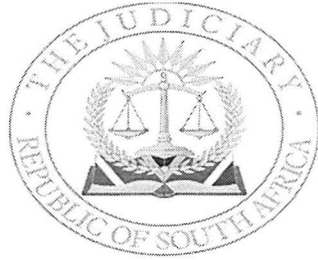
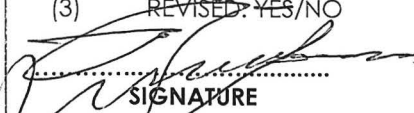


REPUBLIC OF SOUTH AFRICA



IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: LCC163/2022

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES/NO
	8 March 2023
..... SIGNATURE DATE

In the matter between:

ELSABE JUYN N.O

First Applicant

ANDRIANUS JUYN.NO

Second Applicant

ANDRIANUS COERTZEN N.O

Third Applicant

WILLEM FRANCOISIS N.O

Fourth Applicant

JANET MALAN N.O

Fifth Applicant

and

PETRUS JOHANNES BATHO

First Respondent

JB MARICS LOCAL MUNICIPALITY

Second Respondent

**AGRICULTURE AND RURAL
DEVELOPMENT**

Third Respondent

JUDGMENT

NCUBE J

Introduction

[1] This is an application in which the applicants seek an urgent eviction of the first respondent in terms of section 15 of the Extension of Security of Tenure Act, Act 62 of 1997 (“the Act”). The affected land is portion 7 of Kromdraai 509, Registration Division IQ North West (“the farm”) The application is brought in two parts Part “A” is the urgent removal of the first respondent from the farm pending finalization of part “B”. Part “B,” on the applicant’s papers is the interdict application. Whilst part “A” is alleged to be urgent, part “B” is to be heard in ordinary course. The application is opposed by the first respondent. Part “A” is interim in nature pending finalization of part “B.” The parties agreed that part “A” was to be dealt with first. However, for reasons which will become clear later in this judgement, part “B” cannot stand.

[2] The applicants filed their urgent application on 15 November 2022. The application was indeed treated as one of urgency. I condoned non-compliance with rules pertaining to service and filing time lines. I issued directives giving dates on which Answering and Replying Affidavits were to be filed. I also directed that any of the parties were still free to dispute the urgency of the application. I issued Rule Nisi calling upon the first respondent to show cause by 25 January 2023 why orders prayed for could not be granted. The first respondent failed to file his answering affidavit on time as directed hence his condonation application which I shall deal with hereinafter.

Condonation

[3] In terms of the directives issued on 15 November 2022, the first respondent was supposed to have filed his answering affidavit on 23 November 2022 and his heads of argument on 12 December 2022. The first respondent failed to comply with the time frames. He filed his answering affidavit on 07 December 2022. He filed his heads of argument on 19 December 2022, hence the application for condonation. Rule 32 (4) of the Land Claims Court Rules provides:

“The court may upon application and on good cause shown at any stage of the proceedings-

- a.
- b. condone any irregular step or any non-compliance with these rules or with an order or direction of the court; or

C.”

Therefore, the applicant for condonation must show good cause why his non-compliance with the rules or court directions must be condoned.

[4] The legal principles on condonation were succinctly analysed in ***Malane v Santam Insurance Co Ltd***¹ Holmes JA (as he then was) expressed himself in the following terms:

“In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts...”

In *casu*, the answering affidavit was late by ten days and heads of argument were late by seven days. However, the first respondent has given a reasonable explanation. The first explanation is that the first respondent thought that he had ten days to file an answering affidavit. The problem is that the first respondent was served with the notice of motion separately from the court directives. The notice of motion gave him ten days to file notice of opposition. The first respondent was confused when he got court directives giving him 23 of November 2022 to file his answering affidavit. He then started applying for legal aid. For this reason, couple with good prospects of success, the application for condonation should succeed.

URGENCY

[5] The first respondent disputes urgency. He has a right to argue that the application is urgent. Urgency is dealt with in Rule 34 of the Rules of the Land Claims Court. Rule 34 (2) provides:

“The applicant must set out in his or her founding affidavit the circumstances which he or she aver render the matter urgent and the reason why he or she cannot obtain substantial redress at a hearing in due course.”

¹ 1962 (4) SA 531 (A) at 532 B-F

In the present application, the applicants deal with urgency in paragraph 11 of their founding affidavit. Paragraph 11 states: -

- a. "The tenant of the farm, Mr Schoeman is regularly intimidated and threatened by the 1st Respondent that his cattle (valued at R300 000.00) will not be allowed any water on the farm and that Mr Schoeman will be harmed if he would dare to enter the farm;
- b. The cattle herdman and workman of the tenant was chased off the farm by the 1st Respondent and thereafter the cattle were without supervision and were in danger that they might be stolen, injured or die;
- c. The cattle was (sic) subsequently removed to keep them temporarily safe, but they are now without grazing and might suffer or die of hunger, if they are not returned to the farm that the tenant rents from the trust;
- d. The respondent had already caused irreparable harm and damage to the trust in the past and his threats are not irrelevant or idle threats."

[6] All the conduct complained of above, is of a general nature, it is not supported by credible evidence. There is not even a single sentence giving circumstances which render the matter urgent. There is not even a single sentence giving reasons why the applicants cannot obtain substantial redress at a hearing in due course. The alleged conduct of the first respondent is complained of in two letters, one is dated 27 January 2020 and the second one is dated 29 April 2021. However, no urgent steps were taken till now. One wonders why the matter is now, suddenly urgent – PTO when it was not urgent in 2020 and 2021. Urgent litigation is not a game and it should not be easily resorted to if the circumstances do not justify it. This matter is not urgent and could be struck off of the roll, on that ground alone. However, I have decided to deal with the merits of the application as well.

[7] In *casu*, the applicants seek the urgent removal of the first respondent from the farm in terms of Section 15 of the Act. Section 15 provides:

"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 the final order and the court may grant an order for the removal of that occupier if it is satisfied that –
 - (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 others effective remedy available;

- (c) the likely hardship to the owner or any affected person if an order for the 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 Rural Development and Land Reform for his or her information."

[8] To succeed in this type of an application, the applicants must comply with all the requirements of section 15 as discussed above. The founding affidavit does not refer to these requirements. There has been no compliance with the very first requirement as there is no evidence of the real and imminent danger of substantial injury or damage to property if the first respondent is not forthwith removed from the farm. The alleged damage to the cattle of the tenant Mr Schoeman, is not imminent as the cattle are no longer on the farm. Mr Schoeman has removed his cattle from the farm already. In that regard, the removal of the first respondent will serve no purpose. In any event, in WhatsApp message between the first respondent and Mr Schoeman, the first respondent called upon Mr Schoeman to bring back the cattle but he has not done so.

[9] The second requirement is that there must be no other effective remedy. In paragraph 21 of the founding affidavit the deponent there to states:

"During this period we even applied for an eviction order against the 1st Respondent and one of his friends, one Gary Purchase, in the magistrate court of Potchefstroom, only to find that when we succeeded with the order neither Mr Purchase nor the 1st Respondent was staying on the farm at that stage."

The above is evidence of "*other effective remedy*." The applicants are armed with an eviction order which they could have executed, but they did not, they chose to institute the present proceedings.

[10] The likely hardship to the owner and the trustees as against hardship to the first respondent is not addressed at all in the founding affidavit. Likewise, there is no mention of adequate arrangements made for the reinstatement of the first respondent

if the final order is not granted. These are motion proceedings. In these proceedings, the applicants must make out a case in their founding papers.² In **Foize Africa (Pty) Ltd v Beheer Bv and Others**³, Leach JA said:

“As in motion proceedings the affidavits serve as both pleadings and evidence, in a case such as this it would be necessary to place the relevant facts upon which reliance is place before court by way of affidavits.”

See also **ABSA Bank Ltd v Kernsig 17 (Pty) Ltd**.⁴ In **Molusi and Others v Voges N.O and others**⁵ Nkabinde J expressed himself in the following terms:

“It is trite law that in application proceedings the notice of motion and affidavits define the issues between parties and the affidavits embody evidence.”

[11] Section 15 (2) requires the owner or person in charge as a prerequisite for the granting of an order in terms of section 15 to serve a notice of the application on the municipality in whole area of jurisdiction the land in question is situated. The notice must also be served on the head of the relevant Provincial Office of the Department of Rural Development and Land Reform. In the present case, there is no indication such notices were given to those functionaries beforehand as the section requires.⁶ The founding affidavit is also silent in that regard, so, it is safe to assume that it was never done.

[12] The other disturbing feature of this case, is that the applicants do not display any intent to apply for the final eviction order in terms of section 9 of the Act. Section 15 eviction order is an interim order which is granted pending the outcome of the application for the final eviction order. It must be borne in mind that section 15 eviction is a drastic and very exceptional type of an order which the court can make. Therefore, it is necessary that there should be strict compliance with the requirements before such an order can be granted. In this case the applicants failed to make out a case for eviction in terms of Section 15 of the Act.

² *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008 (5) SA 339 (SCA) at para 78*

³ *2013 (3) SA 91 (SCA) at 102 para 30 G-H*

⁴ *2011 (4) SA 492 (SCA) para 23*

⁵ *2016(3) SA 370 (CC) para 27*

⁶ My own emphasis

[13] What remains is the question of costs. Mr Mokotedi, Counsel for the first respondent, submitted in his heads of argument for the dismissal of the applicants' case with costs on attorney and client scale. Mr Coertze, attorney of the applicants, submitted in his heads of argument that a costs order against the first respondent is justified in the circumstances of this case. He even intimated that costs *de bonis propriis* against the first respondent's legal team, should be awarded. In my view, if costs *de bonis propriis* were to be awarded, they should be awarded against Mr Coertze himself for such slovenly drafted papers. The practice in this court is not to make costs orders unless there are exceptional circumstances justifying such a costs order. In this case, there was no need for litigation, let alone, on urgent basis.

[14] In my view, this case is one of those cases where there is a clear abuse of court process. Considering the principles laid down in cases such as ***Nel v Waterberg Landbouwers Ko-operatè vereening***⁷ the court would be justified to express its disapproval of the applicants' conduct of bringing to court such a hopeless application on urgent basis by ordering them to pay costs on an attorney and client scale.

[15] In the result, I make the following order:

1. The *Rule Nisi* is discharged.
2. The application is dismissed.
3. The applicants are jointly and severally, the one paying, the other to be absolved, ordered to pay the costs on the scale as between attorney and client.



M T Ncube
Judge: Land Claims
Court of South Africa

⁷ 1946 AD 597 at 607

Date of hearing: 30 January 2023

Judgment delivered: 8 March 2023

Appearances

For Applicant: M Coertze

Instructed by: Marius Coertze Attorneys

Rietondale

Pretoria

For the First Respondent: KM Mokotedi

Instructed by: Matshitse Attorneys

Potchefstroom