IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER**: LCC 10R/00
In chambers: **MOLOTO** **MAGISTRATE'S COURT CASE NUMBER:** 2433/99
Decided on: 7 March 2000

In the review proceedings in the case between:

AFRICAN CHARCOAL (PTY) LTD Applicant

and

PHINIAS NDLOVU Respondent

JUDGMENT

MOLOTO J:

[1] In this matter, applicant brought an application in the Magistrate's Court for the district of Lions River for the eviction of respondent from its property described as the Remainder of Sub 15 of Rietvallei 1206, situate in the District of Lions River. I shall refer to it as "the property". The application was brought in terms of the Extension of Security of Tenure Act.[1] (I shall refer to it as "the Act"). Respondent did not defend the application and the magistrate granted the order as prayed. The matter now comes before me for automatic review in terms of section 19(3) of the Act.

[2] Evictions under the Act can be effected in terms of one of two sections, namely section 9 for ordinary applications or section 15 for urgent applications. In applicant's correspondence to Mr Richard Clacey, the provincial director (presumably of the Department of Land Affairs) and to the Ndlovu Regional Council, it is stated that the notice of intention to apply to the magistrate's court for an eviction order is given in terms of section 15(2) of the Act. Apart from this assertion, no case is made for urgency. On the other hand, Georgina Elizabeth Gemmill (the deponent to the founding affidavit) states that the respondent, the relevant municipality and the provincial office of the Department

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1 Act 62 of 1997 as amended.

of Land Affairs, were given "not less than two (2) calender months' " notice of hearing of the application; a requirement for an ordinary application and not an urgent one. Indeed, but for the allusion to section 15(2), the entire application appears to be an ordinary one. The notices were sent to Mr Richard Clacey and the Ndlovu Regional Council on 5 November 1999, the notice of motion was only issued on 15 December 1999 and the matter was heard on 23 February 2000. I shall, therefore, deal with the matter as an ordinary application.

[3] The requirements for the granting of an eviction order in terms of section 9 of the Act are contained in subsection (2) thereof, which reads as follows : -

> "(2) A court may make an order for the eviction of an occupier if -
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> (a) the occupier's right of residence has been terminated in terms of section 8;
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> (b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
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> (c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and
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> (d) the owner or person in charge has, after the termination of the right of residence, given -
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> (i) the occupier;
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> (ii) the municipality in whose area of jurisdiction the land in question is situated; and
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> (iii) the head of the relevant provincial office of the Department of Land Affairs, for information purposes,
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> not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based : Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Land Affairs not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with."

[4] According to section 9(2)(a) the first step is to terminate the occupier's right of residence in terms of section 8. Respondent was employed by the applicant and according to the founding affidavit (paragraph 12), it is quite clear that his right of residence on the property was predicated on his employment by the applicant. The relevant subsection of section 8, applicable to respondent is subsection (2) which reads :

> "(2) 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."

The applicant alleges in the founding affidavit that respondent's services were terminated and there is no suggestion that the dismissal was challenged in terms of the Labour Relation Act.[2] I, therefore, accept that the dismissal was in accordance with the provisions of the Labour Relations Act as required by section 8(2) of the Act. After the termination of services, a written notice terminating respondent's right of residence was delivered to him. I am accordingly satisfied that the requirement in section 9(2)(a) has been complied with.

[5] I am also satisfied that section 9(2)(b) was complied with. The written notice required respondent to vacate the property by 1 March 1999. This did not happen.

[6] The respondent had been an occupier of the property since a date prior to 4 February 1997; therefore, section 10 applies.[3] The relevant subsections of section 10 which applicant states were contravened by respondent are subsections 1(a) and (c). They read as follows: -

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

Section 6(3) of the Act provides:

> "(3) An occupier may not -
>
> (a) intentionally and unlawfully harm any other person occupying the land;

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2 Act 66 of 1995.

3 In satisfaction of the requirements of section 9(2)(c).

(b) intentionally and unlawfully cause material damage to the property of the owner or person in charge;

(c) engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or

(d) enable or assist unauthorised persons to establish new dwellings on the land in question."

The applicant alleges that it suspected that respondent stole its goods, as a result of which it (applicant) laid a trap for him. He was caught in the trap and applicant laid a criminal charge against him with the South African Police Service and also held a disciplinary inquiry. It is not stated what became of the criminal charge. However, respondent was found guilty at the inquiry and dismissed. I am satisfied that the crime of theft satisfied the requirements of section 6(3)(a), and (b) and accordingly those of 10(1)(c). In the result, applicant has complied with section 9(2)(c).

[7] Finally, applicant must give notices of intention to apply for an eviction order in terms of section 9(2)(d) to the respondent, relevant municipality and head of provincial office of the Department of Land Affairs. The said notices must contain the prescribed particulars and set out the grounds on which the eviction is based. Notices were delivered to Mr Richard Clacey and Ndlovu Regional Council. No notice was delivered to respondent himself. The proviso to section 9(2)(d) (quoted in paragraph 3 above) is also not complied with, because none of the returns of service states how service of the notice of motion was effected on the respondent or if it was effected on him at all. Two returns each give an address where service was effected and I am able to see that the one return relates to the Ndlovu Regional Council and the other to the Department of Land Affairs. The third return is silent on whom it was served on. It merely states that it was served on "[a]nother person not less than 16 years of age p.i.c Mrs Bongekile Ndlovu." There is no way of determining from the face of the return, that Mrs Bongekile Ndlovu received the notice of motion on behalf of respondent. The proviso to section 9(2)(d) is accordingly not complied with. I will return to this manner of service when I deal with whether it can be said respondent was served with the notice of motion.

[8] I have other problems with applicant's case. These relate to compliance with section 17(4) of the Act and authority of Georgina Elizabeth Gemmill to act on behalf of the applicant in the case.

Section 17(4) provides that -

> "(4) Until such time as rules of court of the magistrate's 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."

Applicant's notice of motion is not according to the High Court rules. The relevant rule for the type of application brought by applicant is rule 6(5) which prescribes that form 2(a) be used.[4] The form used by applicant falls short of the requirements of form 2(a) in the following respects :

(a) applicant has not appointed an address at which it will accept notice and service of all process in the proceedings.

(b) it does not warn respondent that if he intends opposing the application he must notify the applicant's attorney in writing by a certain date and that fifteen days after so filing his intention to oppose, must file an answering affidavit, if any.

(c) it does not warn respondent to appoint an address referred to in rule 6(5)(b) in his notice of intention to oppose at which he will accept notice and service of all documents in the proceedings.

(d) it does not warn respondent of the consequences of failure to enter appearance.

It is important that people who are notified of cases against them be notified in such a way that they are left in no doubt as to their rights and duties, and the consequences of failure to protect such rights or perform such duties.[5] It is therefore, important that litigants adhere to the prescribed forms and procedures, not just for formality's sake, but more importantly so that justice does not miscarry. It is true that the Court has a discretion to condone failure to comply with rules, where no prejudice is likely to be suffered by the opposite side. However, where there are possibilities of grave prejudice being suffered, as in the present case, it is the court's duty to intervene. In this case, the respondent did not enter appearance. It is not clear whether he defaulted because he did not receive the notice of motion,

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4 See *Van der Merwe v Maduna* LCC67R99, 11November 1999, internet website http://www.law.wits.ac.za/lcc/1999/vdmerwessum.html at par 2

5 *Van der Merwe* above, n3 at par 6.

or whether it was because of sheer negligence on his part. For applicant to succeed, it must eliminate this uncertainty.

[9] The resolution on which Georgina Elizabeth Gemmill based her authority to act reads as follows: -

"Resolution
Extract from the minutes of THE DIRECTORS of
THE AFRICAN CHARCOAL COMPANY

held at Lidgetton on the 13 (sic) day of October 1999.

At the above mentioned meeting it was resolved that: -

Georgina Elizabeth Gemmill in her capacity as Director is empowered to sign all documents relating to the eviction of Phinias Ndlovu.

Thus done and signed at Lidgetton on this 13 (sic) day of October

For and (sic) behalf of :	The African Charcoal Company (Pty) Ltd Registration Number 80/06436/07 P O Box 29 3270
Signature	Director
Signature	Director"

It is quite clear that the abovementioned resolution "empowers" Georgina Elizabeth Gemmill "to sign all documents relating to the eviction of Phinias Ndlovu." It does not authorise and require her to do all that is necessary to institute and prosecute the case. Empowerment to sign documents falls short of authority to act.

[10] I now return to the service of the notice of motion. The earlier reference was with respect to compliance with the proviso to section 9(2)(d) of the Act. But, that service also served the purpose of notifying the respondent of a case being brought against him in purported compliance with rule 6(5) of the High Court rules. If High Court rules are to apply in actions and applications brought under the Act, the question arises whether service should not also be according to High Court rules, and not Magistrate Court rules, as was done in this case. I do not intend to decide the point, but wish to raise concerns with the service of process in this matter. There are three returns of service in the file. The one return states that the notice of motion was served at

> "Department of Land Affairs 201 Pietermaritz Street, Pietermaritzburg" by "proper service of a copy of the Notice of Motion upon PIC (I presume that stands for "person in charge") Mrs Nkabinde, Deputy Director at Department of Land Affairs 201 Pietermaritz Street, Pietermaritzburg, being the business of Defendant Phinias Ndlovu a person at the above address apparently not less than 16 years of age, apparently employed there after explaining the nature and contents thereof to the said person. Rule 9(3)(B)."

The other return has similar wording except that it was served at "Ndlovu Regional Council 171 Boshoff Street Pietermaritzburg" and was served on Mrs Pyle. The former return states that the Department of Land Affairs is the business of respondent and the latter that the Ndlovu Regional Council is the place of employment of the respondent. These returns obviously relate to service, not on the respondent as such, but on the provincial office of the Department of Land Affairs and the local municipality respectively, and were intended as such. I therefore attach no importance to the mistakes relating to the one being respondent's place of business and the other his place of employment. The third return, which probably purports to relate to service on the respondent states the following: -

> "I hereby certify that on 17/12/99 the process was served according to the relevant rule application (sic)"
>
> "Another person not less than 16 years of age. Rule 9(3)(b) and (c) p.i.c. Mrs Bongekile Ndlovu"

It is not stated what Mrs Bongekile Ndlovu is in charge of, therefore, it cannot be determined where the notice of motion was served. Neither can it be determined how, if at all, Mrs Bongekile Ndlovu is related to the respondent. The only address given on this return is opposite the name of the "defendant" on the heading of the return, and that address reads as follows: -

> "sub 15 Rietvallei, Lions River"

Assuming that that is the address where service was effected (the return does not state where service was effected), then it is to be noted that according to the supporting affidavit of Georgina Elizabeth Gemmill, sub 15 Rietvallei, Lions River is the property which measures 9,1304 hectares and is occupied by the applicant, applicant's members of staff who occupy a number of houses on the property, and the respondent. Whether the respondent's family is the only Ndlovu family on the property, is not stated. Without a clear explanation on the return of service, I am not satisfied that the notice of motion was served on the respondent.

[11] The following order is made: -

The order of the Magistrate, Lions River, made in case No 2433/99 on 23 February 2000 is set aside in its entirety.

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JUDGE MOLOTO

For the applicant:
Mr Kemp of *Deneys Reitz Attorneys, Durban*

For the respondent:
No appearance