IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER**: LCC 03R/05
In chambers: **MEER J** **MAGISTRATE'S COURT CASE NUMBER**: 1028/02

Decided on: 4 February 2005

In the review proceedings in the case between:
INHOEK VARKBOERDERY (EDMS) BPK Applicant

And

DANIEL KOK & 24 Others Respondent

JUDGMENT

MEER, J

[1] This is an automatic review[1] of an order granted in the Wolmaranstad Magistrates Court, in terms of section 15 of the Extension of Security of Tenure Act 62 of 1997, ("the Act") for the urgent removal of the respondents from the farm Inhoek, Wolmaranstad, owned by the applicant, pending the outcome of proceedings for a final eviction order by the applicant.

[2] The proceedings were commenced on an *ex parte* basis. An interim removal order was granted by way of a *rule nisi* on 25 September 2002 with a return day of 11 October 2002. For reasons which are not entirely clear, and notwithstanding the urgency of the matter, the rule was extended several times, and finally confirmed all of two years later on 20 October 2004. Thereafter it does not appear that an application for a final eviction order in terms of section 9 of the Act, was commenced with.

[1] in terms of Section 19 (3) of the Extension of Security of Tenure Act 62 of 1997

[3] I am unable to confirm the order on review, as, from a careful perusal of the record, I am of the view that the magistrate erred in finding that the applicant had satisfied all the substantive and procedural requirements prescribed at section 15 and was accordingly entitled to an urgent removal order. I set out the extent of the non-compliance with the provisions of section 15 of the Act, hereunder.

Non-compliance with substantive requirements of Section 15.

[4] The substantive requirements for the granting of an urgent removal order are set out at Sections 15(1) (a)-(d) of the Act. Section 15 states as follows:

> **"15. Urgent proceedings for eviction.___(1)** Notwithstanding any other provision of this Act, the owner or person in charge may make urgent application for the removal of any occupier from land pending the outcome of proceedings for a final order, and the court may grant an order for the removal of that occupier if it is satisfied that-
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> (a) there is a real and imminent danger of substantial injury or damage to any person or property if the occupier is not forthwith removed from the land;
> (b) there is no other effective remedy available;
> (c) the likely hardship to the owner or any other affected person if an order for removal is not granted, exceeds the likely hardship to the occupier against whom the order is sought, if an order for removal is granted; and
> (d) adequate arrangements have been made for the reinstatement of any person evicted if the final order is not granted.
>
> (2) The owner or person in charge shall beforehand give reasonable notice of any application in terms of this section to the municipality in whose area of jurisdiction the land in question is situated, and to the head of the relevant provincial office of the Department of Land Affairs for his or her information."

[5] From Section 15 it is clear that an applicant has to satisfy a court that the threshold requirements specified at Section 15(1) (a)-(d) are present before an urgent removal order can be granted.

[6] In the founding affidavit of Michael Kgaudi it is alleged that each and every one of these threshold requirements is present. It is stated that the respondents are former employees of the applicant whose rights of residence arose from their employment on the farm. There was always a harmonious working relationship between applicant and respondents until respondents joined the National Security Commercial and General Workers Union, embarked on a series of aggressive confrontations which both threatened the safety of applicant and other employees. In particular on 7 August 2002, respondents embarked on an unprotected and unprocedural strike, disciplinary proceedings were instituted against them and at a hearing on 23 August 2002 they were discharged and given notices to vacate the farms by 6 September 2002. The respondents declared a dispute which they referred to the CCMA and according to Kgaudi that dispute remains unresolved.

[7] The affidavit goes on to attest to a real and imminent danger if the respondents are not removed from the farm citing the following acts by them:

7.1 The first respondent threatened to assault Kgaudi and he fears this threat;

7.2 The fence around the pigsty has been cut and pigs and cattle have been stolen;

7.3 There have been incidents of assault and intimidation of other employees;

7.4 The respondents have taken a decision to bring Kgaudi's life to an end;

7.5 The police has suggested that the atmosphere on the farm is dangerous;

7.6 The situation is exacerbated by the fact that the respondents are unemployed and desperate.

[8] The answering affidavit of the first respondent and confirmatory affidavits of the other respondents vehemently deny these allegations. The first respondent expresses shock at the unsubstantiated accusations against the respondents and states they are vexatious and without any substance. He alleges that respondents have been victimized because they are members of the Union. Contrary to the applicant, the first respondent states that the dispute referred to the CCMA was decided in respondents' favour.

Applicant's replying affidavit does little to dispel the disputed facts.

[9] From the record then, it is clear that there were real and genuine disputes of fact on the crucial and material issue as to whether the circumstances specified at Section 15(1) (a)-(d) were present. This being the case the Court could not have satisfied itself that the subsection had been complied with, on affidavit only and in the absence of oral evidence. The learned magistrate, however, did not call for oral evidence and in a disconcertingly brief judgment unsupported by any reasons, simply stated that the applicant had complied with the requirements of Section 15 and granted the application. The magistrate clearly erred in so doing. Given the genuine disputes of fact, the application ought to have been referred to oral evidence[2].

[10] The magistrate in my view erred moreover in granting the interim order on an ex-parte basis. An ex parte application is one which is brought without notice either because no relief of a final nature is sought, or because it is not necessary to give

[2] See Frank v Ohlsson's Cape Breweries Ltd 1924 AD 289 @294

notice to the respondent[3]. Given the very real interests of the respondents, who stood to be removed from the farm if the rule nisi was granted, there ought to have been notice to and service upon them, however short, before the interim order for their removal was granted on 25 September 2002. The urgency of the situation does not moreover appear to have been of such a nature so as to circumvent the requirement of service. For respondents to have been removed from the farm by the sheriff pursuant to the granting of the interim order, without their having had an opportunity to be heard, and probably also without knowledge of the commencement of proceedings for their eviction, is contrary to the tenor of the Act.

Non-compliance with the procedural requirements specified at Section 15(2).

[11] Section 15(2) requires the owner or person in charge to give reasonable notice of an application to the municipality in whose area of jurisdiction the land in question is situated as well as to the head of the relevant provincial office of the Department of Land Affairs, for his or her information. From the record and pleadings there is no proof of service on the relevant municipality and the submissions by applicant as well as those of his attorney, in this regard, take the matter no further.

[12] In addition service upon the respondents appears to be far from satisfactory. It would appear that the notice of motion was served on the fourth respondent only. There is also no proof of service of the rule nisi on the first, second or twenty fourth respondents.

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[3] Page 350,Van Winsen et al, The Civil Practice of the Supreme Court of South Africa, fourth edition Juta 1997

[13] A final cause for concern is that notwithstanding the alleged urgency of the application, the return day followed two years after the interim order was granted, and to date there has been no application for a final eviction order in terms of section 9 of the Act. This flies in the face of an urgent application under section 15 which is clearly designed to allow for an urgent removal pending the outcome of proceedings for a final eviction order[4].

[14] In view of all of the above the order stands to be set aside. I grant the following order:

The order of the Magistrate for the district of Wolmaransstad, granted on 20 October 2004 in Case No. 1028/2002 for the removal of the Respondents from the farm Inhoek, Wolmaransstad in terms of Section 15 of the Extension of Security of Tenure Act no. 62 of 1997, is hereby set aside in its entirety.

MEER, J

[4] See Manana v Johannes, Uitkyk Farm Estates (EDMS) BPK v Visser LCC 60/98 unreported