REPORTABLE

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No:495/99

In the matter between:

CAPE KILLARNEY PROPERTY INVESTMENTS (PROPRIETARY) LIMITED Appellant

AND

FUSILE MAHAMBA AND SECOND TO FIVE-HUNDRED AND FORTY-THIRD Respondents

CORAM: Vivier ADCJ, Howie JA and Brand AJA

HEARD: 28 August 2001

DELIVERED: 10 September 2001

Procedural requirements of s 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

J U D G M E N T

BRAND AJA

BRAND AJA

[1] Appellant company is the owner of an immovable property known as Doornbach Farm ("the property") situated within the municipal area of Blaauwberg on the outskirts of Cape Town. Although the property is zoned "industrial" it cannot at present be used for any such purpose since it has become the site of an informal settlement. The settlement consists of 542 dwellings. First to 542nd respondents ("respondents") together with their families are the occupants of these dwellings. In the Court *a quo* the Blaauwberg Municipality was cited as the 543rd respondent. No relief was however sought or granted against it and it is therefore not a party on appeal.

[2] Appellant's case is that respondents are occupying the property without its consent and that they are therefore "unlawful occupiers" as contemplated by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the Act"). Consequently appellant

proceeded to set in motion what it claimed to be the legal machinery provided for in s 4 of the Act for the eviction of respondents and their families from the property.

[3] Its first step was to seek and obtain an order ("the original order") from Foxcroft J in the Cape of Good Hope Provincial Division on 22 June 1999 without notice and in the absence of respondents. To the particular terms of the order I shall presently return. In the main, however, it consisted, firstly, of a rule *nisi* directing respondents to show cause on 28 July 1999 why an order for their eviction from the property should not be granted and, secondly, of directions for service of the order upon respondents.

[4] Respondents did not directly respond to the rule *nisi*. Instead, on 27 July 1999, Ms Doris Tshofuti ("Tshofuti"), an owner of one of the dwellings on the property, but not a named respondent, launched a substantive

application on behalf of all the respondents in terms of rule 6 (12)(c) of the Uniform Rules of Court. This rule provides that " a person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order". Accordingly, the relief sought by Tshofuti on behalf of respondents was that the original order be reconsidered and set aside.

[5] Tshofuti explained that although she was authorised by some of the respondents to bring the rule 6 (12)(c) application on their behalf, she was unable to obtain such authority from every one of the respondents. She contended, however, that she was entitled to approach the court also on behalf of those respondents from whom she could not obtain specific authority by virtue of the provisions of section 38 of the Constitution Act 108 of 1996. Neither in the Court *a quo* nor in this Court was Ms Tshofuti's *locus standi* raised by appellant as an issue of contention. Consequently her

locus standi to act on behalf of first to 542nd respondents must at this stage be accepted.

[6] The matter was postponed on various occasions. Eventually it came before Hlophe DJP. He decided that respondents' rule 6 (12)(c) application should succeed and ordered that the rule *nisi* issued under the original order be discharged with costs, including the wasted costs occasioned by the various postponements. Although the order by Hlophe DJP in its strict terms refers to the discharge of the rule the obvious intention was, in my view, to grant the relief sought in the rule 6 (12)(c) application, namely to set the original order aside. Appellant appeals to this Court with the leave of the Court *a quo,* against its judgment which has since been reported under the reference *Cape Killarney Property Investment (Propriety) Ltd v Mahamba and others* 2000 (2) SA 67 (C)

[7] In this Court respondents raised the preliminary point that the decision of the Court *a quo,* to set the original order aside, was not appealable in that it did not constitute "a judgment or order" as contemplated by s 20 of the Supreme Court Act 59 of 1959. Without deciding the point *in limine* I prefer to consider the matter on the assumption of appealability.

[8] In view of the issues raised by the appeal, a citation of the full terms of the rather lengthy original order as well as the relevant provisions of section 4 of the Act seems to be unavoidable. The original order reads as follows:

> "1. A rule *nisi* is issued calling upon the first to 542nd respondents to show cause on 28 July 1999 at 10h00, ... why an order should not be made in the following terms:
>
> 1.1 An order for the eviction of the first to 542nd respondents from the applicant's farm being Doornbach Farm, Potsdam Road, Killarney, Western Cape.
>
> 1.2 An order determining the date by which the said respondents must vacate the said farm.

1.3 An order determining the date on which the eviction order in Paragraph 1.1 above may be carried out.

1.4 An order for the demolition and removal of the buildings and structures erected by the first to 542nd respondents on the said farm.

1.5 ...

1.6 An order that the first to the 542nd respondents pay the applicant's costs of suit.

2. The first to the 542nd respondents are hereby informed that:

2.1 Applicant's application is being instituted in terms of section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998;

2.2 The application is brought on the alleged grounds that the first to the 542nd respondents unlawfully occupy Doornbach Farm in that neither permission nor consent for their occupation has allegedly been given to any one or more of them;

2.3 The first to the 542nd respondents are entitled to appear before the above Honourable Court on 28 July 1999 at 10h00 to defend these proceedings and that they have the right to apply for legal aid.

3. Service be effected by delivering a copy of this order to each of the respondents in person, or failing such personal service, by delivering and leaving a copy of the said order at the structures set out in the first column

of Annexure "SYR2" of the applicant's founding affidavit on or before 30 June 1999.

4. Those respondents who intend to defend applicant's application are directed to deliver a notice of their intention to do so by serving a copy thereof at the offices of applicant's attorneys ... and filing the original thereof at the office of the Registrar of the Honourable Court ... on or before 14 July 1999.

5. Applicant is ordered to make copies of the notice of motion, supporting affidavits and annexures available on or before 21 July 1999 to those Respondents who by 14 July 1999 have given notice of their intention to defend in terms of paragraph 4 above."

[9] Section 4 of the Act, where relevant for present purposes, provides:

"**4.** **Eviction of unlawful occupiers**.- "(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

(3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.

(4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the

court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.

(5) The notice of proceedings contemplated in subsection (2) must

(a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;

(b) indicate on what date and at what time the court will hear the proceedings;

(c) set out the grounds for the proposed eviction; and

(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid."

[10] Appellant's justification of the original order is largely based on its interpretation of section 4. Before I deal with the interpretation contended for by appellant, however, let me state my own understanding of the section.

[11] Section 4(1) makes it clear that the provisions of the sub-section that follow are peremptory. It also defines the "proceedings" to which the section applies, namely proceedings for the eviction of an unlawful occupier. Section 4(2) requires notice of such proceedings to be effected on the unlawful occupier and the municipality having jurisdiction, at least 14 days

before the hearing of those proceedings. Section 4(2) further provides that this notice must be effective notice; that it must contain the information stipulated in ss (5) and that it must be served by the court. The term, "court" is defined in section 1 of the Act as the "High Court or the magistrates' court". Although s 4(2) could have been more clearly worded, it is obvious in my view that the legislature did not intend physical service of the notice by the court in the person of a judge or magistrate. On the other hand, mere issue of the notice by the registrar or clerk of the court would not suffice. What is intended, I believe, is that the contents and the manner of service of the notice contemplated in ss (2) must be authorised and directed by an order of the court concerned.

[13] Section 4(3) provides that notice of the proceedings must be served in accordance with the rules of the court in question. Accordingly, for purposes of an application in the High Court, such as the one under

consideration, s 4(3) requires that a notice of motion as prescribed by rule 6 be served on the alleged unlawful occupier in the manner prescribed by rule 4 of the rules of court. It is clear in my view that this notice in terms of the rules of court is required in addition to the s 4(2) notice. Any other construction will render the requirements of section 4(3) meaningless.

[14] The fact that the s 4(2) notice is intended as an additional notice of forthcoming eviction proceedings under the Act is also borne out by s 4(4). The latter subsection provides for the possibility of substituted service where the court can be satisfied that for reasons of convenience or expedience, the notice of motion cannot be serviced in the manner prescribed by rule 4. However, even in this event, s 4(2) must still be complied with since s 4(4) is expressly made subject to the provisions of ss 4(2).

[15] Section 4(5)(b) requires the s 4(2) notice to indicate the date upon which the court will hear the eviction proceedings. In High Court

proceedings by way of application this date of hearing will only be determined after all the papers on both sides have been served. It follows, in my view, that it is only at that stage that the s 4(2) notice can be authorised and directed by the court. From the judgment of the learned Judge *a quo* (76 I-J) it appears that according to his understanding of s 4(2) the notice contemplated by that section is to precede service of the notice of motion in terms of the rules and that in fact the minimum period of 14 days stipulated in the section is to elapse before the eviction proceedings can be instituted. As appears from what I have already said, this interpretation cannot be supported .

[16] Section 4 does not indicate how the court's directions regarding the s 4 (2) notice is to be obtained. A common sense approach to the section appears to dictate, however, that the applicant can approach the court for such directions by way of an *ex parte* application.

[17] This immediately brings me to the contention on behalf of appellant that the original order was intended to be no more than a ruling on procedure and that its only object was to satisfy the provisions of s 4(2) of the Act. Consequently, so it was contended, there was no reason why the original order could not be sought and granted on an *ex parte* basis. I do not agree with these contentions. The order that was sought and granted included a rule *nisi* directing respondents to show cause why they should not be evicted from the property. I agree with the view of the Court *a quo* (at 74 G-H) that the rule *nisi* cannot be described as a ruling on procedure only. It constituted substantive relief. More particularly, what was sought and granted included an eviction order in the form of a rule *nisi*.

[18] It follows that in the light of the peremptory procedural requirements of s 4(1)-(5) the original order could not have been obtained on an *ex parte*

basis. The Court *a quo* was therefore correct in finding that for this reason alone the original order was incompetent and had to be set aside.

[19] In the opinion of the Court *a quo* (at 77 C-F) there was another reason why the original order could not stand, namely that paragraphs 3, 4 and 5 thereof authorised a further deviation from the provision of s 4. I find myself in agreement with this consideration as well.

[20] Applicant did not contend that its case was one of urgency. It could hardly do so in view of the fact that some of the respondents had been living on the property for up to 18 years. It therefore did not rely on the provisions of s 5 of the Act nor did it make out a case of urgency under court rule 6(12). Nevertheless it sought and obtained an order to deviate, for example, from rule 6(5) in that respondents were required first to give notice of their intention to oppose before they were to be provided with applicant's notice of motion and the annexures thereto. Moreover, according to the

timetable set by the original order, respondents were obliged to file their answering papers within six calendar days of their receipt of appellant's papers, as opposed to the aggregate of twenty court days required by rule 6.

[21] In this Court appellant's argument in defence of paragraphs 3, 4 and 5 of the original order was that on a proper interpretation of s 4 of the Act, the notice contemplated by s 4(2) is intended as a substitute for and not in addition to the notice required by court rule 6. I believe that there are at least two reasons why this interpretation cannot be sustained. First, the reason that I have already alluded to, namely that it will render the provisions of s 4(3) and s 4(4) meaningless. Secondly, the acceptance of this construction will afford respondents in eviction proceedings under the Act less notice and substantially less time to put their case before the court than is the case with respondents in ordinary motion proceedings. It can be accepted with confidence that this was not what the legislature intended.

The Act has its roots, *inter alia*, in s 26(3) of the Constitution whereby "no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances". Accordingly the purpose of s 4(2) is clearly to afford the respondents in eviction proceedings a better opportunity than they would have under the rules to put all the circumstances that they allege to be relevant before the court.

[22] It follows that in my view the original order was rightly set aside. In these circumstances it is not necessary to deal with the further reasons for its decision advanced by the Court *a quo.*

[23] This brings me to appellant's final objection on appeal, namely, that the Court *a quo* erred in ordering appellant to pay the wasted costs occasioned by all the postponements of the matter, including three postponements requested by respondents. I do not believe, however, that the costs order made was unreasonable. Respondents did not really seek an

indulgence when they requested postponements on those three occasions. What they were in effect seeking was an adequate opportunity to consider their position regarding the eviction application, which opportunity they had effectively been denied by the terms and time constraints of the original order.

[23] For these reasons the appeal is dismissed with costs.

FDJ BRAND
ACTING JUDGE OF APPEAL

CONCURRED:

Vivier ADCJ
Howie JA