REPORTABLE

Case Number : 177 / 99

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

BONGINKOSI ELLEN KHUMALO **Appellant**

and

J C POTGIETER **Respondent**

Composition of the Court : **VIVIER, OLIVIER, SCHUTZ, ZULMAN JJA and MELUNSKY AJA**

Date of hearing : **15 MARCH 2001**

Date of delivery : **26 MARCH 2001**

SUMMARY

The High Court has no jurisdiction in the absence of agreement between the parties to grant an interdict where the relief falls within the ambit of the Extension of Security of Tenure Act 62 of 1997

J U D G M E N T

OLIVIER JA

[1] In May 1998 the appellant (then the applicant) applied on notice of motion in the Natal Provincial Division for the following relief against the respondent :

> '1 That respondent be and is hereby interdicted and restrained from ejecting applicant or any of her family members or possessions from the farm Vaalbank, district of Vryheid;
>
> 2 That respondent be and is hereby interdicted and restrained from contacting, meeting or in any manner communicating directly with the applicant personally, except in the presence of an official or duty member of the South African Police Services or in circumstances where the said applicant is represented by a member of the Department of Land Affairs or their attorney firm herein;
>
> 3 That respondent be and is hereby interdicted and restrained from threatening, intimidating or in any manner interfering or permitting any threats, intimidation or interference with applicant's occupation and use of the farm Vaalbank, district of Vryheid, KwaZulu/Natal.'

[2] The basis of the application was that the appellant, a major unmarried female, was living on the farm Vaalbank, the property of the respondent and that the latter had, in various ways, endeavoured to eject her and her family members from the farm, threatened her and interfered with her rights of occupation.

[3] *In limine* the respondent denied that the High Court had jurisdiction to consider the application. He relied on the provisions of the Extension of Security of Tenure Act 62 of 1997 ("the Act"). The objection was upheld by the Natal Provincial Division, per

Nicholson J, who later granted the appellant leave to appeal to this Court.

[4] The relevant provisions of the Act are the following:

(a) 'S 17. **Choice of court. -** (1) A party may, subject to the provisions of sections 19 and 20, institute proceedings in the magistrate's court within whose area of jurisdiction the land in question is situate, or the Land Claims Court.

(2) **If all the parties to proceedings consent thereto**, proceedings may be instituted in any division of the High Court within whose area of jurisdiction the land in question is situate.' (My emphasis)

(b) 'S 20. **Land Claims Court. -** (1) The Land Claims Court shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power -

(a) to decide any constitutional matter in relation to this Act;

(b) to grant interlocutory orders, declaratory orders and **interdicts**;

(c) .....

(d) .....

(2) Subject to sections 17 (2) and 19 (1), the Land Claims Court shall have the powers set out in subsection (1) **to the exclusion of any court** contemplated in section 166 (c), (d) or (e) of the Constitution.' (My emphasis)

(Section 19 (1) deals with the jurisdiction of Magistrate's Courts but is of no application in the present case.)

[5] It is common cause that

(a) the High Court is a court contemplated in section 166 (c) of the Constitution;

(b) the respondent did not consent to the jurisdiction of the High Court;
(c) the appellant was an 'occupier' and the respondent an 'owner' as envisaged by section 1 of the Act;
(d) the respondent had given consent to the appellant to reside on and use the land in question (see section 3);
(e) the appellant's claimed entitlement to continued occupation of a portion of the farm in question is based solely on the Act;
(f) the farm in question is land to which the Act applies (see section 2).

[6] From the aforegoing it follows that the appellant's right of residence may only be terminated in terms of section 8 of the Act, which not only requires the termination to be lawful, but also that it be just and equitable, having regard to a number of factors, *inter alia* :

> '(a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
>
> (b) the conduct of the parties giving rise to the termination;
> (c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
> (d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and
> (e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to

terminate the right of residence.'

[7] It also follows that the limitation placed by section 9 of the Act on the right of the respondent to evict the appellant from the farm in question, applies in the present case. The appellant may be evicted only in terms of an order of court issued under the Act. A court's right to issue an eviction order is limited and circumscribed by the provisions of section 9 (2).

[8] That being the position, it would appear that the High Court had

no jurisdiction to entertain the application : the respondent had not consented to its jurisdiction in terms of section 17 (1) and, in terms of section 20 (2) read with section 20 (1) (b) the Land Claims Court has exclusive jurisdiction to grant the interdict.

[9] Against this view counsel for the appellant argued :

(a) The word 'interdicts' in section 20 (1) (b) of the Act is not defined

in the Act itself and cannot be given an unlimited meaning, lest it become absurd. The Land Claims Court is a creature of statute and can only exercise the jurisdiction given to it expressly or by clear implication by the Act itself. Section 20 says what that jurisdiction is : it has the jurisdiction to adjudicate on matters where the provisions of the Act are

relevant and it also has

> ‘ ... all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act ...’ (section 20 (1))

(b) Counsel further argued that the appellant did not require the High Court to exercise any power in terms of the Act. She relied on her common law right not to be spoliated (prayer 1). Prayers 2 and 3, likewise, are based on the appellant’s common law rights of personality. The Act did not expressly, even less impliedly, deprive the High Court of its jurisdiction to protect the common law rights of individuals. Suppose, argued counsel, the parties had met one another in a neighbouring town and in the course of an altercation in no way connected with their contractual relationship or the appellant’s occupation of land owned by the respondent, he had assaulted and threatened her. She would have been entitled to approach the High Court for an interdict, notwithstanding that she is an ‘occupier’ and the respondent an ‘owner’ in terms of the Act. That is so, it was argued, because the Act has not taken away the common law jurisdiction of the High Court.

[10] It is true that generally speaking the Act has not deprived the

High Court of its common law powers. In the case postulated by counsel it can hardly be doubted that the High Court would have jurisdiction to interdict an owner from assaulting or threatening someone who happened to be an occupier of his land. But the position changes where the occupier invokes the provisions of the Act in order to establish a cause of action or defence. As soon as that occurs, the Land Claims Court has exclusive jurisdiction because it, and it alone, may apply the provisions of the Act (sections 20 (1) and 20 (2)).

[11] The application launched by the appellant falls in the latter category. In order to succeed with prayer 1, the appellant had to found her case on the provisions of the Act. This is what she in fact did, even though she did not expressly refer to the terms of the Act. The respondent, in his defence, did rely on the Act. If the merits were to be considered by the High Court, some provisions of the Act would become relevant, *inter alia* sections 6 (2), 7 (1), 8 and 9. The High Court would not have the jurisdiction to apply these provisions; conversely, the Land Claims Court would clearly have jurisdiction to do so. By virtue of section 20 (2) of the Act, the latter court has such jurisdiction to the exclusion of the High Court. The same argument goes for prayer 3, as was conceded by counsel for the appellant. Prayer 2 is clearly dependent on and ancillary to

prayers 1 and 3, and must share their fate. (See also *Mogotsi and Others v Pienaar and Others* 2000 (1) SA 577 (T) at 580.)

[12] In the result, the appeal is dismissed with costs.

P J J OLIVIER JA

CONCURRING :

VIVIER JA

SCHUTZ JA
ZULMAN JA
MELUNSKY AJA