IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Case Number: 60/98

In the matter between:

UITKYK FARM ESTATES (EDMS) BPK	Applicant
and	
A H VISSER	First Respondent
E VISSER	Second Respondent

JUDGMENT

MEER, J:

[1] This is a review of an interim order granted on an urgent basis in terms of section 15 of the Extension of Security of Tenure Act No 62 of 1997 (hereinafter referred to as"the Act"), for the removal of the respondents from applicants farm, pending the outcome of proceedings for a final order. The interim order was handed down on 3 July 1998 by the Chief Magistrate of Stellenbosch.

[2] The first respondent was employed as a vineyard worker on applicant's farm, Uitkyk Farm Estate, in the Stellenbosch district, on 15 April 1993. His employment was governed by a written service contract in terms of which he was provided with housing for the duration of his employment. The contract expressly provided that first respondent would be required to vacate such housing within one calendar month of the termination of his employment contract, and that he would at all times abide by the rules pertaining to housing set by the applicant

[3] The second respondent is the wife of the first respondent who lived with him in the house provided by applicant. Her right to do so arose solely from her association with first respondent.

[4] On 30 March 1998 the first respondent was charged with breaching applicant's disciplinary code. His specific contraventions are enumerated at paragraph 7 of the affidavit in support of the urgent application by Neethling, applicant's farm manager as follows:

"7.1 Maak van 'n dreigement van geweld en intimidasie;

7.2 Opsetlike beskadiging van applikant se eiendom en geboue;

7.3 Veroorsaking van onnodige steuring op applikant se eiendom, belediging en vloektaal teenoor medewerkers en aanspreek van die bestuur op uiters beledigende manier deur gebruik te maak van vloektaal;

7.4 Dra van 'n gevaarlike wapen op applikant se eiendom;

7.5 Maak van dreigemente van aanranding van applikant se bestuur en mede werknemers."

[5] A disciplinary enquiry into the above transgressions was held. First respondent was pronounced guilty and it was decided to terminate his services. Two appeals followed the disciplinary enquiry and this decision was upheld.

[6] On 8 May 1998 the first respondent was informed that his services were terminated and he was given notice to vacate his house within a month, in accordance with his service contract, by 8 June 1998. On 8 June 1998 first respondent was given an extension to vacate the premises by 22 June 1998 which he did not do.

[7] First respondent did not challenge his dismissal. He did not refer the dismissal within thirty days to the Commission for Conciliation Mediation and Arbitration on the basis of its unfairness, as is provided for in the Labour Relations Act[1]. Instead he began looking for alternative work and accommodation, whilst still residing on applicant's farm, which he continued to do even after the extended notice period had expired on 22 June 1998.

[8] On the afternoon of 2 July 1998 the respondents were served with a notice of the urgent application in terms of section 15 of the Act for their removal from applicant's farm. The notice informed them that the urgent application was to be heard the following morning, 3 July 1998 in the Stellenbosch Magistrate's Court. According to the first respondent, the person effecting service said it was not necessary for them to attend court the following day. Even though the respondents could not understand the documents, as their capacity to read, is by their own admission limited, they did not appear in court the next day when the

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[1] Act 66 of 1995. Section 191 (1) (b) states that if there is a dispute about the fairness of a dismissal, the dismissed employee must refer the dismissal within 30 days of the date of the dismissal to the Commission for Conciliation Mediation and Arbitration, if no council has jurisdiction.

application was heard. Instead they sought legal advice only on 4 July 1998.

[9] Notice of the urgent application was also served on the Department of Land Affairs Western Cape and the Wynland Distriksraad on 2 July1998.

[10] Accordingly on 3 July 1998 in the absence of the respondents, the Chief Magistrate of Stellenbosch considered the application for their urgent removal in terms of section 15 of the Act. Section 15 states:

> "15. Notwithstanding any other provisions 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 -
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> (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;
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> (b) there is no other effective remedy available;
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> (c) the likely hardship to the owner or 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
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> (d) adequate arrangements have been made for the reinstatement of any person evicted if the final order is not granted."

[11] The aforementioned affidavit of Neethling, in support of the urgent application refers to a pattern of unruly behaviour on the part of first respondent both before and after his dismissal. The relevant portions of the affidavit read as follows:

"22. Eerste respondent het steeds nie die eiendom ontruim nie en dit is nou 'n saak van dringenheid dat hy die eiendom moet verlaat en wel om die volgende redes:

22.1 Die gebeure ten opsigte waarvan die eerste respondent aangekla is en ten opsigte waarvan die dissiplinere verhoor waarna verwys word in paragraaf 10 ingestel is, sluit onder andere in:

22.1.1 dat die eerste respondent op 30 Maart 1998 met 'n dolk tussen die huise van die ander werknemers rondgehardloop het;

22.1.2 dat hy op die ander werknemers geskree het;

22.1.3 dat hy 'n tuinvurk na een van sy medewerkers gegooi het;

22.1.4 dat hy klippe na die ander werknemers se huise gegooi het en ‘n ruit gekraak het;

22.1.5 dat hy die plaasbestuurder van applikant op Uitkyk Wynlandgoed uitgeskel het;

22.1.6 dat hy die plaasbestuurder van applikant op Uitkyk Wynlandgoed met ‘n dolk gedreig het;

22.1.7 dat hy tydens bogemelde gebeure onder die invloed van drank was.

22.2 Dit is nie die eerste keur dat die eerste respondent oortredings van die aard soos hierbo gemeld begaan nie.

22.2.1 Op die 1ste Augustus 1995 is hy skuldig bevind aan wangedrag en die gebruik van skeltaal teenoor medewerkers waarvoor hy ‘n mondelinge waarskuwing van applikant ontvang het;

22.2.2 Op die 16de September 1996 is hy weer skuldig bevind aan die gebruik van skeltaal teenoor polisiebeamptes en ook dat hy ‘n polisiebeampte met ‘n mes gedreig het;

22.2.3 Op die 17de September 1996 is hy ook skuldig bevind aan die gebruik van skeltaal teenoor die polisie waarvoor hy ‘n skriftelike waarskuwing van applikant ontvang het;

22.2.4 Op die 20ste September 1996 is hy weer skuldig bevind aan die gebruik van skeltaal teenoor die polisie en die dreig van ‘n medewerker met ‘n mes waarvoor hy ‘n finale geskrewe waarskuwing van applikant ontvang het.

22.3 Die eerste respondent het na sy ontslag hom skuldig gemaak aan die volgende onaanvaarbare gedrag:

22.3.1 Op 10 Junie 1998 het die eerste respondent rassistiese aanmerkings en skeltaal teenoor myself, gebruik terwyl hy na drank geruik het.

22.3.2 Ek het ook gesien dat die eerste respondent vir Harry Jacobus Paulse, ‘n werknemer van applikant, by twee geleenthede aanrand deur hom voor die bors te gryp.

22.3.3 Dit blyk ook uit die verklaring van Harry Jacobus Paulse hierby aangeheg as Aanhangsel K dat die eerste respondent by drie geleenthede gemelde Harry Jacobus Paulse aangerand

het deur hom voor die bors te gryp en gedreig het om hom met 'n klip te kap."

[12] The statement of Harry Paulse, a fellow worker, dated 18 June 1998 annexed to the application attests to assaults on himself , accompanied by verbal abuse, on 10 June 1998 perpetrated by first respondent whilst under the influence of alcohol.

[13] In satisfying the court that the requirements for the granting of an urgent order for removal specified at sections 15(a)-(d) of the Act were present Neethling went on to submit:

13.1 that in the light of these facts there is a real and imminent danger of substantial injury or damage to persons or property if first respondent is not removed as a matter of urgency from applicant's property, pending the outcome of proceedings for a final order[2]; If first respondent remains on the farm there is a reasonable chance that he will cause further damage to property; the fact that he is not currently working means that applicant cannot monitor his activities and this increases the risk. There is also the great danger that he will continue assaulting innocent people;

13.2 given that all evictions must in future be effected through the Act there is no other effective remedy available[3];

13.3 the likely hardship to applicant and especially the other workers if an order for removal is not granted, exceeds the likely hardship to the first respondent.[4]

13.4 Adequate arrangements had been made for the reinstatement of first respondent to the house he occupied if the interim order was not made final.[5]

[14] On 3 July 1998 the chief Magistrate of Stellenbosch granted an order for the removal of the respondents in their absence as follows:

"(1) Die hof gelas dat die twee respondente onmiddelik verwyder word van die applikant se grond;

(2) 'n Tussentydse bevel word verleen vir die uitsetting van die twee respondente;

(3) Die keerdatum van die tussentydse bevel word bepaal te wees 17/7/98 om 9h00;

(4) Respondente moet redes aanvoer voor 16/7/87 - 9h00 waarom bevel nie finaal gemaak moet word nie;

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2 In accordance with section 15 (a).

3 In accordance with section 15(b).

4 In compliance with section 15(c).

5 In accordance with section 15(d).

(5) Hierdie keerdatum kan met 12 uur kennisgewing vervroeg word."

[15] On 6 July 1998 the respondents applied to the Land Claims Court for the urgent review of the order for their removal in terms of section 15 of the Act. Their application for urgent review cites the respondents as first and second applicant, the Chief Magistrate, Stellenbosch, Magistrate's Court as first respondent and the applicant as the second respondent.

[16] First respondent's affidavit in support of the urgent review application, cited the following grounds for review at paragraphs 13-15 thereof:

"13 (a) die aansoek is effektief gedoen op 'n ex parte basis, waarvoor die Wet egter nie voorsiening maak nie;

(b) die aansoek is effektief 'n ex parte uitsettingsbevel, aangesien die Agbare Hof my summier bevel het om te ontruim sonder om my die geleentheid te gee om die aansoek te verdedig, of om my kant van die saak aan te hoor;

(c) die Agbare Landros het nie redelike oorweging geskenk aan die toepassing van die reg nie ("did not apply his mind") aangesien die aansoek klaarblyklik twee verskillende datums, met 'n tydperk tussen die twee datums, voorsien;

(d) die gevolg van die vermelde bevel is dat 'n uitsettingsbevel teen my verleen is sonder dat ek die geleentheid gehad het om dit te verdedig;

(e) die gebruik van die woord "satisfy" in artikel 15 van die wet sluit spesifiek uit dat net een kant van die saak aangehoor word;

(f) dit was nooit die bedoeling van die wetgewer om landelike bewoners soos myself met minder regte te laat as wat ek onder die gemene reg gehad het nie;

(g) dit was nooit die bedoeling van die wetgewer dat die audi alteram partem beginsel deur vermelde wet uitgesluit word nie.

14. Ek word geadviseer dat dringendheid nie met eensydigheid of partydigheid verwar moet word nie, en dat die Wet, en in die besonder artikel 15 daarvan, nie gelees kan word as om die Agbare

Landdroshof die bevoegdheid te gee om uitsettings bevele op 'n ex parte basis te gelas nie.

15. Ek en my familie het nog geen ander heenkome gevind nie, en indien die bevel van die Landroshof nie hersien en reggestel word nie, sal ek en my gesin uitgesit gesit word in die gure winter ... ."

[17] The affidavit also contended that first respondent's continued presence on the farm did not pose any danger and accordingly there existed no grounds of urgency necessitating his summary eviction. It went on to state that had he been given an opportunity to oppose the urgent application for his removal, first respondent would have proposed 31 July 1998 as a fair and reasonable date for him to vacate the farm. It was of little assistance to him to be accorded the opportunity to defend himself on the return day of the interim order (17 July 1998), as he would then already have lost his dwelling and incurred damages as a result thereof. He stated that his attorneys had in fact attempted to settle the matter on this basis and had written to applicant's attorney on 3 July and again on 6 July 1998, giving an undertaking that first respondent would vacate the premises by 31 July 1998, on condition that the court order for his removal on 3 July 1998 (which had then not yet been signed by the Magistrate), was withdrawn. The applicant had not been prepared to grant respondents an extension until 31 July 1998, and to settle accordingly.

[18] On 10 July 1998 in response to the application for urgent review this court suspended the magistrate's interim order pending the review thereof. Thereafter this court instructed the parties that the case would be dealt with by way of an automatic review under section 19(3) of the Act and invited them to make written submissions.

[19] Written submissions were received on behalf of respondents only. The tenor thereof is expressed in the following extract[6]:

> "We respectfully submit that the conduct of second respondent in obtaining an eviction order with immediate effect (i.e. which could be executed forthwith) on an ex parte basis within about 12 hours from serving a thick bundle of documents on a mostly illiterate farmworker family borders on an abuse of the provisions of the Extension of Security of Tenure Act 62 of 1997, and indeed appears to undermine the very purpose of this Act.
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> We consider that if second respondents abided by proper procedure, and/or if second respondent afforded our clients reasonable or lawful notice (our clients were never afforded even a proper calendar month's notice, as they were entitled to) costly litigation including the referral of this matter to the Honourable Land Claims Court would have been avoided.

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[6] In which the Applicant is referred to as the second respondent, and the magistrate as the first respondent.

In the premises we respectfully submit that the Honourable Court in reviewing the above matter should order:

(a) that the second respondent's application for eviction in terms of section 15 of the Extension of Security of Tenure Act 62 of 1997, be struck from the roll of the Stellenbosch Magistrate's Court;

(b) that the second respondent is liable for the costs of the applicants in the application for review by the Honourable Land Claims Court, as well as for the costs of the respondents in opposing the ex parte eviction application."

[20] In the light of the above I now turn to review the order granted by the Magistrate in terms of section 15 and consider respondent's submissions in relation thereto. I am of the view that the applicants did make out a case for urgency and that the affidavit of Neethling satisfies the requirements of section 15(a)-(d). The pattern of violent and abusive conduct displayed by first respondent over a period of time as well as the assault perpetrated by him on his fellow worker after his dismissal (an assault which is not denied by first respondent in his affidavit), points to there having been a real and imminent danger to persons and property if he was not removed from the farm.

[21] I do not agree with first respondent's submissions that the obtaining of an eviction order on an ex parte basis within 12 hours from serving documents on a mostly illiterate farmworker family borders on an abuse of the provisions of the Act and appears to undermine it.

[22] It cannot be said that the order was obtained on an ex parte basis. Claasen's Dictionary of Legal Words and Phrase[7] defines the term, ex parte, as follows:

"On behalf of; from one side. An application to the court ex parte is made by the applicant only in the absence of the respondent. Such application would not be ex parte if the respondent had due notice and failed to appear at the time appointed for its hearing."

[23] Service was effected on respondents by the Sheriff's office only 12 hours before the hearing, a not unusual time period for an urgent application. Thereafter it was the respondents' responsibility to attend the court proceedings which had been brought to their attention; especially because of their inability to properly read and comprehend the documents. In this

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[7] Vol 2 (Butterworth, Durban 1997) at E-46.

regard there is the uncontradicted allegation by first respondent that the person effecting service told them not to appear in court the next day.

[24] Uniform Rule 4 pertaining to service in the High Courts places a general obligation on sheriffs to explain the nature and contents of documents to persons on whom they are being served.[8] Magistrate's court Rules 8 and 9 pertaining to sevice do not impose the same general obligation which is regrettable. It was the High court rule 4 and the obligation to explain the contents of the documents specified therein, which applied to service in this case. This is so because of Sections 17 (3) and(4) [9]of the Act which says that High Court rules of procedure shall apply to magistrate's court proceedings in terms of the Act until such time as the Rules Board makes rules to govern the procedure under the Act. The Rules Board has not yet made such rules. The importance of explaining the nature and contents of legal documents when effecting service, especially upon laypersons of limited literacy, cannot be sufficiently stressed.

[25] The above notwithstanding the allegation by first respondent about the person effecting service informing them that they did not have to attend court, does not in my view excuse their non attendance. It is, I believe, fair to assume that respondents must have had some idea what the court case pertained to, given that they were living on applicant's farm on "borrowed" or extended time. They ought to have perceived the importance of the proceedings and consequences of their failure to attend court. Not to have appeared in court themselves, under the circumstances, and to use their "mostly illiterate" status as an excuse was, I believe, irresponsible.

[26] I suggest with the greatest of respect, that the circumstances of persons like the respondents cry out to be enriched and empowered, by self help and the assumption of greater responsibility. It would ill behove them were this court to condone their lack of initiative in failing to appear in the magistrate's court for the urgent application. I cannot lay the blame for their non appearance in court on the applicant, as the respondents would have me do, nor

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[8] Rule 4 (d) states "It shall be the duty of the sheriff or other person serving the process or documents to explain the nature and contents thereof to the person upon whom service is being effected and to state in his return or affidavit or on the signed receipt that he has done so."

[9] Section 17

"(3): The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No 107 of 1985), may make rules to govern the procedure in the High Court and the magistrates' courts in terms of this Act.

"(4) Until such time as rules of court for the magistrates' courts are made in terms of subsection (3), the rules of procedure applicable in civil actions and applications in a High Court shall apply *mutatis mutandis* in respect of any proceedings in a magistrate's court in terms of this Act."

on the person who effected service upon them.

[26.1] The course chosen by respondents to remedy the alleged service "problem" and consequent failure to appear in court, was to launch an urgent review application. There was of course another avenue open to them. They could, instead, have anticipated the return date of the interim order under section 15 when they would have had the opportunity to put forward their case.

[27] The respondents were served and must take responsibility for their failure to appear in court and the consequences thereof. I may add that from the contents of first respondent's affidavit in support of the urgent review application, it does not appear to me that his presence in court on 3 July would have persuaded the learned magistrate[9] to give a ruling in his favour. Nor does it appear to me that had respondents been given a calendar month's notice on 1 June 1998 to vacate by 1 July 1998, litigation would have been avoided, as alleged by first respondent, given that the respondents had not vacated the farm by this later date.

[28] It is my view moreover that service having been effected on the respondents, and given the urgency of the matter, the learned magistrate did not err in granting the interim order in their absence. In so doing he was acting within the ambit of the discretion under UniformRule6(12)[10], prayed for by the applicant in the application in terms of section 15 of

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[10] The High Court rule applies for the reasons set out at paragraph 24 above. See also footnote 9.

Uniform Rule 6(12) states:
"(12)

(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.

(b) In every affidavit or petition filed in support of any application under para (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

(c) A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order."

the Act.[11]

[29] The above notwithstanding, I find I am unable to agree with the order granted by the learned Magistrate under section 15 for the following reasons:

29.1 The order granted by the Magistrate under section 15 makes provision at paragraph 4 thereof, for the interim order for respondents' removal to be made final upon the return date. Paragraph 4 of the order under section 15 states:

> "4. Respondente moet redes aanvoer voor 16/7/98 - 09h00 waarom bevel nie finaal gemaak moet word nie;"

29.2 The Magistrate in my view erred in providing for a final order under section 15. Only an interim order is permitted under section 15, "pending the outcome of proceedings for a final order". The final order that is referred to in the section is not a final order under section 15, but a final eviction order under section 9[12]. Rule nisi proceedings are in order under section 15 provided the confirmed rule remains an interim order and is not made final. Were a final order permitted under section 15, it would be open to landowners to evict under that section in total disregard not only of the provisions requiring notice of intention to obtain an eviction order to be given to the Municipality and the Department of Land Affairs, as specified at section 9(2)(d)(ii) and (iii), but other provisions of the Act as well. This would undermine and subvert the intention of the legislature.

29.3 There is in the present case no evidence that there are pending proceedings for a final order, and whilst notice of the urgent application in terms of section 15 was given to the Municipality and Department of Land Affairs, this did not satisfy the notice requirements specified at section 9(2)(d)(ii) and (iii) of the Act.

29.4 Relief granted under section 15 should make provision for an interim order for removal pending the outcome of proceedings for a final order under section 9. Section 15 read with section 9 in my view, envisages the commencement of an application for urgent relief under section 15 after, just before or simultaneously with the

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[11] Prayer 1 of the application in terms of section 15 of theAct states:

> 1. Dat hierdie aansoek as een van dringenheid behandel word en dat die bogenoemde Agbare Hof ingevolg die bepalings van Hofreel 6 (12) van die Wet op Hoogeregshof , Wet No 59 van 1959 sal afsien van die vorm en betekening wat die Reel voorskyf;"

[12] *City Council of Springs v Occupants of the Farm Kwa -Thema 210[1998]4 All SA155(LCC)at 157; Manana and others v Johannes LCC 34/98, 17 September 1998,as yet unreported at 9.*

commencement of eviction proceedings under section 9.[13]

29.5 In the present case the applicant upon the commencement of the urgent application for removal ought to have applied to court for an order for the eviction of respondents and served a notice of such court application upon the Municipality and Department of Land Affairs not less than 2 months before the commencement of the eviction hearing. The interim order for their urgent removal under section 15, ought then to have been granted pending the final eviction order. In practical terms this would mean that respondents would have been temporarily removed from the farm in terms of an interim order with immediate effect, pending the final hearing for their evictions 2 months thereafter. The order granted by the learned magistrate, not being in compliance herewith, I find I am unable to confirm it and must accordingly set it aside. The respondents have moreover already vacated the farm with no intention of returning.

[30] I note in passing that it is indeed unfortunate that the parties were unable to settle this matter on the basis that the respondents be given until 31 July 1998 to vacate the premises as proposed by them. A settlement to that effect would have averted an urgent and presumably costly review application.

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JUDGE Y S MEER **Handed down on:** 6 November 1998

For the applicant:
Hofmeyr Herbstein Gihwala & Cluver Ing.

For the respondents:
Chennells Albertyn

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[13] *Manana v Johannes* ibid at 9.