IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at RANDBURG on 20 April 2001 **CASE NUMBER**: LCC 02/01
before **Bam AP**

Decided on: 09 October 2001

In the matter between:

ANGLO OPERATIONS LIMITED t/a KRIEL COLLIERY Applicant

and

WELCOME MADLOPHA Respondent

JUDGMENT

BAM AP:

[1] This is an application for an order of eviction in terms of the Extension of Security of Tenure Act[1] ("ESTA"). The proceedings were instituted directly in this Court by Notice of Motion at the end of January 2001 and were set down for hearing on 20 April 2001. Before that date the parties completed the filing of outstanding notices and affidavits and submitted their heads of argument to the Court. On the same day that the respondent's heads of argument were filed, a notice of withdrawal by the respondent's attorneys of record was also filed. The problem was resolved the very next day when the same attorneys of record generously arranged with Mr Godfrey Malumane who agreed at short notice to present argument on behalf of the respondent.

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1 Act 62 of 1997, as amended.

[2] The applicant is a coal mining company with operations at the Kriel Colliery in Mpumalanga and is the juristic person in charge of premises accommodating its workers and their families known as the Kwanala Mine Village. The respondent is an adult male person who is a former employee of the applicant and who resides in a house at the Kwanala Village allocated to him while still in employment from 23 September 1987.

[3] Before a court can grant an eviction order all the requirements of section 9 of ESTA must be complied with. Section 9(2) provides firstly that the occupier's right of residence must have been terminated in terms of section 8 of ESTA. Secondly, the owner or the person in charge of the land must have given notice to the occupier to vacate the land within a specified period of time, and the occupier must not have complied with this. Thirdly, the conditions for an order for eviction in terms of section 10 or 11 of ESTA (depending on the circumstances; *in casu* section 10 is applicable) must have been complied with. Lastly, the owner or the person in charge of the land, after the termination of the right of residence, must have given the occupier, the municipality in whose area of jurisdiction the land is situated, and the head of the relevant provincial office of the Department of Land Affairs, not less than two calendar months' written notice of his or her intention to obtain an order for eviction. Section 9(3) requires a report on *inter alia* the availability of alternative accommodation and the effect the eviction will have on the constitutional rights of any affected persons.

[4] The applicant alleged that the respondent's right of residence was terminated in accordance with sections 8(2) and (3) of ESTA 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*.
>
> (3) 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*." (my emphasis)

[5] It is the applicant's contention that the respondent's occupation of the premises arose solely from the parties' agreement of service in which it was an express term that, upon termination of the service for whatever reason, the respondent and his dependants would vacate the premises. I have no hesitation in accepting the applicant's contention in this regard notwithstanding the respondent's bare denial of it. It is clear from the written agreement handed up that the right of residence of the respondent arose solely from the employment agreement between the parties. This, however, is not the end of the matter. The statute further limits termination of the right of residence to specific circumstances, namely resignation from employment or a dismissal in accordance with the provisions of the Labour Relations Act.[2]

[6] It is common cause that the respondent was indeed dismissed from his employment on the 30 March 2000, following a disciplinary hearing held on 22 March of the same year. It is also common cause the respondent subsequently challenged the dismissal internally and lodged a dispute with the Dispute Resolution Committee set up for the purpose in terms of a collective agreement between the applicant and the representative workers' union. The dispute officer and shop stewards decided that they would not take further steps in the matter on behalf of the respondent as the "dismissal was neither procedurally nor substantively unfair".[3]

[7] The respondent was not content with this trend of events and on 5 June 2000 he referred the matter to the CCMA.[4] The proceedings before the CCMA took place on 11 September 2000. The commissioner found it did not have jurisdiction for the reason that the collective agreement between the parties was binding between the parties. The applicant contended at this point that the dismissal

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2 Act 65 of 1995.

3 Quoted from a facsimile by the dispute officer or originator, addressed to the Industrial Relations Officer dated 25 April 2000 which is annexed to the founding affidavit of the applicant.

4 Commission for Conciliation, Mediation and Arbitration.

had run its full course in accordance with the provisions of the Labour Relations Act.[5] The respondent did not agree and stated that the Independent Mediation Service of South Africa (IMSSA) had jurisdiction to arbitrate on this matter but that the organization was no longer in existence. In consequence, the respondent stated that he had launched another application to the CCMA for arbitration of the dismissal. He concluded therefore as follows:

> "I have thereof (*sic*) not exhausted all the remedies available to me to dispute my dismissal. The application pursued by the Applicant is therefore premature as the validity of my dismissal has not been arbitrated upon." (my underlining)

[8] This is where matters stood at the end of the hearing on the 20 April 2001. I was left uncertain as to whether this further referral to the CCMA was really part and parcel of determining whether the dismissal was in accordance with any provisions of the Labour Relations Act, if indeed, such a referral had been made as the respondent had not filed any document purporting to be proof of such referral. Consequently I reserved judgment in order to make the necessary enquiries and advised counsel that, depending on the outcome, I might require further submissions to enable me to reach a final decision. After preliminary enquiries I did not deem it useful to call for further submissions in order to make a decision. This is the case even though, in the course of my Court's communications with the parties and with the CCMA in Witbank, some unsavoury and probably unethical practices have come to the surface which may become the subject of a separate investigation, but which should not be allowed to further delay the outcome of the application itself.

[9] The Court, in applying ESTA, must ensure that the right of residence has only been terminated after any dispute over the dismissal has been determined in terms of the Labour Relations Act. The word "determined" in this context cannot be interpreted to mean the final and ultimate exhaustion of all conceivable remedies which the respondent might still explore or, for that matter, to mean the final and ultimate exhaustion, on his part, of all conceivable *fora* in which he might still challenge the validity of his dismissal either on the merits or even procedurally. Some criteria or limitation, in conformity with the Labour Relations Act, needs to be set to prevent the stalling of the granting

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5 Section 23 of the Labour Relations Act.

of eviction orders merely by an assertion on the part of a respondent that it has not exhausted all its remedies.

[10] It was submitted on behalf of the respondent that the case of *Karabo and Others v Kok and Others*[6] decided by this Court was authority for the proposition that, for as long as any potential for challenge existed on the part of an employee who wishes to dispute a termination, no court order for his eviction can be obtained. I do not agree. The court in that case was dealing with a vibrant dispute which had been timeously referred to the CCMA in terms of section 191(1) of the Labour Relations Act[7] and to which there was an end in sight albeit in the distant horizon. In two subsequent cases, the view that the mere fact that a disgruntled employee might potentially refer a dispute to the CCMA in terms of the Labour Relations Act, means there can be no termination before any potential dispute in respect of the dismissal has been determined in accordance with that Act, was firmly rejected by this Court.[8]

[11] In my view a dismissal is in accordance with the Labour Relations Act if certain basic pre-dismissal procedures set out in the Code of Good Practice: Dismissal in schedule 8 of that Act have been observed. These are set out in general terms to accommodate varying circumstances. The fundamental requirement appears to be that there should have been a fair hearing. Section 4 of the said code is headed "Fair procedure" and reads as follows:

> "(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision

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6 1998 (4) SA 1014; [1998] 3 All SA 625 (LCC). See paras [14], [15] and [22] of that judgment.

7 Section 191(1) of the Labour Relations Act specifies that an employee has 30 days within which to refer a dispute about the fairness of a dismissal to the CCMA or relevant bargaining council.

8 *Holdengarde v Zondi and Another* 2000 (4) SA 910 (LCC); [2000] 4 All SA 319 (LCC) at para [4]; *Kift v Windvogel and Others*, LCC 99R/00, 20 February 2001, [2001] JOL 8201 (LCC), Internet web site: http://www.law.wits.ac.za/lcc/2001/99r00sum.html at para [8].

taken, and preferably furnish the employee with written notification of that decision.

(2) . . .

(3) If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement.

(4) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures."

The above is to be read subject to section 188 of the Labour Relations Act which requires the reason for dismissal be a fair reason relating to the employee's conduct or capacity and that it was effected in accordance with a fair procedure.

[12] The Labour Relations Act nowhere includes the exhaustion of appeal processes as being part and parcel of procedural fairness. According to the authors of *The Labour Relations Act of 1995*: *A Comprehensive Guide*

> "CCMA commissioners have held that the Code does not require an appeal as part of a fair procedure. However, if the employer's code or policies make provision for an appeal, the employer will be obliged to ensure that a fair appeal procedure is followed."[9]

An interpretation by this Court which included the exhaustion of appeal processes as being a part of fair procedure would therefore go beyond the requirements of the Labour Relations Act itself. What is more, it would in many instances, virtually extinguish, rather than merely limit, the right of owners of land (or persons in charge of land) to a court order for eviction. That will be to go far beyond the intention of the legislation which is "to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land",[10] not to make such persons immune from eviction.

[13] It is therefore my considered view that the respondent's right of residence was terminated

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9 Du Toit *et al* 2nd ed (Butterworths, Durban 1998) at 387.

10 Taken from the long title of ESTA.

when he had exhausted the procedures afforded him in terms of the collective agreement which governed his employment relationship with the applicant. In this case I am convinced that the procedures were exhausted when, after the matter had been determined by the dispute resolution committee in terms of the collective agreement, the referral of the matter to the CCMA failed in September 2000.

[14] The Court is aware that, after proceedings were instituted in this Court, the respondent made a second referral to the CCMA which was also turned down for lack of jurisdiction. The respondent was duly advised on 9 July 2001 of this state of affairs and has, as far as the Court is concerned, taken no further steps in the matter. For that reason alone the Court would be justified in finding that the respondent's employment has been terminated in terms of the Labour Relations Act considering that over two months have passed with no further steps taken. In somewhat similar circumstances, in the case of *Holdengarde v Zondi and Another*,[11] Meer J of this Court stated the following:

> "The failure of an employee to pursue a referral to the CCMA and a dispute remaining unresolved for that reason, ought not to constitute grounds for finding that the dispute is undetermined for the purposes of section 8(3). Section 8(3) clearly contemplates a decisive determination of a dispute about the termination of employment beyond the mere referral thereof. It would clearly frustrate the operation of the Act if referrals of disputes to the CCMA were used to delay evictions in this manner."[12]

[15] It is accordingly my finding that the dismissal of the respondent was in accordance with the Labour Relations Act in that-

(a) a disciplinary hearing was held on 22 March 2000 in which it is not disputed that the respondent was allowed an opportunity to state his case;

(b) the Court accepts the applicant's version that the respondent was served notice of the disciplinary hearing and the respondent's bare denial in this respect is rejected;

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11 See n 8 above.

12 Above n 8 at para [4].

(c) it is common cause that on 5 April 2000 the respondent lodged a dispute with an internal committee established in terms of a collective agreement;

(d) it is common cause that the respondent was assisted by a shaft steward;

(e) finally it is also common cause that the decision taken was conveyed to the respondent.

All the above are minimum requirements or guidelines laid down in the code and in accordance with the Labour Relations Act.

[16] I am satisfied that all the other requirements set out in section 9(2) of ESTA for obtaining an eviction order have been met in that the respondent failed to vacate the premises in the period given after the termination of his right of residence; that a fundamental breach of the relationship between the applicant and the respondent occurred as provided for in section 10(1)(c) and that it is not practically possible to remedy it; and that the necessary notices as required by section 9(2)(d) of ESTA have been served as prescribed.

[17] The Court has studied the report submitted to it in terms of section 9(3) of ESTA which has highlighted the plight in which the respondent and his dependants will face should an order for their eviction be granted. Alternative accommodation in the area is not available as it is essentially a mining operations area with accommodation for mining workers and personnel. There is a nearby settlement falling under the Kriel Town Council but the Town Engineer, who was approached, informed the department that there are no vacant stands available. An even greater hardship will be suffered by the respondent's five children all of whom are still attending school in the area. While the Court is acutely sensitive to these factors it cannot, in terms of its mandate, deny the applicant's

rights.[13] For that reason the Court will accordingly grant an order for eviction but on such conditions as will afford the respondent and his family time to seek other alternatives.

[18] Consequently, I make the following order:

(a) The respondent, and any person who occupies through or under him, is hereby evicted from the applicant's premises situated at House No 22, Kwanala Village, Kriel Colliery, Mpumalanga.

(b) The respondent, and any person who occupies through or under him, must vacate the premises on or before 31 October 2001.

(c) If the respondent, and any person who occupies through or under him, has not

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13 See in this regard *Zorgvliet Farm & Estate (Edms) Bpk v Alberts and Another* [2001] 1 All SA 62 (LCC) at para [27]:

"Ek weet ook nie wat van die respondente gaan word indien hulle wel uitgesit word nie. Is daar vir hulle werksgeleenthede op ander plase? Of gaan hulle deel word van die massas mense wat blyplek in plakkerskuilings moet vind? Daar woon kinders saam met die respondente, wat ŉn reg op skuiling het. Dakloosheid is ŉn wesenlike sosiale probleem in Suid-Afrika. Ofskoon dit nie van plaaseienaars verwag kan word om onbepaald huisvesting vir gewese werknemers te voorsien nie, en ofskoon die owerheid bepaalde verantwoordelikhede ten aansien van huisvesting dra, het plaaseienaars tog ŉn sosiale verpligting teenoor gewese werknemers, veral werknemers wat al vir baie jare op die plaas woon."

See also *Glen Elgin Trust v Titus and Another* [2001] 2 All SA 86 (LCC) at para [7]:

"[7] With regard to the right to housing sections 26(1) and (2) [of the Constitution of the Republic of South African, Act 108 of 1996] clearly impose a duty upon the State to take measures towards the realisation of everyone's right to adequate housing, whilst section 26 (3), which specifies the duty not to evict or demolish homes without an order of Court applies horizontally as well. The right of children to basic shelter features in section 28(1)(c) of the Constitution together with the rights of children to basic nutrition, basic health care services, and social services. Whilst the primary onus must be on the State to deliver such services, these rights can apply horizontally as well especially when subsumed under the right to parental care contained in section 28(1)(b) of the Constitution. Similarly section 29(1)(b) imposes a primary obligation upon the State to ensure a basic education, whilst the right may also be capable of horizontal application vis-a-vis parents, guardians and others who may bear this duty. The protection of property rights of landowners embodied in section 25 of the Constitution clearly imposes duties on both the State and private persons. Section 25(1) which prevents the arbitrary deprivation of property except in terms of law of general application talks to the State and private persons alike, whilst sections 25(2) to (9) talk to the State."

vacated the premises on or before 31 October 2001, the Sheriff is hereby authorised to carry out the eviction order on 7 November 2001.

(d) The applicant is required to satisfy the Court before the date on which the eviction order referred to in paragraph (c) above is to be carried out, that the requirements of section 13 of ESTA, if applicable, have been adequately addressed.

(d) There is no order as to costs.

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ACTING JUDGE PRESIDENT F C BAM

For the applicant:
Leppan Beech Attorneys, Woodmead.

For the respondent:
Zehir Omar Attorneys, Springs.