IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER**: LCC 29R/00
MAGISTRATE'S COURT CASE NUMBER: 1373/2000

In chambers: **MEER J**

Decided on: 6 June 2000

In the review proceedings in the case between:

BERGBOERDERY Applicant

and

MESHACK SHADRAC MAKGORO Respondent

JUDGMENT

MEER J:

[1] This case came before me by way of a written request on behalf of the respondent that an order for his eviction granted under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[1], (hereinafter referred to as "PIE"), by the Magistrate, Lydenburg be reviewed by this Court in terms of its review powers under the Extension of Security of Tenure Act[2] (hereinafter referred to as "ESTA"). The request for a review was based on the contention that the respondent was an occupier under ESTA and the magistrate had erred in not considering the matter in terms of that act, and thereafter submitting it to the Land Claims Court for review.

[2] The facts and circumstances pertaining to the matter are as follows:

---

1 Act 19 of 1998.

2 Act 62 of 1997.

(i) The applicant commenced[3] an urgent application in the Lydenburg magistrate's court under section 5 of PIE for the eviction of the respondent from his farm, Oshoek. Although the eviction application was brought under PIE, (the requisite statute under which one seeks the eviction of an unlawful occupier[4] who occupies land without consent), the founding affidavit, without making reference to ESTA, intimates[5] that the respondent was in fact an occupier under ESTA. The affidavit states that the respondent had consent to reside on the farm from 25 June 1999 when he commenced employment with the applicant, until about 1 February 2000, when his employment was terminated.

(ii) The application appears to have been drafted, issued and an interim order granted at lightning speed, all of which occurred on 16 March 2000, with no thought to service upon the respondent. Although the application is called "EX PARTE AANSOEK OM UITSETTING" and is addressed to the respondent whose interest therein was clearly paramount, it was in fact not served on him. The respondent accordingly had no knowledge of the application when it was heard on 16 March 2000.

(iii) It was only on 20 March 2000 (after an interim eviction order had already been granted) that the respondent was served with a copy of the eviction application together with the interim order in respect thereof. At the same time he was served with a summons[6] for his eviction.

---

3 The application and supporting affidavit are dated 16 March 2000. On that same date the application was also issued and an interim order granted. The application was not served on the respondent before the interim order was granted.

4 'Unlawful occupier' is defined at PIE as "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Rights Act, 1996 (Act 31 of 1996)."

5 Although there is no reference to ESTA by name in the founding affidavit, para 4 thereof states that the respondent had the requisite consent to reside on the farm as is required of an occupier under ESTA. In this regard see para [8] below.

6 The summons was subsequently withdrawn on 12 April 2000.

(iv) On 27 March 2000 a notice of appearance to defend was served on the applicant's attorney and thereafter filed at court. The notice reflects the defendant's[7] attorney as GG Mashimbye of the Nkuzi Development Association Legal Unit. On the return day, 6 April 2000, attorney Mr Mashimbye appeared in the magistrate's court on behalf of the respondent. From the magistrate's cryptic notes of the proceedings contained in his order, as well as his subsequent submissions to me, it appears that the applicant's attorney objected to Mr Mashimbye being given a hearing because the respondent had not filed an opposing affidavit. Remarkably, and notwithstanding Mashimbye being the attorney of record, the objection was sustained, Mr Mashimbye was not given an opportunity to be heard, and a final eviction order was granted against his client.

(v) Almost immediately after the final order was handed down on 6 April 2000, the respondent's attorney[8] sent a written request to the magistrate to send the matter for automatic review under section 19(3) of ESTA to this Court, as the order related to the eviction of an occupier under ESTA. This did not happen.

(vi) Thereafter written submissions were sent to this Court on behalf of the respondent, requesting a review of the matter. From these it would appear that the respondent vacated the farm late in March. I sent a copy of the respondent's submissions to both the magistrate and the applicant's attorney, inviting them to make submissions of their own, which they did.

(vii) The magistrate conceded, in his submissions, that it was a *bona fide* mistake on his part to have granted the eviction order under PIE as opposed to ESTA. He stated also that the matter should have been sent for review to the Land Claims Court in terms of section 19(3) of ESTA and that the letter from the respondent's attorney requesting him to do so had not been brought to his attention.[9]

---

7 The notice of appearance to defend is presumably in respect of the summons, hence the reference to "defendant".

8 This letter is from attorneys Breedt and Herholdt, Lydenburg. From the Notice of Appearance to Defend it would appear that they are the Lydenburg correspondents of respondent's attorney.

9 The magistrate's submissions are set out more fully at para [8] below.

(viii) Submissions from the applicant's attorney stated that the respondent left the farm before 6 April (the return day of the interim order) on his own without an eviction order, and his whereabouts are not known. The applicant's submissions go on to state that the magistrate was correct in not granting the respondent's attorney a hearing on account of his failure to furnish an opposing affidavit, and also offer the opinion that the latter did not have proper instructions, and had been misinformed that the eviction had already occurred.

The jurisdiction of the Court

[3] Before dealing with the merits of the review application, I have to determine whether this Court has jurisdiction to adjudicate thereon. This poses the question whether I have the requisite jurisdiction to review an eviction order commenced and granted under PIE, an act over which the Land Claims Court has no jurisdiction,[10] where the record indicates that ESTA is applicable, the respondent subsequently alleges that the case fell to be determined under ESTA, and the magistrate concedes as much. The Court's review jurisdiction is set out at Chapter V of ESTA. Section 19(3) provides for automatic review and states -

> "Any order for eviction by a magistrate's court in terms of this Act . . . shall be subject to automatic review by the Land Claims Court . . . "

Section 20(1)(c) accords the Land Claims Court common law review jurisdiction:[11]

> "to review an act, omission or decision of any functionary acting or purporting to act in terms of this Act"

10 Section 1 of PIE defines 'court' as "any division of the High Court or the magistrate's court in whose area of jurisdiction the land in question is situated".

11 Unlike in the case of automatic reviews under section 19(3) of ESTA, the procedure for a review under section 20(1)(c) of ESTA is set out at Land Claims Court rule 35. Substantively such review accords with the grounds specified at section 24 of Supreme Court Act, No 59 of 1959.

In *Skhosana and Others v Roos t/a Roos se Oord and Others*[12] Gildenhuys J, after a comprehensive analysis of the sections of ESTA (including the two sections mentioned above) in which the phrase "in terms of the Act" appears, concluded:

> "Having regard to ESTA as a whole and taking into account its purpose and scope, I have come to the conclusion that the phrase 'in terms of', where used in the sections of ESTA from which this Court derives its jurisdiction, must be interpreted in a manner which will enable this Court to adjudicate in a case where the provisions of ESTA are at issue. So interpreted, the phrase 'in terms of this Act' will mean 'within the sphere of law established by this Act'. That does not mean that this Court will have jurisdiction to decide every issue which might arise in such cases. The issue must have some relationship with ESTA."[13]

[4] The learned Judge comments specifically on the Court's review jurisdiction under section 19(3) as follows:

> "Where in an action for eviction under common law, the defendant raises a defence based on ESTA and the magistrate finds that ESTA is not applicable and grants the eviction order, must the magistrate send the order to the Land Claims Court for automatic review? On a narrow interpretation of 'in terms of the Act' it will not be necessary because the eviction order was not made under common law. <u>However the legislature in providing for the automatic review of ESTA cases clearly intended that the Land Claims Court must scrutinise the records of those cases to ensure that the provisions of ESTA were correctly applied. It would be absurd if, on the one hand an eviction order made under the provisions of ESTA has to be reviewed by this Court while, on the other hand, an eviction order under common law consequent upon a decision that ESTA does not apply, is not subject to such review.</u>"[14] (my emphasis)

Drawing from the above, this Court would similarly have jurisdiction to review an eviction order like this one, granted under PIE (and accordingly by implication consequent upon a decision that ESTA does not apply), where the record indicates that the respondent was an occupier under ESTA[15] notwithstanding the fact that ESTA itself is not mentioned by name therein.

---

12 Reported as *Skhosana v Roos* in [1999] 2 All SA 652 (LCC).

13 *Skhosana* above n 12 at para [18].

14 *Skhosana* above n 12 at para [12].

15 In the following cases this Court has assumed jurisdiction where the records have indicated that ESTA is applicable: *De Villiers v Msimango* 1999 (4) SA 59 (LCC) at para [9];*Atkinson v Van Wyk and Another* 1999 (1) SA 1080 (LCC) at para [9] - [10]; *Pitout v Mbolane*, LCC 21R/00, 2 May 2000, internet web site http://www.law.wits.ac.za/lcc/2000/21r_00sum.html at para [6], *Theunissen v Chibodu*, LCC 70R/99, 18 November 1999, [1999] JOL 5785 (LCC); internet website http://www.law.wits.ac.za/lcc/1999/theunissensum.html at para [4].

[5] On the question of the Court's review jurisdiction in terms of section 20(1)(c), Gildenhuys J goes on to state in *Skhosana* as follows:

> "[T]he words 'purporting to act' might provide an indication of how far the legislature intended the jurisdiction of this Court to extend. If a magistrate should make a decision professing it to be in terms of ESTA, this court will have jurisdiction to review that decision on the grounds that it is not in terms of ESTA; in other words, this Court will have jurisdiction even if the Magistrate did not 'act in terms of ESTA' but only 'purported' to do so. In a reverse situation, where a magistrate, either knowingly or unwittingly, fails to apply ESTA under circumstances where ESTA should have been applied, and if the decision is brought under review on the basis that the Magistrate committed an irregularity by not applying ESTA, I can think of no logical reason why the legislature would have intended that the review must not be justiciable in this Court." (my emphasis)[16]

[6] The present case is clearly one in which the magistrate failed to apply ESTA in circumstances where ESTA should have been applied. Since the record indicates that ESTA is applicable I am able to assume jurisdiction to review under section 19(3) of ESTA. The position would have been different had the record contained no indication that ESTA was applicable. In *Theunissen v Chibodu*,[17] a case in some ways uncannily similar to this one,[18] Moloto J relying on the aforementioned extract from *Skhosana*, found that notwithstanding the Land Claims Court not having jurisdiction in cases under PIE, it has jurisdiction to review an omission of a magistrate to apply ESTA where the circumstances called for such application.[19] In that case too the record indicated that ESTA was applicable and the learned Judge went on to review the magistrate's order by way of automatic review under section 19(3) of ESTA.

[7] Relying on all of the above I find I have the requisite jurisdiction to review this matter in terms of the automatic review powers accorded at section 19(3) of ESTA. I am of the opinion that the magistrate's order stands to be set aside for the reasons set out below.

---

16 *Skhosana* note 12 at para [13].

17 Above n 15.

18 The respondent in the *Theunissen* case was also evicted under PIE. The magistrate thereafter also conceded to this Court that he had misdirected himself, as the respondent was an occupier under ESTA. The magistrate requested that his order be set aside.

19 Above n 15 para [4].

The magistrate erred in considering this matter under PIE as opposed to ESTA

[8] In his submissions the magistrate concedes that it was a *bona fide* mistake to grant the application in the form it was presented. In his view the application should have been brought in terms of section 15 of ESTA, as the respondent appears to fall within the definition of occupier as defined in ESTA. He in fact states that when the application was presented he had the provisions of section 15 of ESTA in mind. He attributes his mistake to his working conditions stating:

> ". . . due to extreme pressure of work and being the only magistrate available to attend to Motion Court applications, Civil and Criminal Courts as well as the administrative duties regarding the general public and office, I granted the order, intending it to be an interim order in terms of Section 15 of Act 62 of 1997."

It is regrettable in the extreme that a magistrate has to work under conditions which impact negatively on the administration of justice.

[9] From the papers before the magistrate it was evident that the respondent was an occupier under ESTA and not an unlawful occupier under PIE. This much is clear from paragraph 4 and 5 of the applicant's affidavit which state that the respondent had consent to reside on the farm from 25 June 1999 until his employment was terminated. The magistrate should have been alert to the fact that since there had been consent to reside on the farm the respondent could not have been an unlawful occupier[20] as defined in PIE but an occupier[21] as defined in ESTA.

[10] I note in passing that I am unable to agree with the magistrate's assertion that his order ought to have been granted in terms of section 15 of ESTA. This is so because the magistrate could not have been satisfied from the applicant's affidavit that the prerequisites for the granting of an urgent order for

---

20 See above n 4.

21 Section 1 of ESTA defines 'occupier' as "a person residing on land which belongs to another person and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding-
(a) a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996);
(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and
(c) a person who has an income in excess of the prescribed amount;"

removal specified at section 15(a) - (d) of ESTA were present.[22] These set out the essential averments required of the applicant in such an application.

The magistrate erred in not granting the respondent's attorney a hearing

[11] It was a miscarriage of justice for the magistrate not to have accorded the respondent's attorney a hearing on the return date. An appearance to defend had been filed on behalf of the respondent on 27 March 2000 from which his opposition was clear. His attorney of record was perfectly entitled to be heard on the return day whether or not an opposing affidavit had been filed. There is simply no basis for the ruling that the filing of an opposing affidavit is a prerequisite for the granting of a hearing to a legal representative, let alone one appearing at short notice[23] on the return day of an urgent application. I note also that neither the notice of motion nor the interim order of 16 March 2000 call for an opposing affidavit. The interim order simply calls for the respondent to show cause on 6 April 2000 why it should not be made final, cause which the respondent's attorney was prevented from showing. The magistrate's refusal to hear the respondent's attorney because of the applicant's objection that no opposing affidavit had been filed, appears particularly harsh in the light of his failure to take issue with the non service of the application upon the respondent prior to the hearing of 16 March 2000.

The magistrate erred in granting the interim eviction order in the absence of service thereof upon the respondent

[12] Failure to serve the application on the respondent prior to the hearing thereof, especially when it was addressed to him constitutes a serious miscarriage of justice which escaped the attention of the

---

22 See *Kgaphola v Mogashoa*, LCC 15R/98, 19 January 1999, [1999] JOL 4424 (LCC); internet website http://www.law.wits.ac.za/lcc/1998/kgaphulosum.html at para [2.1] and *Uitkyk Farm Estates (Edms) Bpk v Visser and Another*, LCC 60/98, 6 November 1998, internet web site http://www.law.wits.ca.za/lcc/1998/uitkyksum.html at para [13].

23 Mr Mashimbye indicated in the record of the proceedings in court on 6 April 2000 that the matter has been brought to his attention late.

magistrate.[24] As the relief claimed in the application very significantly affected the rights of the respondent, it was incumbent upon the applicant to serve upon him albeit at extremely short notice due to the alleged urgency. I note also that the magistrate did not raise any objection to the anomaly that the application is styled as an *ex parte* one, yet is addressed to the respondent. An application is typically brought *ex parte* where a litigant approaches the court for relief affecting his or her rights only and not those of anyone else. Clearly this was not the case here.

[13] An *ex parte* application by its very nature places only one side of the case before the court and requires the utmost good faith on the part of the applicant.[25] According to Harms an applicant may apply for relief by way of an *ex parte* application in the following circumstances:

> "(a) If the relief sought affects the rights of the applicant only and not those of anyone else;
> (b) If the relief sought is preliminary to the main proceedings and is necessary to bring other interested parties before court. Examples are applications for edictal citation, substituted service, arrest to found or confirm jurisdiction, removal or restrictive conditions and the like;
> (c) if the nature of the relief sought is such that notice to the respondent may render the relief nugatory. A typical example is the Anton Piller-type application;
> (d) If, due to the urgency of the matter, notice cannot be given to the respondent, for instance if the harm is imminent;
> (e) If the identity of the respondent or respondents is not really ascertainable (in which event the relief sought will be for a rule *nisi* with directions on how to serve the rule *nisi*)."[26]

In addition a good and proper case must be made out as to why the application should be made *ex parte*.[27] These circumstances did not pertain to the application brought on 16 March 2000, albeit the relief claimed therein was not final in nature. I note also in passing, (since the magistrate's courts rules were applied in the eviction application, and notwithstanding the fact that High Court rules apply in

---

24 See in this regard *Serfontein v Molo and Others*, LCC 53R/99, 7 September 1999, [1999] JOL 5286 (LCC) at para [10] - [11]; *Malan v Gordon* [1999] 2 All SA 389 (LCC); 1999 (3) SA 1033 (LCC) at fn 21; *Wessels v September and family*, LCC 11R/00, 17 March 2000, internet web site: http://www.law.wits.ac.za/lcc/2000/11r00.sum.html at para [4].

25 Harms *Civil Procedure in the Supreme Court* (Butterworths, Durban 1998) at 177.

26 Harms above n 25 . See also *Collective Investment (Pty) Ltd v Brink and Another* 1978 (2) SA 252 (N) at 255G; *Office Automation Specialists CC and Another v Lotter* 1997 (3) SA 443 (E) at 446A - 447C.

27 *Office Automation* above n 26 at 448B.

matters which fall to be considered under ESTA), that an application for eviction cannot be brought on an *ex parte* basis in the magistrate's court.[28]

[14] Regard being had to all of the above I made the following order on 22 May 2000:

> 1 The order for the eviction of the respondent granted by the Magistrate, Lydenburg in case number 1373/2000 is set aside in its entirety.
>
> 2 The applicant is ordered to immediately restore to the respondent his full rights of occupation.

[15] At the time of making the order I indicated that reasons would follow. My reasons are as stated above.

_____

JUDGE Y S MEER

For the applicant:
S E Curlewis of Jacobs Attorneys, Lydenburg

For the respondent:
GG Mashimbye of *Nkuzi Development Association Legal Unit, Pietersburg*

---

28 Magistrate's court rule 56 provides for the following orders to be brought *ex parte*:
(a) an arrest *tamquam suspectus de fuga;*
(b) an interdict;
(c) an attachment to secure claims; and
(d) a *mandamentem van spolie*.

.