

IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD IN RANDBURG

Decided on: 26 March 2010

CASE NUMBER: LCC 05/2010

In the matter between:

MINAH KELATLILE LEBOGANG

Applicant

and

PETER SIEGWARD WALLACH

First Respondent

DEPARTMENT OF RURAL DEVELOPMENT

AND LAND REFORM

Second Respondent

JUDGEMENT

MIA A J:

[1] The matter came before this Court on 12 January 2010 on an urgent basis requesting relief as follows:

- “1. That in terms of Rule 34(1) (a) of this Court, this Application be heard as one of extreme urgency and that the non compliance with the rules of this Honourable Court be condoned; and
2. That the first respondent be ordered to restore unhindered access for applicant and her children to their house on Plot 53, Sandrella; and
3. That the first respondent is hereby interdicted from unlawfully evicting the applicant and her children from plot 53, Sandrella; and
4. That the First Respondent be ordered to put down all the dogs belonging to the first respondent within 24 hours of this order; and
5. Should the First respondent fail to put down the dogs as ordered that the local sheriff for Krugersdorp be ordered to do so immediately; and
6. That the First respondent be ordered to pay costs incurred by the Sheriff in this regard.
7. Costs on attorney own client scale.

8. Further and/or alternative relief.”

BACKGROUND

[2] Upon receiving the application, directions were issued herein and the matter was set down for hearing on 29 January 2010. On 29 January 2010 the legal representatives Mr. Sigogo instructed by Ms D Gilfillan and Mr. E Friedman acting on behalf of the respondent appeared and requested an opportunity to settle the matter. The legal representatives requested a remand by agreement to the 18 February 2010 to attempt to settle the matter. No settlement was reached by the 18 February 2010 and the matter proceeded.

[3] The applicant is a tenant on the respondent's property at plot 53, Sandrella, Muldersdrift, and Mogale City. She resides on this property since 2003, with her children Lesego, Joseph and Mpho, until he died. In December 2009 the applicant's minor child, Mpho was mauled by the respondent's dogs and subsequently died in hospital. The applicant states at paragraph 12 of her affidavit that:

“This is a matter of extreme urgency. I have been threatened with eviction by the first Respondent on 8th January 2010 who is intimidating us into leaving the property against our will and without an order of court.”¹

[4] The applicant indicates further in her affidavit that a charge of culpable homicide is pending related to the death of her child, Mpho and that the threat of eviction emanates from this incident. The applicant expressed concern that the dogs were still roaming the property and that she feared for her life and safety. The

¹ Page 4 paragraph 12 of Applicant's founding affidavit.

applicant indicated that this was not the first attack on a person by the respondent's dogs. She refers to two previous incidents where persons were bitten by the respondent's dogs. She states that since her child, Mpho's death they lived in constant fear of attack by the dogs whilst on the property.

- [5] The legal principles applicable to the granting of an interdict are trite and elucidated in various judgments. In **Diepsloot Residents' and Landowners' Association and Another v Administrator, Transvaal 1994 (3) SA 336(A) at 336 H-I**, the requirements are noted as follows:

"The requisites for a final interdict are well settled. The appellants have to establish (i) a clear right (ii) unlawful interference with that right, actually committed or reasonably apprehended and (iii) the absence of any other satisfactory remedy."

- [6] The issues in this case are whether the applicant has made out a case proving her right to occupy the premises, whether her continued occupation has been harmed or threatened by an eviction or that there is a reasonable apprehension of harm from the respondent or his dogs. The applicant must also prove that she has no alternative remedy available. If she satisfies the requirements in this regard she is entitled to an order interdicting the respondent from evicting her from the property as well as relief which ensures her security.

- [7] Section 5 of "ESTA" refers to fundamental rights which are recognized whilst section 6 provides for the occupiers rights. The relevant sections read as follows:

"5. Fundamental rights
Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a

person in charge shall have the right to-

- (a) human dignity;
- (b) **freedom and security of the person;**
- (c) privacy;
- (d) freedom of religion, belief and opinion and of expression;
- (e) freedom of association; and
- (f) freedom of movement,

with due regard to the objects of the Constitution and this Act.

6. Rights and duties of occupier

(1) Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly.

(2) Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right-

- (a) to security of tenure;
- (b) to receive bona fide visitors at reasonable times and for reasonable periods”
[my emphasis]

[8] The applicant refers to her rights as an occupier to human dignity, freedom and security of person, guaranteed to occupiers in terms of “ESTA” and also in terms of the Constitution of the Republic of South Africa. She states that this right is breached by the threat of an eviction and of an attack by respondent’s dogs whilst they roam the property unaccompanied or without control. She fears a further attack by the dogs whilst on the property.

[9] The respondent raises the question of the Court’s jurisdiction to grant an order to destroy the dogs. It was submitted that such a request is only reserved to the State in criminal proceedings in terms of the **Animal Matters Amendment Act 1993, Act 42 of 1993**. Further that only a court adjudicating a criminal matter has jurisdiction to grant an order to destroy animals in terms of the aforementioned Act.

[10] The respondent denies having threatened to evict the applicant. It was submitted that the applicant enjoys unhindered access to her room on the property and has failed to prove that she was evicted or threatened with eviction. The respondent in his answering affidavit offers the applicant a fresh twelve month lease contract to demonstrate his attitude to the applicant's continued occupation. The applicant persists with her allegation in her replying papers and refers to a conversation she had with the respondent to support her version.

[11] Having regard to the affidavits filed herein there is no longer any dispute with regard to the applicant's continued occupation of the property, in view of the new lease tendered by the respondent. The applicant's right to occupation is established and there appears to be no threat from the respondent with regard to an eviction. From the applicant's occupation of the leased premises, it follows that the applicant as an occupier enjoys the rights afforded in terms of sections 5 and 6 of "ESTA". She has the right to security of her person and also freedom of movement sufficient to enable her to enter the property and to move around her particular living quarters.

[12] The applicant states that her security of person is compromised by the threat of the respondent's dogs. In support of this statement she refers to an attack on two other persons as well as the attack on her own child. The respondent does not dispute that the dogs bit the applicant's child or the other persons, he does

however disagree with the manner in which the applicant describes such prior incidents. The respondent's version on the one incident is that a group of persons were unlawfully trespassing on his property. They were warned to leave and refused. One of the dogs came to the respondent's aid when it appeared that one of the group appeared to attempt to attack the respondent. The second incident occurred when the dogs were fighting and a visitor was accidentally bitten.

- [13] The respondent opposes the relief to put down his dogs. It was further submitted that this Court has no jurisdiction to grant an order to put down the dogs as section 25(1) of the Constitution provides that no person may be deprived of property except in terms of a law of general application, and no law may arbitrary deprive one of property. Mr. Friedman submitted that the destruction of the dogs amounted to a deprivation of property which is protected by section 25(1) of the Constitution. It was further submitted that it is not possible to have the dogs enclosed within the fenced area around the respondent's home as he had property beyond the fenced area which required protection. The respondent was concerned about burglaries on farms and wishes to be in a position to protect his property. Mr. Friedman indicated that the dogs burrow under the fence and could escape from the enclosed space and an order which required that he keep the dog in the fenced area would not protect the applicant. Mr Friedman submitted further that his client's right to security must be balanced with the applicant's rights as an occupier.

[14] In response Mr. Sigogo submitted that the application for alternative suitable relief accommodates the applicants request for alternative relief in the form of an order that the dogs be suitably restrained to ensure that applicant is protected while she is an occupier on the property and also per Section 5 of “ESTA”. Mr. Sigogo submitted that the erection of a fence around the property occupied by the applicant would secure her safety and that the dogs be restricted to a fenced area around the respondent’s home.

[15] Both Mr. Sigogo and Mr. Friedman requested that costs be found in their favour. Whilst the first prayer requested by the applicant is no longer applicable in view of the tender of a fresh lease, the applicant’s apprehension with regard to harm from the dogs is reasonable. The respondent tendered a fresh lease but was not willing to take any steps to ensure the occupiers security. Having regarded to the papers and counsel’s address I am of the view that each party shall pay their own costs.

[16] In view of the previous incidents and particularly the last incident where the respondent’s dogs attacked the applicant’s minor child, the fear that the applicant or her other children may be attacked is a reasonable fear. Even on the respondent’s version of the incidents, the incident involving a visitor to the respondent’s home resulted in an injury to a visitor which occurred without provocation by the visitor. The applicant is entitled to security as provided for in terms of Section 5 of “ESTA”.

[17] The applicant has a right to security of her person as provided in section 6 of ESTA as well as the Constitution. The applicant's fear of harm to her person was reasonable under the circumstances. This fear caused her to approach this court for the relief requested. The respondent whilst tendering a fresh lease did not adopt a similar attitude with regard to keeping control over the dogs. Having regard to all of the facts herein and the practice in this court not to award costs orders neither of the parties have convinced me that there should be a deviation in this matter. Consequently I am of the view that each party is to pay their own costs.

The following order is made:

[18] In light of the above considerations the following order is made:

1. The first respondent shall erect a chain link fence around the compound in which unit 26 where the applicant resides.
2. The first respondent shall take all reasonable steps not to allow the dogs to exit the fenced area around his house without adequate supervision.
3. There is no order as to costs.

SC Mia

Acting Judge

LAND CLAIMS COURT

APPEARANCES

Counsel for Applicant: Advocate L. Sigogo

Instructed by: Gilfillan Du Plessis Attorneys (Pretoria)

Counsel for Respondents: Mr. L. Freidman

Earle Friedman Attorneys (Johannesburg)