IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER**: LCC70R/99
In chambers: **Moloto J** **MAGISTRATE'S COURT CASE NUMBER:** 1/4/15-1/99

Decided on 18 November 1999

In the review proceedings in the case between:

JOHANNES CHRISTIAAN THEUNISSEN Applicant

and

SEM CHIBODU Respondent

JUDGMENT

MOLOTO J:

Introduction:

[1] Applicant in this matter brought an application for ejectment of the respondent from his farm Ysterpan No 89, Sentrum, district Thabazimbi in the Magistrate's Court, Thabazimbi under case number 1/4/15-1/99 in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.[1] I shall refer to it as the "Prevention of Illegal Eviction Act". I will refer to applicant's farm Ysterplan No 89 as "the farm". It is not clear whether the farm is No 89 or No 99, as it is described as No 99 in the Notice of Motion and No 89 in the supporting affidavit. The matter first came before the magistrate on 16 September 1999 and again on 7 October 1999. The record shows that appearances on 16 September 1999 were "Mnre [sic] Roos" for applicant and "Mnre [sic] Geen" for respondent and on the return date (7 October 1999) were "[p]ersone soos voorheen". I will return to this point later.

The applicant's prayer reads as follows:-

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1 No 19 of 1998, as amended.

> "1. die Respondent en alle persone op die plaas Ysterpan no. 99, Sentrum, distrik, THABAZIMBI, bevind word, onregmatige okkupeerders te wees, soos omskryf in Artikel 1 van die Wet op Voorkoming van Onwettige Uitsetting en Onregmatige Besetting van Grond, 1998, Wet 19 van 1998.
>
> 2. Dat die Respondent en enige onregmatige okkupeerders aldaar gevind, gelas word om die perseel te ontruim voor of op 23 SEPTEMBER 1999, tesame met al hul besittings.
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> 3. Dat indien die Respondent en/of ander persone weier om gehoor te gee aan klousule 2, die Balju gemagtig en gelas word om die Respodent en/of ander okkupeerders, tesame met hulle besittings van die perseel uit te sit.

The magistrate's order states:

> "Dat Kragtens Artikel 4(8) Wet 19/98
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> (a) die okkupeerder gelas word om die grond ontruim op 30/11/99 en
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> (b) 1/12/99 die datum waarop `n uitsettingsbevel uitgevoer kan word.
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> Respondent Koste hiervan te betaal".

[2] The magistrate then referred the matter to this Court under cover of a letter dated 27 October 1999. In the letter, he states that, subsequent to granting the order he was satisfied that he had misdirected himself in so granting it. He further stated that the respondent is in fact a person defined as an "occupier" in section 1(x) of the Extension of Security of Tenure Act[2] (hereinafter referred to as "ESTA") and requested that his order granted on 7 October 1999 be set aside.

Jurisdiction

[3] Before dealing with the merits, it is important to determine whether this Court has jurisdiction to review the matter. In terms of the Prevention of Illegal Eviction Act,

> " 'Court' means any division of the High Court or the magistrate's court in whose area of jurisdiction the land in question is situated".[3]

2 No 62 of 1997, as amended.

3 Section 1.

Accordingly, the only courts which have jurisdiction in cases under the Prevention of Illegal Eviction Act are the High Courts and the magistrates' courts, in other words not the Land Claims Court.

[4] Section 20(1)(c) of ESTA, states that this Court has jurisdiction -

> "to review an act, omission or decision of any functionary acting or purporting to act in terms of this Act".

In a comprehensive analysis of the situations where jurisdiction in terms of section 20(1)(c) should be exercised, Gildenhuys J[4] came to the following conclusion:

> "[T]he words 'purporting to act' might provide an indication of how far the legislature intended the jurisdiction of this Court to extend. If a magistrate should make a decision professing it to be in terms of ESTA, this Court will have jurisdiction to review that decision on the grounds that it is not in terms of ESTA; in other words, this Court will have jurisdiction even if the magistrate did not 'act in terms of ESTA' but only 'purported' to do so. In a reverse situation, where a magistrate, either knowingly or unwittingly, fails to apply ESTA under circumstances where ESTA should have been applied, and if the decision is brought under review on the basis that the magistrate committed an irregularity by not applying ESTA, I can think of no logical reason why the legislature would have intended that the review must not be justiciable in this Court" (my emphasis).

He then goes further to say:

> "... it is evident that the phrase "acting in terms of ESTA" in section 20(1)(c) may have to be purposively interpreted so as to give this Court jurisdiction to review cases which fell to be dealt with in conformity with ESTA, but were not so dealt with. So interpreted, the phrase "in terms of ESTA" would be descriptive of the sphere of law applicable to the magistrate's actions or omissions. The phrase "in terms of" was, albeit in different context, given a similar meaning in *C Ltd v Commissioner of Taxes* in order to avoid a result which would be "so absurd that the legislature could never have intended it".[5]

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4 In the case of *Skhosana v Roos* [1999] 2 ALL SA 652 (LCC) at 659g-j.

5 *Skhosana* above n 4 at 660d

The Learned Judge goes on to state that:

> "The power of this Court under a review application in terms of section 20(1(c) must be distinguished from the powers of this Court under automatic review of section 19(3) of ESTA. The latter powers are much wider.[6]

It is quite clear that this Court has jurisdiction to review an omission of a magistrate to apply ESTA, where the circumstances called for such application. The magistrate will, therefore, have referred the matter to this Court correctly, and it will have jurisdiction if the facts reveal that he unwittingly omitted to apply ESTA.

As already mentioned above, this matter was referred to this Court for automatic review in terms of section 19(3). Therefore, I am satisfied that the power of this Court to review under section 19(3) is even wider than the power of the Court under section 20(1)(c).

Grounds of review.

[5] I referred earlier to the fact that on the return date the parties were represented by "[p]ersone soos voorheen" and indicated I would return to this point. From a reading of the record of the oral evidence, it does not appear as if respondent was represented. I say so because, although respondent clearly states, both in evidence-in-chief and under cross-examination, that he had consent to reside on the farm, this point seems to have slipped by unnoticed.

In evidence -in-chief respondent said:

> "Ek het inderdaad woonplek gevra en het nie net goedere gestoor nie"

and under cross-examination he said:

> "V: Is dit reg dat jy verniet daar bly.
> A: Ja, so ooreengekom in Junie '94.
> V: Maar hy kan huur kry. Dink jy dit is reg.
> A: Hy het my al die jare daar laat bly.

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6 *Skhosana* above n 4 at footnote 22 of that case.

V: Nou verloor hy R500 per maand.
A: Ja.
V: U het daar gebly as gevolg van `n verguning.
A: Ja".

The cross-examiner goes on to suggest that the favour (to stay on the farm) was withdrawn, which respondent does not deny. But this suggestion by applicant's representative, that respondent resided on the farm as a favour, is in contradiction to applicant's affidavit that respondent was only given permission to keep his personal belongings in a structure on the farm and not for him to reside thereon. In any case, it is suggestion be tantamount to a concession that respondent had consent to reside on the farm.

[6] The tenor of this evidence made me curious to know if "Mnre Geen" is indeed a person or whether the intention was to say nobody appeared for respondent. I confirmed with the magistrate that the respondent was indeed unrepresented. Under the circumstances, the magistrate should have been alert to the fact that consent to reside on the farm was given, and that therefore the Prevention of Illegal Eviction Act would not apply, but rather ESTA. Respondent is not trained in the law and is probably unlettered, hence would not know of the Prevention of Illegal Eviction Act and ESTA. Therefore, by omitting to deal with the matter in terms of ESTA, the magistrate committed a reviewable irregularity in terms of section 20(1)(c) of ESTA. I am satisfied that he correctly referred the matter for automatic review, and correctly requested that his order be set aside.

[7] There are other issues which, I believe, are worth mentioning. Firstly, applicant sought to obtain an order for eviction in the magistrate's court in terms of the Prevention of Illegal Eviction Act. The Prevention of Illegal Eviction Act is justiciable in either the magistrate's court or High Court and each of these courts must use its own rules.[7] A magistrate has no competence either under the Magistrates' Court rules or the Magistrates' Court Act[8] to order permanent ejectment

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7 Section 4(3) of Prevention of Illegal Eviction Act states:

> "(3) Subject to the provision of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the Court in question".

8 Act 32 of 1944, as amended.

on application or to issue a final ejectment interdict.[9] Secondly, the magistrate granted applicant an order for costs when no such prayer was included in the order prayed and there is no evidence of an application, either from the bar or otherwise, for amendment of the order prayed to include a prayer for costs. All that applicant's representative did in his address was to ask for an order as prayed "met koste". That is not an application to amend. The magistrate erred in granting the costs order when one had not been applied for.

[8] I give the following order:

> The order of the magistrate granted on 7 October 1999 is set aside in whole, and the following order is substituted therefor:
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> " The application is dismissed".

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JUDGE J MOLOTO

For the applicant:
Mr Roos of *Eric Marx Incorporated, Thabazimbi*

For the respondent:
Unrepresented.

9 *Jordan and Another v Penmill Investments CC and Another* 1991 (2) SA 430 (E) at 435H