IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held in **Durban** on **21 August 2006** **CASE NUMBER**: LCC71R-06
Before **Ncube AJ**

Decided on: 25 August 2006

In the matter between :

UMOBA FARMS (PTY) LTD Applicant

and

GANTSHO MACEBO AND 60 OTHERS Respondents

JUDGMENT

NCUBE A J :

[1] This is an opposed application for leave to appeal against the review judgment of this Court which was handed down on 26 June 2006. In that judgment, this Court set aside the Magistrate's provisional order for eviction of the respondents from the property of the applicant.

[2] The applicant had instituted an urgent application for the removal of his former employees from the farm as they had been dismissed by the applicant. The reason for dismissal was that the respondents had engaged in an unlawful strike. The application was made in terms of Section 15 of the Extension of Security of Tenure Act, Act 62 of 1997 (hereinafter referred to as "the Act").

[3] The grounds of appeal are set out in the notice of application for leave to appeal. The matter was fully argued before this Court on 21 August 2006.

[4] In short, the grounds for appeal were that this Court erred in finding that there was no evidence of violence, not even a threat thereof, that respondents had peacefully withdrawn their services, that there was no real and imminent danger of substantial injury to person or damage to property, that no adequate arrangements had been made for the reinstatement of the respondents

in the event of the final order not being granted, and that this Court should have accepted hearsay evidence of coercion to participate in the strike, seeing that informants did not file affidavits.

[5] In his argument in Court, Mr Pillay who appeared on behalf of the applicant, relied heavily on the fact that since there is already differing judicial pronouncements in the matter, in so far as the Magistrate has granted the order and this Court has set aside that order, the application for leave to appeal should therefore be allowed.

[6] I find myself unable to agree with Mr Pillay's submission. In my respectful view, the learned Magistrate misdirected himself when he made a finding that the applicant had made out a case for a provisional order for the urgent removal of the respondents from the farm. The facts of the case did not support the requirements of Section 15 of the Act.

[7] My view that the Magistrate misdirected himself, is fortified by the submission made by him. On page 3 of his submissions, the Magistrate said the following :

> "Magistrates do not deal with ESTA and PIE on a regular basis. The road to an acceptable solution under both these Acts, is paved with almost insurmountable hurdles for the unwary and the inexperienced. My humble apologies for that."

In response to the question whether the Magistrate had satisfied himself that there was a real and imminent danger of substantial injury to person or damage to property, the Magistrate expressed himself in the following terms :

> "Experience has shown that people who are on strike, do not shrink from violence towards people who are not part of their cause and even towards innocent people. They likewise do not care to damage property. An example that comes to mind is the recent strike of security officers who went on a rampage where people were killed and private property damaged regardless of who the victims were. *In casu*, various members of the respondents were being coerced in the strike and they feel intimidated by the presence of the so-called leaders."

This is a clear misdirection on the part of the learned Magistrate, as each case must be considered on its own merits.

[8] There is only one test for purposes of granting leave to appeal. The test was laid down by the Supreme Court of Appeal (the Appellate Division by then) in the case of *Zweni v Minister of Law and Order* 1993 (1) SA 523. Harms AJA (as he then was) said at 531 B-E :

> "The jurisdictional requirements for a civil appeal emanating from a Provincial or Local Division sitting as a Court of first instance are two fold :
>
> (1) the decision appealed against must be a 'judgment or order' within the meaning of those words in the context of S20(1) of the [Supreme Court] Act; and
>
> (2) the necessary leave to appeal must have been granted, either by the court of first instance, or, where leave was refused by it, by this Court. Leave is granted if there are reasonable prospects of success. So much is trite. But, if the judgment or order sought to be appealed against does not dispose of all the issues between the parties the balance of convenience must, in addition, favour a piecemeal consideration of the case. In other words, the test is then 'whether the appeal, if leave were given, would lead to a just and reasonably prompt resolution of the real issues between the parties'."

[9] With all due respect, the test in applications for leave to appeal is clear. The test for granting or refusal of the application does not depend on whether or not there is already differing judicial pronouncements, but whether there are reasonable prospects of success. In the case of *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another* 2005 (3) SA 231, Hlophe JP said at 237 B-C :

> "With respect, the test for matters of this nature is very clear. It is not the existence or otherwise of a dissenting judgment, no matter how powerful it might be. While it is true that dissenting judgments, especially on questions of law, may be of importance to the development of the law, they should never be elevated into the law."

[10] I turn now to deal with the admission or otherwise of hearsay evidence in urgent applications. Mr Pillay's submission was that I should have admitted hearsay allegations of threats of violence since such evidence is admissible in urgent applications. Whilst it is true that hearsay evidence may be admissible in such cases, if confirmed by way of an affidavit, this is not a general and untrammeled rule of evidence. In my original judgment, I found that the matter was not urgent as the facts did not support the requirements set out in Section 15(1)(a) to (d) of the Act.

[11] In any event, for hearsay evidence to be admissible in urgent applications, two requirements must be satisfied, *viz* the deponent to an affidavit must disclose the source of his information and, in addition, he must state that he believes those allegations to be true. In *Gulp v Tansley NO and Another* 1966 (4) SA 555, Theron J held at 559G :

> "But one important point emerging from the cases which I have enumerated in the preceding paragraphs is this, viz that our Courts have consistently refused to countenance the admission as evidence – for any purpose whatever – of any statement embodying hearsay material, save where such statement has properly been made the subject of an affidavit . . . of information and belief, i e save where the deponent . . . has not only revealed the source of information concerned but in addition has sworn .. . that he believes such information to be true and furnished the grounds for his belief."

[12] In *Mia's Trustee v Mia* 1944 WLD 102 Schreiner J dealt specifically with the need for averring in applications of urgency containing hearsay statements that the deponent believes in the truth of the statement in question. At 104, the learned judge expressed himself as follows :

> "It seems to me, however, that the foundation for the admission in application (sic) of this sort of what would otherwise not be evidence is the deponent's sworn or solemnly affirmed statement that he is informed and believes that certain facts exist. We have no rule requiring any particular form to be used and it may be assumed that any language showing that the deponent affirms his belief in the information would suffice. But it would not in my view be sufficient for the deponent merely to set out statements made by other persons without indicating whether he believes them to be true or not."

[13] The statement which I have been called upon to admit as evidence appears in paragraph 41 of Mr Koekemoer's founding affidavit. Mr Koekemoer states : -

> "Since the hearing on 8 April 2006, various members of the Respondents have approached Mr Potgieter and Mr Cele had informed them privately that they do not want to participate in the strike but are being coerced into doing so by a small number of 'group leaders'. I have been unable to identify who these leaders are but believe that they are elderly or high-ranking members of this worker party who have been working for Applicant and/or Illovo Sugar for a number of years. This situation creates its own tension and may also result in tempers flaring and ultimately violence."

This statement is too vague. The statement does not disclose the names of persons who made a report to Mr Potgieter and Mr Cele. There is also no mention in the statement that the deponent believes these specific hearsay allegations to be true. Therefore, even if it was accepted that this was an urgent application, such statement could not have been admissible.

[14] In *Southern Pride Foods v Mohidien* 1982 (3) SA 1068, Odes AJ held at 1071 :

> "The Courts were not indulging in formalistic fantasies in requiring an affidavit or affirmation 'of information and belief' for the admission of hearsay statements. Sound and practical reasons exist for the two-fold requirement. The source of information must be disclosed to enable a respondent, confronted by an allegation normally inadmissible as hearsay, to check its accuracy. And when the Courts prescribe the disclosure of the source of information, they mean, in my view, a disclosure with a degree of particularity sufficient to enable the opposing party to make independent investigations of his own, including, if necessary, verification of the statement from the source itself. General statements as to source such as 'one of the respondent's creditors' will not suffice to constitute an adequate compliance with the requirements.

> Such statements tell the opposing party nothing and are no more a disclosure source than the well-worn phrase, "I have been informed."

In the light of the above judgment, par 41 of Mr Koekemoer's statement, in its present form, is inadmissible.

[15] Mr Pillay argued that "damage to property' in the words of Section 15(1)(a) of the Act, must be construed to include financial ruin in the sense that, if the farm of the applicant stands idle, without cultivation, it is being damaged. He relied for this submission on the judgment of my learned brother Dodson J in *Grandvalley Estates (Pty) Ltd v Nkosi* 1999 (3) All SA 435. I disagree. Firstly, Dodson J did not decide the question of whether "damage to property" or threat of damage includes financial ruin. At 445(d) he held :

> "I am accordingly satisfied that the applicant has shown compliance with the requirements of Section 15(1)(a) of ESTA. There is therefore no need for me to consider the applicant's further argument that the applicant's property is threatened in that it faces financial ruin if the Trust withdraws from the project because of the respondent's presence on the land"

Secondly, it could never have been the intention of the Legislature to include financial ruin in the phrase "real and imminent danger of substantial injury or damage to any person or property". When this phrase is read in its context it refers to physical injury to person or damage to property, not financial ruin. Financial hardship is not sufficient.

[16] In the circumstances of this case, I am satisfied that there are no reasonable prospects of success on appeal.

1 Application for leave to appeal is hereby dismissed.

2 No order as to costs.

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ACTING JUDGE M T NCUBE

For the applicant :
Adv I Pillay instructed by the *Deneys Reitz Attorneys,* Durban.

For the respondents :
Adv R Pillemer instructed by *Brett Purdon Attorneys*, Durban