Others v Visagie* [1999] JOL 5719 (LCC) the applicants brought an application in terms of s 14 of ESTA for the restoration of water and electricity supplies. With regard to the electricity supply, Bam P, in addition to finding the allegation of the discontinuation of the electricity supply to be speculative, said the following at para [12]:

> "I am also not persuaded that its deprivation or denial amounts to an "eviction" and there is no allegation in the papers that it was such a

> service as had been expressly or tacitly agreed upon, and on what terms, with either Dr. Thaning or the respondent."

I am consequently unable to conclude that the respondent acted unlawfully in discontinuing the electricity supply.

[25] The applicants effectively applied for final relief. They had to show a clear right, an injury committed or reasonably apprehended, and the absence of another remedy. In my view they failed to establish an injury committed or a reasonable apprehension of injury. They did not demonstrate unlawful conduct on the part of the respondent in disconnecting the electricity supply or moving the cattle. One is then left with the letters written in March, September and November 2013. In my view the letters, especially the second and third letters, make it clear that the respondent always intended to follow the law in seeking an eviction. The first letter from the respondent stated that the applicants' failure to vacate would have "legal consequences". The letter of 18 September 2013 gave them 60 days to vacate, failing which an order of court would be sought. The letter of 5 November 2013 stated that the respondent would be proceeding with an application for eviction. The latter two letters were from the respondent's attorneys, from which one could reasonably infer that the respondent was resorting to a legal procedure. In my view, the letters do not give rise to a reasonable apprehension that the respondent was about to evict the applicants by unlawful means. On the contrary, they refer to a lawful procedure. On this ground alone, the rule should be discharged.

[26] The rule is discharged with costs.

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J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

For the Applicants: Adv S G Poswa, instructed by Netteltons Attorneys, Grahamstown

For the Respondents: Adv M W Nobantana, instructed by Nolte Smit Attorneys, Grahamstown