Blidstreek 8/1988

REPORTABLE

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matters between

TIMOTHY RADEBE (Case No 431/86) ..... APPELLANT

and

EASTERN TRANSVAAL DEVELOPMENT BOARD .... RESPONDENT

N B MTHETHWA (Case No 429/86) ..... APPELLANT

and

EASTERN TRANSVAAL DEVELOPMENT BOARD ... RESPONDENT

JOSEPH JELE (Case No 430/86) ..... APPELLANT

and

EASTERN TRANSVAAL DEVELOPMENT BOARD ..... RESPONDENT

CORAM : CORBETT, HEFER, NESTADT, JJA, NICHOLAS et KUMLEBEN, AJJA

DATE HEARD : 18 FEBRUARY 1988

DATE DELIVERED : 11 MARCH 1988

JUDGMENT/.....

J U D G M E N T

KUMLEBEN, AJA:

The above three matters, now on appeal, came before Heyns J as opposed applications in the Transvaal Provincial Division. They were heard together since the issues to be decided and the material facts are the same. Respondent claimed against each appellant an order for his ejectment from premises occupied by him. Such orders were granted as prayed. The judgment of the Court is reported as Ontwikkelingsraad Oos-Transvaal v Radebe and Others in 1987(1) SA 878 (TPD). The Court granted leave to appeal. Through inadvertence the notices of appeal were not lodged timeously resulting in petitions for condonation. Mr Swart, who

appeared for respondent, correctly conceded that there were good grounds for condonation, which was duly granted.

In resisting the claims for ejectment appellants rely on certain provisions of the Black Communities Development Act, 4 of 1984 (to which I shall refer as "the Act") and on some of the regulations of the Regulations Governing the Control and Supervision of an Urban Black Residential Area and Relevant Matters contained in Chapter 2 of Government Gazette No R1036 published in Government Gazette No 2096 of 14 June 1968. Before turning to the merits, some explanatory commentary on these two enactments is appropriate.

Prior to the promulgation of the Act, respondent was an "administration board" established by sec 2 of the Black Affairs Administration Act,

45 of 1971. In terms of sec 3(1)(d) of the Act (4 of 1984) administration boards were deemed to be development boards. It was common cause that the property occupied by each appellant was situated within a Black residential area, as declared and determined in terms of sec 3(1)(a) of the Act, in respect of which respondent was authorised to exercise the powers conferred upon such a board. These included authority to "sell, let, hypothecate or otherwise dispose of or encumber any land belonging to it" (sec 36(1)(d) of the Act). It should be noted, merely in passing since it has no bearing on the outcome of the appeals, that in terms of sec 2(1) of the Abolition of Development

Bodies Act, 75 of 1986, "development bodies", which by definition included a development board, were abolished. And in terms of section 3 of that Act the assets, liabilities, rights, duties and obligations of respondent with effect from 1 July 1986 vested in the Administrator of the Transvaal.

Initially the aforesaid regulations, governing inter alia the control and supervision of urban Black residential areas, were published in terms of sec 38(8)(a) of the Black (Urban Areas) Consolidation Act, 25 of 1945, for the guidance of urban local authorities. By Government Notice R1267 published in Government Gazette No 2134 of 26 July 1968 these regulations were applied to such authorities. The Act (4 of 1984) repealed

most/.....

most of Act 25 of 1945 but, in terms of sec 35(5)(b) - before amendment by sec 9 of Act No 74 of 1986 - and 69(2) read with sec 66(3) of the Act, the regulations remained applicable to a Black residential area.

In considering the merits, to which I now turn, I shall for convenience refer to the record in one of the appeals only, that of the appellant Radebe.

The founding affidavit of respondent alleges that it is the owner of the property occupied by appellant. This fact, if proved or admitted, entitles respondent to repossession unless appellant can establish some overriding right as against respondent entitling him to remain in occupation.

As explained in Chetty v Naidoo 1974(3) SA 13(AD) at 20 B - D:

> "It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a reivindicatio, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res - the onus being on the defendant to allege and establish any right to continue to hold against the owner (cf. Jeena v Minister of Lands, 1955(2) SA 380 (AD) at pp 382E, 383)."

In the answering affidavit respondent's allegation of ownership was denied. The Court below held this fact to have been proved - at 880 I to 883 F of the

judgment - and on appeal this finding was not challenged. In the circumstances appellant was required to prove a right to retain possession. To do so he alleges in his answering affidavit that:

"(a) My rights and obligations in regard to the possession and occupation of the said property are governed solely by the Regulations pertaining to the Control and Supervision of an Urban Black Residential Area.

(b) The said property is within an Urban Black residential area to which such regulations pertain.

(c) Such regulations are presently of force and effect in terms of Government Notice R1036 of 14 June 1968 as published in Government Gazette No 2096 (Regulation Gazette No 976) of that date, together with

all subsequent relevant amendments.

(d) Such common law rights as the applicant may claim to the said property have therefore been displaced by the said regulations and do not avail the applicant for the relief that he seeks.

(e) The applicant has failed to use the procedure stipulated in the said regulations for my eviction."

It is thus the contention of appellant that his right of occupation is governed by the regulations and that these entitle him to remain in occupation unless and until the steps provided in these regulations for his eviction have been successfully pursued. Or put more explicitly, his answer to the claim for ejectment is that the vindicatory right of an owner, in the case of property/.....

perty in a Black residential area, has been abolished and replaced by the regulations providing for eviction. They are the following:

Regulation 15(4)

"(4)(a) On the cancellation of the permit or certificate, the holder concerned and all his dependants and all persons who claim to be in the residential area through a qualification or the authorisation of the holder or under him shall forthwith leave the site and dwelling, unless the superintendent otherwise determines, and the holder shall deliver the permit or certificate to the superintendent.

(b) If the holder of a permit or certificate fails or his dependants fail to comply with the provisions of sub-regulation (a), the superintendent may apply to a competent court for an order for the ejection of such holder, his dependants and all other persons from such site and dwelling."

Regulation 47

"(1) Any person who .....

(ℓ) having been ordered in terms of regulation 19(5) of this Chapter to remove from the site, dwelling or Black residential area and not being otherwise authorised to remain in the Black residential area, fails, neglects or refuses without reasonable cause to comply with such order .....

shall be guilty of an offence and liable to the penalties prescribed in section 44 of the Act.

(2) The court, on convicting any person in terms of subregulation (1)(ℓ) may make an order for the ejectment of such person from the site, dwelling or Black residential area concerned."

Regulation 19(5), referred to in regulation 47(1)(ℓ), is as follows:

"Any person found in the Black residential area without the authority to

be/.....

be therein in terms of these regulations may be ordered by the manager or any person authorised by him, either specifically or generally, to remove from the Black residential area forthwith."

The main argument in the court below dealt with the defence raised by appellant on the supposition that appellant's occupancy was in fact governed by the regulations. The first enquiry, however, is whether the allegations in the answering affidavit establish this. The regulations, one notes, entitle a person to be in a Black residential area under ~~differing~~ different authorisations and in ~~different~~ several capacities: as a "lodger", being a person who legally resides at a dwelling with the holder of a site or residential permit (reg 20); as the holder of a

residential permit, a "tenant" by definition, in respect of a dwelling allocated to him (reg 7); as a "grantee", that is, a person to whom a certificate of occupation of a Board dwelling has been issued (reg 8 read with reg 1). A person may also occupy a site allotted to him for the erection of a private dwelling (reg 6). Moreover a "Black" may enter or remain in a black residential area on the strength of an "accommodation permit" which has no reference to any site or dwelling (reg 19(2)). And certain persons, who may or may not be Blacks, are permitted to be in a black residential area without any special authorisation or permit (reg 19(6)). Thus, though the references to authorisation in this paragraph do

not purport to be a comprehensive review of the rights of persons to be in a Black residential area or to occupy premises therein, it is plain that in terms of the regulations there are various categories with differing rights attaching to each.

Against this background one must decide whether the answering affidavit raises a defence to respondent's claim for ejectment. One notes that appellant's case is not that he is entitled to remain in occupation, whether by virtue of the regulations or some other fact. Nowhere is this alleged. He in effect says: "Even if I have no such right, you have invoked the wrong remedy". In support of this contention, as pointed out, it is submitted that the

procedure laid down in the regulations for eviction is the only permissible one. The basis for this assertion is in turn the allegation that his occupation is governed by the regulations. But this is a conclusion of law not a statement of fact. It was essential for appellant to have alleged that he was the holder of one of the permits, to which I have referred, or to have averred some other facts having the effect of making the regulations applicable to him and to his occupancy of the premises in question. What he has alleged is analagous to relying on the protection afforded by section 28 of the Rent Control Act, 80 of 1976, without alleging the necessary facts, which, if proved, would establish that it applied. Mr Unterhalter,/....

halter, who with Mr Black appeared for the appellants, argued that it was the eviction provisions in the regulations, and not the regulations as a whole, which were being relied upon and that it therefore matters not in what capacity or by what authorisation appellant occupied the premises. This misses the point. Unless the regulations apply, the provisions relating to eviction, which are part of them, cannot be relied upon.

If I am incorrect, or inaccurate, in regarding the crucial allegation in the answering affidavit as a conclusion of law, it is at best for appellant an inference, a "secondary fact", with the primary facts on which it depends omitted. (Cf. Willcox and Others v Commissioner for Inland Revenue 1960(4) SA 599(AD) at 602). The remarks

of Miller J in Hart v Pinetown Drive-in Cinema (Pty) Ltd 1972(1) SA 464 (D & CLD), though made in reference to a petition, are pertinent. At page 469 C - E it was stressed that:

> "where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound."

Even viewed simply as a pleading the answering affidavit falls short. As stated in Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice (22nd Ed.) at page 97:

> "Whenever the same legal result can be attained in several different ways it is not sufficient to aver merely that the result has been arrived at, but the facts must be stated showing how and by what means it was attained."

In the instant case it is a legal result alone which has been "pleaded".

Respondent failed to deny these allegations in a replying affidavit. This is of no legal consequence since they do not amount to statements of fact disclosing a defence to respondent's

claim. In this regard at page 886A of the judgment it is recorded that

> "Counsel for applicant concedes that the letting of applicant's premises to respondent is governed by these regulations, but he points out that nowhere in para 6 of his answering affidavit does respondent pertinently say on what legal right he relies to occupy the property of applicant. He simply says that: 'Such common law rights as the applicant may claim to the said property have therefore been displaced by the said regulations and do not avail the applicant for the relief he seeks.'"

From what is said in this passage, and from the judgment as a whole, it would appear that this concession was made for the purposes of the main argument advanced for respondent in the court below. Mr Unterhalter, who also appeared for the

appellant in the application, confirmed this and said that at no stage was any admission made on behalf of respondent at that hearing.

Mr Unterhalter sought to meet this difficulty arising from the inadequacy of the averments in the answering affidavit by relying solely on an allegation, which was a statement of fact and was admitted, namely, that appellant occupied a site in a Black residential area. He submitted that, whatever the (undisclosed) circumstances which gave rise to appellant being in occupation, the regulations must inevitably apply, and particularly regulation 15(4) and regulation 47(2). But these two sub-regulations do not confer any general right

to evict or apply for an eviction order in all circumstances. Each such right is circumscribed by its terms. The right afforded a superintendent to apply to a competent court for an order of ejectment in terms of regulation 15(4)(b) is restricted to cases in which a permit or certificate has been cancelled and the erstwhile holder has failed to vacate. There is no reference to a cancelled permit or certificate in the answering affidavit. The eviction remedy - assuming it to be such - provided for in regulation 47(2) is only available if the facts justifying a conviction in terms of reg 47(1)(ℓ) are present - and one may add only if the occupant is successfully prosecuted. In short, if this sub-

regulation is to be invoked, the appellant is required at the very least to allege facts which establish that he committed an offence in terms of that sub-regulation before the provisions of sub-regulation (2) can apply. The answering affidavit does not allege that he was ever given the necessary order, or that he was not "otherwise authorised to remain in the Black residential area" or that he failed without reasonable cause to comply with any such order.

In regard to regulations 47(1)(ℓ) and 47(2), appellant is faced with a further insuperable difficulty. Respondent claimed an order for the eject-ment of appellant from a particular site. For this reason

Mr Unterhalter initially based his argument on that portion of regulation 47(1)(ℓ) which relates to an order for removal from a site or dwelling and not on the reference to removal from a Black residential area as a whole. Regulation 47(1)(ℓ) as originally published made no reference to a site or dwelling and in that form accorded with regulation 19(5), which similarly referred only to a Black residential area. The words "site, dwelling or" were inserted where they now appear in regulation 47(1)(ℓ) by Government Notice R2081 published in Government Gazette No.3310 of 19 November 1971. For some reason regulation 19(5) was not correspondingly amended. Counsel submitted that by necessary implication a

similar amendment of regulation 19(5) must be inferred. I cannot accept this. An order in terms of regulation 19(5) is the substantive ground on which the offence is based. It is the failure to comply with an order in terms of regulation 19(5) which constitutes the offence. Since this sub-regulation is restricted to an order for the removal from a Black residential area, the amendment of regulation 47(1)(ℓ) cannot extend its scope. In the circumstances counsel for appellant sought to argue that, though regulation 19(5) and therefore regulation 47(1)(ℓ) are restricted to orders relating to removal from a Black residential area, the latter sub-regulation could nevertheless be invoked when

a person/....

a person is in unlawful occupation of a site or dwelling. This submission is plainly unsound, as counsel was constrained to concede, for the simple reason that a person may be in unlawful possession of a site or dwelling though lawfully in the Black residential area concerned. For instance, the holder of an accommodation permit. Moreover an unlawful occupant of premises may be a person exempt from the requirement of obtaining such a permit in terms of regulation 19(6), for example, a member of the South African Railways and Harbours Police. (Incidentally from the papers in the Joseph Jele appeal it appears that he was such an official).

For these reasons I consider that the appel-

lant failed to make out a case against the grant of an eviction order in his answering affidavit and that, in any event, as regards regulation 47(1)(ℓ), it has no bearing upon an order for removal from a site or a dwelling.

One infers, however, that the main purpose of these appeals was to determine, in the general public interest and for future guidance, whether regulation 15(4), or regulation 47(1)(ℓ) read with regulation 47(2), in circumstances when one or other applies, replaces the vindicatory right to reclaim possession.

Counsel for the appellant based his submissions in this regard on the well known dictum

of Kotzé AJJA in Madrassa Anjuman Islamia v Johannesburg Municipality 1917 AD 718 at 727, to wit:

> "If it be clear from the language of a Statute that the Legislature, in creating an obligation, has confined the party complaining of its non-performance, or suffering from its breach, to a particular remedy, such party is restricted thereto and has no further legal remedy; otherwise the remedy provided by the Statute will be cumulative."
> (My underlining)

Whether a particular enactment does give rise to such a restriction is a matter of interpretation, often a difficult one as subsequent decisions on the subject bear out. In certain of them the correct approach to this enquiry has been debated. See, for instance, Da Silva & Another v Coutinho 1971(3) SA 123(AD) per Jansen JA at 134G - 135H and per

Muller AJA 149A - 150H. As pointed out at 149 D the problem presents itself and difficulties arise :

> "in those cases where the statute, in creating a duty, provides for a sanction in the form of a penalty but is silent on the question whether a civil remedy for its breach was intended or not".

It is unnecessary to address this question in any detail, or to refer to other decisions in which it is discussed, because the facts of this case are distinguishable in a critical respect. The two regulations in question introduced no new statutory obligation with a correlative right. The duty to vacate property unlawfully occupied and the right to exercise a rei vindicatio to secure possession were not, one need hardly say, created by the regulations.

The question in issue is therefore not the same as that considered in the Madrassa case and others cited by counsel. It is whether these regulatory remedies, when they apply, have by implication replaced and extinguished an important fundamental right and common law remedy which pre-dates the regulations - as a matter of fact by some fourteen centuries! To answer this question affirmatively would therefore require convincing reasons, which are not present in this case.

Regulation 15(4)(b) authorises the superintendent to apply to a competent court for an order for ejectment. This provision is not at variance or inconsistent with the right of an owner to

recover/.....

recover possession. It is plainly intended to confer on this official - no doubt for reasons of practical convenience - a right which he would otherwise not have possessed. What is more, its exercise is left to his discretion. It is inconceivable that, should he decide against taking action, respondent, as owner of the premises, would be precluded from doing so.

The grounds for concluding that regulation 47(1)(ℓ) read with regulation 47(2) does not have such effect are equally compelling. It is as inconceivable that it could ever have been intended that the right to evict a person from a Black residential area should be exclusively dependent upon a successful prosecution for a contravention of regulation

47(1)(ℓ). The differences between criminal proceedings with provision for an eviction order on conviction and a civil vindicatory action are too obvious to require elaboration. (But see in this regard National Industrial Council of the Leather Industry of SA v Parshotam & Sons (Pty) Ltd 1984(1) SA 277 (D & CLD) at 280 D - F.) Moreover, should a prosecution lead to a conviction, the court in terms of regulation 47(2) is not obliged to grant an ejectment order. Should it decide against doing so, it would follow that the convicted person would then have a permanent and entrenched right of occupation unless new grounds for a further prosecution arose. This could never have been intended. Regulation 47(2)

was, to my mind, introduced as a practical, expeditious and cost saving-measure to secure the eviction of an unlawful occupier when a person is charged and successfully prosecuted and the circumstances make the grant of such an order appropriate. (Section 300 of the Criminal Procedure Act, 51 of 1977, for instance, was enacted with the same considerations in mind.) Regulation 47(2) was intended to be additional to, not in substitution of, the civil remedy.

In the result the appeals, on both grounds dealt with in this judgment, are dismissed with costs including any occasioned by the application for condonation.

CORBETT)
HEFER) - JJA
NESTADT)
NICHOLAS) - AJA - concur

KUMLEBEN, AJA

TIMOTHY RADEBE (CASE NO 431/86), N B MTHETHWA (CASE NO 429/86) & JOSEPH JELE (CASE NO 430/86)

vs EASTERN TVL DEVELOPMENT BOARD

Neem asseblief kennis dat die woorde op bladsy 12 van bogenoemde saak (vierde reël van onder af) "..... differing authorisation and in different ..." deur die volgende woorde vervang word "... different authorisations and in several ..."

> be therein in terms of these regulations may be ordered by the manager or any person authorised by him, either specifically or generally, to remove from the Black residential area forthwith."

The main argument in the court below dealt with the defence raised by appellant on the supposition that appellant's occupancy was in fact governed by the regulations. The first enquiry, however, is whether the allegations in the answering affidavit establish this. The regulations, one notes, entitle a person to be in a Black residential area under different authorisations and in several capacities: as a "lodger", being a person who legally resides at a dwelling with the holder of a site or residential permit (reg 20); as the holder of a