

SOUTH AFRICA / JUDGMENT

Basfour 3327 (PTY) Ltd v Thwala and Others (LCC160/2017) [2022] ZALCC 20 (5 October 2022)

[2022] ZALCC 20

COURT

Land Claims Court

BEFORE

Ncube

CASE / FILE NUMBER

LCC160/2017

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Policy

HEADNOTE:

NEW
BUILDING FOR LAND OCCUPIER
Land
– Occupiers – Building new dwellings – Without consent of owner or person in charge – Entitled to improvements to render dwelling habitable – Unlawful to build entirely new structure without consent – Extension of Security of Tenure Act 62 of 1997, s 6.
REPUBLIC
OF SOUTH AFRICA
IN THE LAND CLAIMS
COURT OF SOUTH AFRICA
HELD AT DURBAN
CASE NO: LCC160/2017

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
YES/NO
05
October 2022
In

the matter between: BASFOUR
3327 (PTY) LTD
Applicant
and
LUCY
THWALA
First Respondent
MINENHLE
MAHLANGU
Second Respondent
S.L
RADEBE
Third Respondent
LETHY
KHANYI
Fourth Respondent
ROBERT
THWALA
Fifth Respondent
UNKNOWN
OCCUPIERS
Sixth and Further Respondents

JUDGMENT

NCUBE J

Introduction

[1] This is an Application for a declaratory order. The Applicant seeks an order declaring the construction of a new building by the Respondents on the property of the Applicant, unlawful. The affected land is U [...] [...] HS (“the farm”). In addition, the Applicant seeks other ancillary relief specified in the Notice of Motion. The application is opposed by the First to Fifth Respondents. On 09 June 2017, this court issued an interim order preventing the

Respondents from carrying on the construction of the new house.

- [2] On 25 October 2018, my sister Barnes AJ issued a second order (“engagement order”). In terms of the engagement order, parties were ordered to engage with one another and try to resolve the dispute. The engagement order would include the use of the services of a mediator if possible. On 31 October 2019, this court issued a third order (“referral order”). In terms of the referral order, the disputed issues were referred for the hearing of oral evidence. The disputed issues which were to be determined by hearing of oral evidence, were the purpose, the nature and the extent of the partially constructed house.

Facts not in dispute

- [3] At the time of this application all the Respondents were reported to be resident on the farm as occupiers. The Fourth Respondent passed away in October 2018. The Fourth Respondent was the mother to the First and Fifth Respondents and a grandmother to the Second Respondent. The Fourth Respondent was the wife of the now late Kantoor Mahlangu (“Kantoor”). The Fourth Respondent, Kantoor and their six children, inclusive of the First and Fifth Respondents, came to the farm in 1991. The owner of the farm, at that time, was one Mr De Beer. Mr De Beer employed Kantoor and allowed him to reside on the farm with the Fourth Respondent, his wife and their children. Four of their children are now late. The parents are also late. They are survived by the First and Fifth Respondents and two grandchildren.
- [4] The Applicant, represented by Louis De La Rey Hatting (“Mr Hatting”) acquired the farm from Mr De Beer in 2006. He took transfer in 2008. Kantoor had passed away before the Applicant took ownership of the farm. Mr De Beer informed Mr Hatting that the Fourth Respondent has his (Mr De Beer’s) consent to reside on the farm. She resided on the portion of the farm with other members of her family (“the Thwala family”). The Thwala family occupied a cluster of houses built of mud walls and corrugated iron.
- [5] Shortly after the purchase of the farm, Mr Hatting called a meeting of all farm residents. At the meeting, Mr Hatting introduced farm rules which were to be complied with. One such rule was that no occupier was allowed to construct any new dwellings on the farm without the consent of the Applicant. The other rule was that no one was allowed to keep more than six herd of cattle. Another meeting was held with occupiers and the officials from the Department of Rural Development and Land Reform. The purpose of the second meeting was to agree on a more structured manner relating to the further occupation of the farm. Pursuant to the meeting, Mr Hatting agreed to outspan a grazing camp of a six hectares for the exclusive use of the Fourth Respondent. The Fourth Respondent was also granted permission to reside within the outspanned area- in her cluster of houses. That agreement was reduced to writing, however, Mr Hatting misplaced the copy of the agreement.
- [6] On 01 June 2017, Mr Hatting conducted an inspection on the farm and discovered that the Respondents had started constructing a new brick and mortar house on the farm. The house was on the foundation stage. Mr Hatting informed the Respondents that they had no consent from the Applicant or from him to construct new structures on the farm and that the

Respondents had to stop the construction. The Applicant thereafter, approached this court for an order prohibiting the Respondents from continuing with the construction of the new building. On 09 June 2017 an interim order, was then issued.

Statement of Agreed Facts and Facts in Dispute:

- [7] On 17 and 18 January 2022 the legal representatives, on behalf of the parties, signed a joint statement of agreed facts and facts which are in dispute. The statement highlighted the fact that the Applicant became the owner of the farm in 2008 and that the Applicant gave consent to the late Fourth Respondent, who was the head of the Thwala

family in 2008, to reside on the farm with some members of her family. It was agreed that the Applicant set aside six hectares of grazing land for the exclusive use of the late Fourth Respondent. It was agreed that the Respondents had started constructing a brick and mortar house on the farm. It was agreed that the Respondents never requested consent from the Applicant to construct a new dwelling on the farm and that no such consent was granted by the Applicant. It was further agreed that the Respondents were building the brick and mortar house for the occupation by the late Fourth Respondent.

- [8] It was recorded that the Applicant was disputing that any of the Respondent save the late Fourth Respondent had any independent right to reside on the farm. It was further recorded that the Applicant was disputing that the First, Second, Third and Fifth Respondents had independent consent from the Applicant to reside on the farm. The Applicant disputed that the Respondents had a right to construct an entirely new brick and mortar structure on the farm without the Applicant's consent. The statement of agreed facts and facts in dispute was handed in and marked exhibit "A."

Inspection in loco

- [9] On 24 January 2022 an inspection in loco was held at the farm with the court and all parties present. The parties prepared the joint record of the inspection in loco. That joint record was handed in and marked exhibit "B". A cluster of mud house with corrugated iron was observed. The mud houses are very old and there are cracks on the walls. The corrugated iron roof is held tight with rocks on top in order to prevent the roof from being blown away by wind. Photographs of all the mud structures and brick and mortar foundation were taken and are depicted on the record of inspection in loco.
- [10] It is clear that the mud houses as depicted on the photographs and observed at the scene are not suitable for human habitation. Those mud houses are also not in keeping with human dignity which is guaranteed and enshrined in our Constitution. The cracked walls and loose iron roof pose a danger to the occupants of those houses.

Testimony of Mr Hatting

- [11] Mr Hatting testified that the Applicant purchased the farm in 2006, but only took transfer thereof in 2008. At the time the Applicant took transfer, some of the Respondents were resident in a cluster of homestead on the portion of the farm. Shortly after acquiring ownership of the farm, Mr Hatting convened a meeting of all occupiers. The purpose of the meeting was to explain the farm rules. One such rule was that no person was allowed to construct new dwellings on the farm without consent of the Applicant.
- [12] Mr Hatting testified that on 01 June 2017, he inspected the farm. He noticed that the Respondents before court had just started constructing a new dwelling on the farm without consent. Mr Hatting then informed the Respondents that they had no consent from the Applicant or from him as a person in charge to construct a new house. On 02 June 2017, Respondents were served with a Notice to cease the construction of a new structure on the farm as they had no consent to do so. Mr Hatting went on and informed the court that a second meeting with the occupiers was held. Present at the second meeting, were the Respondents and other officials from the Department of Rural Development and Land Reform. The purpose of the second meeting was to agree on a more structured manner in which the Respondents were going to occupy the farm. The Respondents ceased the construction of a brick and mortar house after they got an order from court.

Evidence by Respondents

- [13] The Respondents were of the view that they are entitled to build new structures on the farm without the consent of the Applicant. The Respondents maintain that they were informed by officials from the Department of Rural Development and Land Reform that on the side where their homestead is built, they could do whatever they like and they do not require the Applicant's permission to construct new buildings. The Respondents mentioned one Mr Mahlalela as being the one who told them they could do whatever they wanted to do on their side of the farm. Three witnesses testified for the Respondents. It was Robert Thwala, Minenhle Mahlangu and Fezeka Thomo.

Testimony of Robert Thwala

- [14] Mr Thwala testified that he was sixty-three years old. He arrived on the farm in 1991, he was twenty-two years old at that time and was working already. He moved to the farm with his parents. His father Kantoor started working for Mr Jan de Beer on the farm. Neither his mother nor Mr Thwala ever worked on the farm. In 1991, Mr Thwala was already working in Upington as a carpenter. He testified that he would go home at the farm every month end. Mr Thwala testified to the effect that he owns an immovable property in Sky in Vukuzakhe township in District of Volksrust. He also confirmed that he did not get consent from Mr Hatting to construct a brick and mortar house. The Thwala family owned forty-seven cows at the time when the Applicant purchased the farm. Their grazing amounted to about twenty-five hectares, he said.

- [15] Mr Thwala testified further that the First Respondent Lucy Thwala used to work in Johannesburg. When Lucy lost her job in Johannesburg, she returned to the farm. She has now moved into the late Fourth Respondent's house as her house can fall at any time. Mr Thwala testified that his house in Sky is currently occupied by children who attend school. According to Mr Thwala, the new brick and mortar house was built for occupation by his late mother, the Fourth Respondent.

Testimony of Minenhle Mahlangu

- [16] Minenhle Mahlangu is the Second Respondent herein. She is the daughter of the First Respondent. She testified that she was born on 05 May 1995. She is working for the Department of Public Works in Daggakraal. She started working there on 12 August 2019. She sleeps at home. She drives to work every day. Minenhle testified that her late grandmother asked for permission from Mr Hatting to build a brick and mortar house, but Mr Hatting refused to give consent saying he does not talk to female people. What is important is that Minenhle later confirmed that they started building the brick and mortar house without consent from Mr Hatting.

Testimony of Fezeka Thomo

- [17] Fezeka Thomo ("Fezeka") is the son to the First Respondent. He testified that the brick and mortar house was built for the whole family. He said the mud structures cannot be fixed. Fezeka also testified that the new house was for his grandmother to live in. He testified that they got permission to build the new structure from the officials from the Department of Land Affairs who advised the family that the family could do whatever they want with their portion of land.

Evaluation of evidence

- [18] Mr Hatting gave a very honest, credible and reliable evidence. Even prodding and aggressive cross-examination could not put him off his stride. The same cannot be said of the evidence of the Respondents. Respondents' evidence was contradictory. They did not only contradict their testimony in court, but also contradicted their earlier affidavits. To mention but a few, all three Respondents' witnesses who testified stated in their affidavits, that they were born and bred on the farm. In cross-examination, it transpired that the affidavits were not correct because the witnesses were not born on the farm. Mr Thwala conceded in cross-examination that he came to the farm when he was twenty-two years old. Minenhle and Fezeka conceded that they were born in hospital, not on the farm.
- [19] Mr Thwala's testimony was so contradictory and evasive to such an extent that at the end of the cross examination, he could no longer see wood for the trees. When it was put to Mr Thwala that a statement in his affidavit that said he was born on the farm was a lie, Mr Thwala said

"My niece and nephews are the one that were born there. I only came with my mother"

Mr Thwala was again asked: -

“So if you say there under oath I was born on the farm, that cannot be correct. Do you agree”

Mr Thwala answered

“It was written incorrectly. I came with my mother to the farm.”

Legal Matrix

[20] Chapter two of the Constitution[1] contains a Bill of Rights with fundamental rights entrenched in it. Those fundamental rights are mirrored in section 5 of the Extension of Security of Tenure Act (“ESTA”) which provides:

““5 fundamental Rights-

Subject to the limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to-

- (a) human dignity;
- (b) freedom and security of the person;
- (c) privacy;
- (d) freedom of religion;
- (e) freedom of association;
- (f) freedom of movement;

with due regards to the objects of the Constitution and this Act.”

[21] Section 6 of ESTA deals with the rights and duties of occupier and it states:

““6 Rights and duties of occupier-

- (1) Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner

or person in charge, whether expressly or tacitly

- (2) Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right-
 - (a) to security of tenure
 - (b)
 - (c)

- (d) to family life in accordance with the culture of that family: Provided that this right shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997
- (e)
- (f)
- (3) An occupier may not-
 - (a)
 - (b) intentionally and unlawfully cause material damage to the property of the owner or person in charge
 - (d) enable or assist unauthorised persons to establish new dwellings on the land in question.”

Discussion

[22] As mentioned earlier in this judgement, parties, in their statement of agreed facts, have agreed that the rights and obligations of the Applicant and occupiers were compliant with the provisions of ESTA. The further agreed upon fact is that the construction of a new dwelling on the farm, is “intentionally” and “unlawfully” causing damage to the Applicant’s property and the conduct is in contravention of section 6(3) of ESTA. It is not clear in what respect the construction of this particular dwelling is causing damage to the property of the Applicant.

[23] Section 6(3) of ESTA prohibits the causing of material damage to the property.[2] It also forbids the occupier from enabling or assisting unauthorized persons to establish new dwellings on “the land in question.”[3] It may be that the Applicant is moving from the premise that the Fourth late Respondent allowed the rest of the Respondents to

establish a new dwelling on the farm. It is one of the disputed facts agreed upon that the First, Second, Third and Fifth Respondents have independent rights to reside on the farm. In other words, it is in dispute that other Respondents apart from the late Fourth Respondent are occupiers.

Who is an Occupier

[24] ESTA defines an occupier thus:[4]

““occupier” means a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding...

- a)
- b)
- c) a person who has an income in excess of the prescribed amount,”

ESTA Regulations were on 18 December 1988, published in the Government Notice.[5] In terms of clause 2(1) of the Regulations “the prescribed amount for the purposes of paragraph (c) of the definition of “occupier” in section 1(1) of the Act shall be an income of R5000 per month.”

[25] It is evident from section 6(1) that a person has the “right to reside on and use the land” only if he or she qualifies to be an “occupier” as defined in section 1 of ESTA. As the law stands a person who has income in excess of R5000 per month does not qualify to be an occupier. Some of the Respondents before court are employed. However, it is not clear from the papers and the evidence led how much those Respondents earn per month. What is clear though is that the Respondents reside on the farm and when the Applicant took ownership of the farm in 2008, the Respondents were on the farm. The previous owner of the farm knew that the late Fourth Respondent was residing on the farm with the members of her family in accordance

with her right to family life in accordance with the culture of her family.[6] That was communicated to Mr Hatting.

[26] In terms of ESTA, for a person to qualify as an occupier he or she must have consent or other right in law to reside and use land in question. Consent can either be express or tacit. In terms of ESTA, a person who has openly and continuously resided on land for a period of one year shall be presumed to have consent unless the contrary is proved.[7] Further, a person who has continuously and openly resided on land for a period of three years is deemed to have done so with the knowledge of the owner or the person in charge.[8]

[27] Therefore, in the absence of specific amount of earnings by the employed Respondents, it is safe for this court to assume that they are all occupiers as they have resided on the farm for more than three years. It is presumed that the Respondents had consent from the Applicant and are deemed to have stayed on the farm, with the knowledge of the Applicant or Mr Hatting and they are occupiers.

[28] The burning issue is whether the Respondents were entitled in law to build a completely new structure without consent and knowledge of the Applicant or Mr Hatting. This is an aspect which should not detain me for a long time. The Respondents had no consent from the Applicant to build a new structure. The Respondents aver that in terms of the Scribante decision they are entitled to build a new structure without the consent of the owner as they are improving the old mud houses which are dilapidated. The reference to Scribante decision, is a reference to the Constitutional court decision in *Daniels v Scribante and Another*. [9]

[29] Scribante is no authority for the finding that the occupier can build new structures on the farm without the consent of the owner or person in charge. Scribante is concerned with the making of improvements on the existing structure. Even in the case of improvements, Scribante requires a meaningful engagement between the occupier and the owner or person in charge. The occupier can proceed and effect improvements to the existing structure, without consent of the owner, or person in charge, only after meaningful engagement and

where the owner or person in charge, unreasonably withholds consent.

- [30] Even in the case of improvements, the occupier does not have untrammelled right to effect improvement to a dwelling. He is entitled to effect improvements that are reasonably necessary to render his dwelling habitable in conformity with his right to human dignity. In unreported judgement of this court,[10] Meer AJP expressed herself in the following terms:

“The Applicant is not entitled to a general right to make improvements to his dwelling, which the first prayer of his notice of motion seeks. He is entitled to an order permitting improvements which are reasonably necessary to render the dwelling habitable in the exercise of his right to human dignity.”

- [31] In casu, the existing mud structures are clearly old and have cracks on the walls. The corrugated is iron roof pressed down with rocks on top. Occupation of those structures, is clearly not in harmony with the Respondents’ right to human dignity. Had the Respondents demolished the mud structures, levelled the same site and rebuilt the same, strong and durable structure using concrete or cement blocks, they would have brought their structure within the meaning of improvements which render the structure habitable and concomitant with their right to human dignity. This they could do even without the consent of the Applicant or Mr Hatting, if after a meaningful engagement the Applicant, or Mr Hatting unreasonably withheld consent. The Respondents, contrary, are building a totally new structure without the consent of the owner or person in charge. That is not allowed. It is therefore up to the Respondents what they intend doing, from now moving forward. What is clear is that the Respondents urgently need proper dwellings, the occupation of which will be in keeping with their right to human dignity.

Costs

- [32] Mr Grobbelaar sought costs against the Respondents, especially the Fifth Respondent. The practice in this court is not to award costs unless there are exceptional reasons why such an order should be made. In this case no exceptional reasons have been shown to exist, justifying a costs order.

Order

- [33] In the result, I make the following order:

1. It is declared that the construction of an entirely new dwelling or structure, by the Respondents on a portion of the farm U [...] [...] HS, in the District of Volksrust, Mpumalanga without consent of the Applicant or person in charge, is unlawful.
2. The Respondents are prohibited and restrained from building entirely new dwellings or structures on the farm U [...] [...] HS, without the express written permission of the Applicant or person in charge.
3. The Respondents are prohibited and restrained from proceeding with the construction of the entire new dwelling or structure on the farm U [...] [...] HS.

4. The Respondents are prohibited and restrained from enabling or assisting an unauthorised persons from establishing entirely new dwellings on the farm U [....] [....] HS, without the express written permission of the Applicant or Mr Hatting as a person in charge.
5. The Respondents are ordered to demolish the unlawfully constructed building foundation on the farm U [....] [....] HS, within ten (10) days from the date of service of this order upon them.
6. The Sherriff for the District of Volksrust is authorized to demolish the unlawfully constructed building foundation should the Respondents fail to comply with paragraph 5 of this order.
7. There is no order as to costs.

MT NCUBE

Judge of the Land Claims Court of

South Africa, Randburg

APPEARANCES

For Applicant:

Mr P Grobbelaar

Reviera,

Pretoria

For Respondents: Adv K.S Mashaba

Instructed by:

Mthimunye Attorneys

Embalenhle

Mpumalanga

[1] Act 108 of 1996

[2] Section 6(3)(b)

[3] Section 6(3)(d)

[4] Section 1(1).

[5] See GN R1632 GG 19587 dated 18 December 1998

[6] Section 6(2)(d)

[7] Section 3(4).

[8] Section 3(5).

[9] 2017

(4) SA 341 (CC)

[10] LCC119/2020, dated 21 September 2021 para 27.

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