IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 5 February 1999 **CASE NUMBER**: LCC08/99
before **Bam P**
In the case between:

LEEUDOORN GOLD MINE Applicant
and

JOHN MNENGELE Respondent

JUDGMENT

BAM P:

[1] The applicant originally brought these proceedings as a matter of urgency praying for the issue of a rule *nisi* for eviction against the respondent and also further interdicting and restraining him from unlawfully interfering with or obstructing normal operations on mine premises. The order was to be implemented immediately pending the outcome of proceedings for a final order. Such an application is clearly envisaged in terms of section 15 of the Extension of Security of Tenure Act[1] (hereinafter referred to as "ESTA"), which reads as follows:

> "**15 Urgent proceedings for eviction**
>
> (1) Notwithstanding any other provision 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-
>
> (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 any other affected person if an order for 4removal 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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1 Act 62 of 1997.

(d) adequate arrangements have been made for the reinstatement of any person evicted if the final order is not granted.

(2) The owner or person in charge shall beforehand give reasonable notice of any application in terms of this section to the municipality in whose area of jurisdiction the land in question is situated, and to the head of the relevant provincial office of the Department of Land Affairs for his or her information."

[2] The three sets of affidavits finally filed[2] on behalf of the applicant, contained allegations and matter only some of which were relevant to the requirements of section 15 but most of which were extraneous to those requirements. On the other hand, as appeared on closer scrutiny, there was only partial compliance with the provisions specifically of section 15(2). In effect, the eviction was being sought on various causes of action and not confined to proceedings based on urgency.

[3] Most of these other causes of action were indeed based on sections to be found in ESTA but with different and more elaborate requirements than those prescribed in section 15. For instance, the eviction was sought, *inter alia*, on the grounds set out in section 8(2)[3] of ESTA and it was alleged that the respondent's employment had been lawfully terminated and so, therefore, had been his right of residence which had arisen solely from his employment agreement. There was a dispute of fact in this regard but, more importantly, to succeed on those grounds the route to have been followed is different from that required by section 15. It requires the observance of the provisions set out in section 9.[4] The same applies where the eviction is sought (as it strongly was in this case) on the grounds set out in section 10(1)(a) and (c)[5] and it was alleged that the

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2 The parties had earlier, by consent, requested the Court for a postponement and for leave to file further affidavits.

3 Section 8(2) reads as follows:

"The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act".

4 See, for example, *Karabo and Others v Kok and others* 1998 (4) SA 1014 (LCC) at 1019D-1020D, [1998] 3 All SA 625 (LCC) at 630f-631d.

5 Section 10(1)(a) and (c) states that:

"(1)An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if-

(a) the occupier has breached section 6(3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;

respondent engaged in conduct threatening to others and had, through various deeds of misconduct, committed a fundamental breach of the relationship between him and the owner which was practically irredeemable. In this instance again, the provisions set out in section 9 cannot be bypassed.

[4] When the urgent application came up for hearing, Mr van As, who appeared for the applicant, submitted that due to the effluxion of time, and the filing of further affidavits during the intervening time, and having regard to new developments surrounding the case, the Court was now in a position to proceed not only in terms of section 15 for interim relief but also to treat the proceedings as being for a final order in terms of section 10(1)(a) and (c) on the papers as augmented. Mr Beaton, who appeared for the respondent, while not opposing this suggestion, was uncertain as to the efficacy of such a procedure and accordingly reserved his right to make submissions at a later stage in this regard, if necessary.

[5] The Court proceeded to hear argument on this basis being of the view that there was, in principle, nothing against hearing argument for a final order on augmented papers simultaneously as for an interim order under section 15.[6]

(b) . . .

(c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or

(d) . . . ".

6 *Uitkyk Farm Estates (Edms) Bpk v Visser and Another*, LCC 60/98, 9 November 1998, as yet unreported, internet website address http://www.law.wits.ac.za/lcc/1998/uitkyksum.html, where Meer J stated the following at para 29.4:

> "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 commencement of eviction proceedings under section 9."

See also, *Kgaphola v Mogashoa*, LCC 15R/98, 19 January 1999, [1999] JOL 4424 (LCC), internet website address http://www.law.wits.ac.za/lcc/1998/kgaphulosum.html at paras 2.1. and 2.1.2.2.

[6] Mr van As in consequence then concentrated his argument on the application for final order in terms of section 10(1)(a) and (c) of ESTA. Turning to section 10(1)(a), Mr van As particularly laid emphasis upon his reliance on section 6(3)(c) which provides that an occupier may not-

> "engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; . . ."

He submitted that the respondent had breached the section and that there was sufficient undisputed evidence on the papers to warrant the Court to grant the final order on the papers as augmented. In dealing with section 10(1)(c), he submitted that the conduct of the respondent as set out in the papers constituted a fundamental breach of the relationship between the parties such as is contemplated in the section.

Background

[7] The applicant is a division of Kloof Gold Mining, a company carrying on the business of gold mining. The gold mining is done on the farm Leeudoorn in the district of Potchefstroom. There is a hostel complex on the property accommodating some 5 100 of the applicant's employees.

[8] The respondent was, until 13 October 1998, an employee of the applicant and occupied a house within the hostel complex. He was retrenched on 13 October 1998 but continues to live in the house. It is now common cause that the respondent has contested the fairness of his dismissal and that the matter is being dealt with in terms of the Labour Relations Act[7] by the Labour Court.

[9] The applicant has sought to make out its case for eviction within the context of a historical background of strife and violence on the mine due to trade union factionalism within the labour force. I understand it to be the applicant's contention that the respondent played and continues to play a crucial role in contributing to the escalation of that state of affairs and is currently instrumental in the perpetuation of tensions and in the deterioration of labour relations between the unions, especially with regard to the administration of the hostel complex.

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7 Act 66 of 1995.

[10] In its original urgent application for an interim order, the applicant contended in the papers that, given the background as sketched above, the continued presence of the respondent on the premises constituted a real and imminent danger that violence might erupt once again with consequent injury to persons and damage to property.

[11] In the present proceedings for a final order, I understood it to be the submission of Mr van As that the same role which the respondent played and continues to play amounts to conduct which threatens or intimidates others and is thereby a material breach of section 6(3) which the respondent has not remedied.

[12] It is so that in both the founding and supplementary affidavits filed on behalf of the applicant, some reliance appears to be placed on the allegation that the respondent's contract of employment was lawfully and fairly terminated. This stance was, however, not pursued by counsel at the hearing and, in my view, rightly so once it was established that the dismissal was contested and pending in the Labour Court. In this regard, section 8(3) states that-

> "Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act".[8]

[13] These affidavits placed further reliance upon an alleged breach by the respondent of a collective agreement entered into between the applicant and the National Union of Mineworkers (NUM) as at the date of retrenchment, October 1998 when, it is alleged, the respondent was a member of the said union and was therefore bound to leave the premises in terms of such agreement. Again counsel for the applicant did not pursue this argument as it was clearly a contention in terms of the common law and outside the jurisdiction founded in terms of ESTA.

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8 See also, *Karabo and Others v Kok and Others* supra n 4; *Clos Cabriiëre Estate (Pty) Ltd v Johannes*, LCC12R/98, 3 November 1998, as yet unreported, internet website address http://www.law.wits.ac.za/lcc/lccalph.html at para [2].

[14] I now turn to examine the troubled events on the gold mine and the nature of the respondent's involvement and conduct as appears from the papers. On 19 August 1996, violent clashes occurred on the mine as a result of disagreements between members of NUM, the majority and recognised union, and members of a minority rival union, at that time the United Workers' Union of South Africa (UWUSA).

[15] NUM had, in earlier negotiations, come to an agreement on 5 August 1995 with management that it was desirable to change the structure in hostel management in such a way as to promote the participation of hostel residents in the decision-making processes pertaining to hostel affairs. UWUSA did not have a presence on the mine at the time of these negotiations but appears to have gained a minority following by the time the re-structuring was to be implemented and insisted on participation, though it did not enjoy recognition. The respondent was a member of UWUSA and it is common cause that this union was opposed to the manner, if not the establishment, of the Hostel Residents Committee ("HRC") which was intended to replace the older Hostel Block Representatives Structure, of which the respondent was a member. The parties to this application agree that it was this issue that led to the violence in 1996, in which some five people died and fifteen sustained injuries.

[16] It appears that the ultimate retrenchment of the respondent, during October 1998, after twenty-two years of service, was the direct consequence of the reshuffling that took place upon the establishment of the HRC since his position as a Hostel Administrative Officer became redundant as he was not employed in any other capacity.

[17] It is significant that the respondent's retrenchment occurred more than two years after the initial turbulence during 1996. There do not appear to have been any incidents more distressing or even as distressing in the period in-between. Indeed most of that time was devoted to exploring ways in which the respondent might be accommodated and kept within the fold of the mine and, in his founding affidavit for the applicant, Kuhn, who is the Human Resources Superintendent responsible for the administration of hostels on the mine, states the following:

> "24. During the period April to May 1998, the respondent requested that the applicant offer him [a] voluntary retrenchment package as his position had become redundant. The applicant turned down the

> request for a voluntary retrenchment package as the respondent's services were going to be required to facilitate the establishment of the HRC and the training of the members of the HRC, that is, if the respondent was elected to the HRC. Further alternatives to retrenchment were explored. The applicant offered the respondent an opportunity of presenting himself as a candidate for the HRC which was to be democratically elected, and/or, alternatively, that he accept an alternative position as an underground employee as these were the only positions available at the applicant's mine."

[18] The significance of all this is that it demonstrates that, up until the final breakdown of negotiations with the respondent after 5 October 1998, his services were in demand but it was not easy to strike a bargain with him. This is borne out further in Kuhn's affidavit when he states that the contemplated retrenchment date of 5 October 1998 was not implemented so as to hold further consultations with the respondent's representatives. Hence the final date of the retrenchment was 13 October 1998.

[19] This means that until then the respondent did not pose a threat of real and imminent danger likely to cause substantial injury to any person or damage to property; it means he had not 'engaged in conduct which threatens or intimidates others who lawfully occupy the land', in the words of section 6(3)(c); and it also means he had not committed such a fundamental breach of the relationship between him and the applicant that it was not practically possible to remedy it, to paraphrase the words of section 10(1)(c). Indeed up until after 13 October 1998, applicant wanted to keep respondent employed on the mine. Nothing untoward involving the respondent or pertaining to the situation on the mine is recorded in the papers after the retrenchment date of the respondent on 13 October 1998.

[20] The first incident recorded is that on 27 October 1998 when a new rival minority union, the Mouthpeace Workers' Union, wrote the applicant a letter claiming that the respondent was its member and that it was mandated to act on his behalf and re-open negotiations in respect of his retrenchment. The applicant refused.

[21] Although the respondent's action of associating himself with the Mouthpeace Workers' Union (which is admitted by him), is not cited as one of the factors perceived by the applicant as amounting to a fundamental breach in the relationship, it is clear that it must have contributed to such a perception. I reach this conclusion because the incidents involving the respondent and cited

in the founding affidavit as intolerable conduct on his part all centre around the Mouthpeace Workers' Union.

[22] The second incident was on Thursday, 14 January 1999, when again the Mouthpeace Workers' Union wrote a letter to the applicant requesting that three retrenched employees, not including the respondent but who had also been on the old Hostel Block Representatives Structure, be allowed to come and retrieve their belongings from the hostel. Upon arrival, according to Mr Kuhn's affidavit, they became provocative and one of them, Vitalis Pheello Fetkane, uttered aggressive threats to hostel employees:

> "We are back now my subjects, those who thought we will never come back were dreaming, even if we can leave the hostel, we will come back to cause havoc".

Similar threats were made by another of the retrenched trio as they were approaching the gate to leave the hostel. Although the respondent did not feature at all in this particular incident or in the uttering of the threats, it is clear that Mr Kuhn was making no distinction between him and the three former Hostel Block Representatives and was attributing their actions to the respondent by association. He even refers to the trio as respondents (which they are not) in his affidavit and states:

> "My impression was that what was being said by the respondents (sic) had the potential to lead to violence that preceded the establishment of the HRC".

[23] The third incident was on 19 January 1999 when Mr Kuhn received information from one David Mngadi, who is employed by the applicant in the Industrial Relations Department, stating that members of the Mouthpeace Workers' Union were holding meetings at the No 3 Boiketlo Street married quarters, ie at the premises where the respondent lived, and that this was without the required permission. Mr Kuhn was also informed by David Mngadi that in fact the Mouthpeace Workers' Union had held three other meetings at different venues on previous occasions.

[24] The fourth incident is on 27 January 1999 when Mr Kuhn again received information from David Mngadi that the Mouthpeace Workers' Union was using the applicant's fax machine to communicate with the respondent without the applicant's permission. The respondent is only passively involved as having responsibility for this incident, assuming the report to be true.

[25] These are the only incidents recorded in the papers when the applicant filed his urgent application for the eviction of the respondent. In the one incident, information is received that the Mouthpeace Workers' Union has been holding meetings at venues which, among others, include the hostel where the respondent lives. There is absolutely no verification of this as Kuhn is deposing to hearsay evidence from Mngadi and we do not know whether the respondent was present or not or whether he said or did anything. He himself states that he has no knowledge at all of the incident. In the other two incidents, the respondent is obviously being judged vicariously and unfairly, in my view, for conduct attributable either to the three former members of the Hostel Block Representatives Structure or to the Mouthpeace Workers' Union. Clearly the Court cannot come to the assistance of the applicant on such a basis.

[26] The applicant then filed a supplementary affidavit which did not really take matters further save to recount the murder of an employee by the name of Joaquim Changue at the hostel on 25 January 1999, ie a week before the founding affidavit was signed, as Mr Beaton points out. The circumstances surrounding the murder could not be determined, but the affidavit of Kuhn speculated that there was a real possibility that the murder was-

> "directly linked to the current volatile situation at the applicant's hostels between the residents who support the Hostel Residents' Committee System and those who do not".

I cannot find that there is any evidence in the papers to link the murder of Joaquim Changue even remotely to the conduct of the respondent.

[27] It was recorded, once more in the supporting affidavit, that David Mngadi had supplied more information of how the Mouthpeace Workers' Union had actively been recruiting membership among hostel residents who did not support the establishment of the HRC. Mngadi had further advised Kuhn that these dissidents frequently met at the hostel occupied by the

respondent for the purposes of holding meetings of the Mouthpeace Workers' Union without the applicant's permission. The respondent admits knowledge that the Mouthpeace Workers' Union has indeed been active in recruiting members on the mine but disputes allegations that they have used the house he occupies to hold meetings. Again, I am not able to find any case of misconduct on the part of the respondent from these allegations even if they had been true and undisputed.

[28] It finally remains to deal with allegations made in Andre Kuhn's replying affidavit on behalf of the applicant. It was more of a supplementary rather than a replying affidavit. It was argumentative and full of new and often irrelevant matter. I cannot appreciate, for instance, how it is material to the applicant's case to allege, on hearsay evidence, that the respondent earned additional income by selling liquor from outlets in the Bekkersdal location. I can similarly not comprehend the significance of the new information that the respondent was a member of the United Association of South Africa when it was previously alleged that he was bound to the retrenchment agreement by virtue of his membership of the NUM.

[29] Much was also made of the allegation that the respondent was seen on 26 February 1999 (25 days after the notice of motion was filed) driving in a motor vehicle with Sabath Kuali towards the hostel complex allegedly in breach and in contempt of an order of the High Court. In this regard, I am in full agreement with the submissions of Mr Beaton, counsel for the respondent, that the principle that a cause of action should exist at the time of institution of action, enunciated in the case of *Philotex (Pty) Ltd and Others v Snyman and Others; Textilaties (Pty) Ltd and Others v Snyman and Others*,[9] ought to apply and the court should not take cognisance of this incident.

[30] One thing that has emerged very clearly from these proceedings, is the applicant's deep concern and apprehension over the fact that the respondent is still not reconciled to the formation of the HRC or to the manner in which it was formed. It is also clear that this issue has been utilised as a rallying point in a recruiting campaign by the rival minority union, the Mouthpeace Workers' Union, which does not enjoy recognition of the applicant. The respondent is admittedly a member of this union and has resisted being co-opted into the new hostel structures which have

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9 1994 (2) SA 710 (T).

the support of the dominant and recognised National Union of Mineworkers (NUM). This is not a situation which this Court can resolve by granting an order of eviction since in terms of the Constitution,[10] every worker has the right-

> "(a) to form and join a trade union;
> (b) to participate in the activities and programmes of a trade union."[11]

[31] In all the circumstances, I come to the conclusion that the applicant has failed to establish the existence of a situation fraught with real and imminent danger of injury to persons or damage to property if the respondent is not removed from the mine premises he now occupies. The urgent application for an interim order for his removal in terms of section 15 of ESTA is accordingly dismissed.

[32] The application for a final order for his eviction in terms of ESTA on the papers is similarly dismissed. There is nothing in the conduct of the respondent on the augmented papers that amounts to a fundamental breach of section 10(1)(a) and (c) read with section 6(3) upon which the application for a final order was based. More importantly, even if the respondent's conduct had been found to have been a breach of these sections, an order could not have been granted as it became apparent during the hearing that-

(i) the labour dispute was still unresolved and, in any case,

(ii) there was no compliance with the prerequisites prescribed in ESTA particularly those under section 9(2) before a final order can be granted .

Costs:

[33] This Court has in several cases not made an order for costs and has deviated from the usual principle that the successful party is awarded costs as between party and party. None of the

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10 Act 108 of 1996.

11 Ibid, section 23.

rationale in those cases is applicable to the facts of this case and I am accordingly of the view that the ordinary rule should apply.

[34] Accordingly, the order which I make is the following:

1. The application for an interim order is dismissed with costs and so are all the orders sought in paragraphs 2, 3, 4 and 5 of the Notice of Motion; and

2. The application for a final order of eviction of the respondent made from the bar is dismissed with costs.

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PRESIDENT F C BAM

Heard on: 5 February 1999 **Handed down on:** 15 June 1999

For the applicant:
Adv van As instructed by *Leppan Beech Attorneys*, Johannesburg

For the respondent:
Adv M Beaton instructed by *Bungane Attorneys*, Oberholzer