

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In chambers: **Gildenhuys AJ**

CASE NUMBER: LCC 92R/00

MAGISTRATE'S COURT CASE NUMBER: 591/00

Decided on: 30 November 2000

In the review proceedings in the case between:

GREEN AM

Applicant

and

GUMEDE T a.k.a. SILEVU D

Respondent

JUDGMENT

GILDENHUYS AJ:

[1] In this matter the Additional Magistrate, Howick, granted an eviction order on 20 April 2000 in terms of the Extension of Security of Tenure Act¹ (which I will refer to as the “Tenure Act”). The order reads as follows (I quote *verbatim*):

“2.1 That the Respondent and all persons occupying through him the immovable property known as Mansfield Farm and situate in the district of Nottingham Road be and are hereby evicted from the said immovable property together with their movable property of any nature whatsoever;

2.2 That the Respondent be directed to pay the costs of this Application;

That pending the finalisation of this Application, the Respondent and all persons occupying through him and their movable property be and hereby removed from the immovable property known as Mansfield Farm and situate in the district of Nottingham Road and:

3.1 That the Respondent and all persons occupying through him the said Mansfield Farm be and are hereby directed to vacate the said Mansfield Farm on or before 16.5.2000;

3.2 That in the event of the Respondent and all persons occupying through him the said Mansfield Farm failing to vacate the said farm on or before the date mentioned in paragraph 3.1 above, the

1 Act 62 of 1997, as amended.

Sheriff may take all such steps as reasonably necessary to evict the Respondent and all occupying through him from the said Mansfield Farm, together with their movable property.”

[2] The Magistrate describes the circumstances under which the eviction order was made in a note which reads as follows (I quote *verbatim*):

- “1 The Applicant who is the owner of “Mansfield Farm” situate at Nottingham Road made an urgent application for eviction of the Respondent who was an employee on the farm in terms of Section 15 of the Extension of Security of Tenure Act No. 62 of 1997 on the grounds set out in the notice of the application.
- 1.2 On 12.4.00 a Rule Nisi was issued calling upon the Respondent to show cause on or before 14.6.00 why the order prayed for should not be made and the Respondent was ordered to file answering affidavit by 18.4.00 whereafter the Rule was extended until 20.4.00.
- 1.3 On 20.4.00 the Respondent having not filed an answering affidavit and not made an appearance, the order was granted in terms of paragraphs 2 and 3 of the Notice of application.
- 1.4 The Respondent later filed answering affidavits in the light of which it became desirable that oral evidence be heard.
- 2 It has since come to my notice that in granting the order I did not comply with the provisions of Rule 35A of the Land Claims Court Rules as I was then not aware thereof and as a result the order has in the meantime been enforced.”

Pursuant to the eviction order, the respondent and all persons occupying through him were evicted from “Mansfield Farm”.

[3] It is not possible, from a perusal of the order, to determine under which subsection of the Tenure Act the order was granted.² The order is now before me on automatic review under section 19(3) of the Tenure Act. The matter was not submitted for review on an earlier date, because the Magistrate did not know that it was necessary. The Tenure Act has been in operation for some time now. Extensive dissemination of information and training programmes for judicial officers and practitioners have taken place. The Magistrate’s ignorance of the review requirements of the Tenure Act deserves unsparing censure, all the more so because the Magistrate did not even apologise or explain how it happened that he was unaware that his order was subject to automatic review. The applicant’s attorney

2 See in this respect par [8] below.

also should not have allowed the eviction order to be implemented, because in terms of the Tenure Act³ the order is suspended pending review thereof by this Court.

[4] The eviction order granted by the Magistrate on 20 April 2000 followed the exact wording and numbering of the applicant's notice of application. After the eviction order was granted, answering affidavits were filed. No application was, however, made for rescission of the eviction order.

[5] After the eviction order was executed, the respondent in the eviction application applied by way of notice of motion dated 13 June 2000 for an order against the applicant in the eviction application that he and those who occupied through him, be restored "with possession of the 3 roomed dwelling" on Mansfield Farm. The many prayers contained in the June notice of motion do not contain a prayer for the rescission of the eviction order dated 20 April 2000. If the eviction order is not rescinded, the basis for some of the prayers are difficult to understand. Further affidavits were filed in response to the June notice of motion.

[6] Section 15(1) of the Tenure Act allows an urgent application for an order whereunder a person can be removed from the farm. Such an order, if granted, is an interim order that operates pending the outcome of proceedings for a final eviction order.⁴ Prior to launching a section 15(1) application, the applicant must give reasonable notice of the application to the municipality in whose area of jurisdiction the farm is situated, and to the relevant provincial office of the Department of Land Affairs.⁵ There is no indication that this was done. If the order of 20 April 2000, or any portion thereof, is intended to be a removal order under section 15(1), the failure to give the requisite notices renders the eviction

3 Section 19(5). The subsection was inserted by section 11(b) of the Land Affairs General Amendment Act 11 of 2000.

4 See for example *Du Preez v Tserema and others* [2000] 3 All SA 367 (LCC).

5 Section 15 (2) of the Tenure Act provides:
 "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."

proceedings defective.⁶ The applicant must also, in an application for an interim removal order, satisfy the court that the prerequisites for such an order, as contained in section 15(1)(a) to (d), have been met.

[7] A final eviction order may be granted under section 9(2) of the Tenure Act. Such an order is different from an interim order, and has different requirements. Apart from the substantive requirements of section 9(2)(a), (b) and (c), there is also, in section 9(2)(d), a requirement that two calendar months advance notice must be given to the occupier concerned, to the municipality in whose area of jurisdiction the farm is situate, and to the head of the relevant provincial office of the Department of Land Affairs. If the order of 20 April 2000, or any portion thereof, is intended to be a final eviction order in terms of section 9(2), then the proceedings which led to the order are defective because there is no indication in the papers before me that written notices were given as required by section 9(2)(d). The applicant stated in an affidavit dated 3 April 2000 that he will “in the interim give the notices as referred to in section 9(2)(d)”. Even if he did so, which has not been established, the notice period would have fallen short of the requisite two calendar months as the eviction order was granted on 20 April 2000.

[8] The order granted by the Magistrate, and also the relief claimed by the applicant, are confusing. The applicant averred in his affidavit of 3 April 2000:

“I respectfully submit and aver that in so far as the prayer for interim relief is concerned, this application should be dealt with as an urgent application in terms of the provisions of section 15 of the [Tenure] Act.”

It would appear that the prayers in 3.1 and 3.2 of the Notice of Motion were intended to be for interim relief in terms of section 15(1) of the Tenure Act, because they are asked for *pending the finalisation of this application*, whilst those in 2.1 and 2.2 of the Notice of Motion would be for final relief in terms of section 9(2). How both sets of relief could have been granted on 20 April 2000, defies comprehension. Surely final relief (under 2.1 and 2.2 of the order) would supercede any interim relief (under 3.1 and 3.2 of the order).

6 Du Preez above n 1 at para [5].

[9] I doubt whether the applicant has proved all the facts which must be established in terms of section 15(1)(a) to (d) for an interim removal order, or all the facts which must be established in terms of section 9(2)(a) to (c) for a final eviction order. In view of the still pending litigation, I will make no further comments. I will set aside the order of 20 April 2000 on the grounds that the procedures were deficient as discussed in paragraphs [6] and [7] above. Such a course will leave the pending litigation untrammelled by findings of this Court on any of the merits, and leave it to the parties, through apposite proceedings in the Magistrate's Court, to extricate themselves from the procedural disarray into which the case has fallen.

[10] Finally, I impress upon the parties that, pending the resolution of this matter, they must behave without hostility towards each other. If the respondent should decide to return to the farm, I point out to him that no form of violence will be tolerated.

[11] For the foregoing reasons I make the following order:

- (a) the order of the Additional Magistrate: Howick dated 20 April 2000 is hereby set aside in full;
- (b) the case is remitted to the Magistrate;
- (c) the applicant is ordered to restore possession of the three roomed dwelling on Mansfield farm to the respondent and to all other persons who previously occupied through him; and
- (d) nothing contained in this order will prevent the Magistrate from adjudicating upon any of the applications (including this application) presently pending before him.

For the applicant

Mr Lotz instructed by Shepstone & Wylie Tomlinsons, Pietermaritzburg

For the respondent

In person