
SOUTH AFRICA / JUDGMENT

Berger v Unknown Individuals trespassing and-or attempting to invade and-or settle on the immovable property known as the remaining portion 331 of the farm Waterkloof 305 JQ (M501/16) [2017] ZANWHC 70 (27 October 2017) [2017] ZANWHC 70

COURT

North West High Court, Mafikeng

BEFORE

A.M. Kgoele

CASE / FILE NUMBER

M501/16

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO. M501/16

ESME BERGER Applicant

and

THE UNKNOWN INDIVIDUALS TRESPASSING AND/OR

ATTEMPTING TO INVADE AND/OR SETTLE ON THE

IMMOVABLE PROPERTY KNOWN AS THE REMAINING

PORTION 331 OF THE FARM WATERKLOOF 305 J.Q. 1st Respondent

STATION COMMANDER: RUSTENBURG POLICE

STATION 2nd Respondent

MINISTER OF POLICE 3rd Respondent

CIVIL MATTER

DATE OF HEARING: 14 SEPTEMBER 2017

DATE OF JUDGMENT: 27 OCTOBER 2017

COUNSEL FOR THE APPLICANT: Adv. J G C Hamman

COUNSEL FOR THE RESPONDENTS: Adv. J J Botha

IN THE HIGH COURT OF SOUTH AFRICA

ABEL MOLEFE AND 38 OTHERS Applicants

ESME BURGER 1st Respondent

JOHANNES HENDRIK LUBBE DE KLERK 2nd Respondent

GUSTAV DU TOIT HEUER 3rd Respondent

THE SHERIFF OF THE HIGH COURT RUSTENBURG 4th Respondent

THE STATION COMMANDER OF SAPS RUSTENBURG 5th Respondent

THE PROVINCIAL COMMISSIONER SAPS N.W. 6th Respondent

THE MINISTER OF POLICE OF THE REPUBLIC OF

SOUTH AFRICA 7th Respondent

COUNSEL FOR THE APPLICANTS: Adv. J J Botha

COUNSEL FOR THE RESPONDENTS: Adv. J G C Hamman

JUDGMENT

KGOELE J.

- [1] Two applications served before me having been filed under the same case number. I ordered that the applications be heard together as one because the parties are the same, the central issue which the parties are fighting about are also similar/one.
- [2] The first application, which I will refer to as the main application, served before the Urgent Court of this Division to halt a land invasion. A Rule Nisi was granted in the absence of the 1st respondents, who were at the time cited as the “Unknown individuals trespassing or attempting to invade and/or settle on the immovable property” belonging to the applicant in this matter. The applicant now seeks to confirm this Order. The Rule Nisi granted in essence interdicted the respondents from invading the property of the applicant and from also erecting structures thereon. It further mandated the Sheriff to demolish the uninhabited structures. The 2nd respondent, the police, were directed to assist to give effect to the Order.
- [3] After the main application was served and implemented, a person named Abel Molefe and 38 other applicants launched a separate application for the Rescission of the said Order (the Rescission application). They furthermore in this application sought for the restoration of the alleged structures which they claimed were their residence. For the sake of convenience I will refer to the applicant in this main application who is the respondent in the Rescission application as applicant, and the unknown individuals in the main application and who are applicants in the Rescission application as respondents in this judgment.

[4] The circumstances under which the Rule Nisi Order was granted was as follows:- The applicant, who currently resides in Australia, allegedly requested the deponent to the founding affidavit (Mr De Klerk) to check up on her immovable property as she received reports that certain people were trespassing in her property. According to the founding affidavit, Mr De Klerk, who also is the neighbour of the applicant went to the property and witnessed approximately 40 people clearing a large area of land in the said property. Upon discussions with these people, they allegedly stated to him inter alia that they were concerned about certain graves situated on the immovable property. Applicant was informed about this and was apparently willing to enter into an agreement with these people in order to provide access to the grave sites and an agreement was drafted, but eventually not signed. De Klerk indicated that he was accompanied by the applicant at that particular time of the negotiations as she was still in the Country and two police officers. He also alleged that at the first meeting on the 6th July 2016 it was agreed that they will cease trespassing the property and building activities until discussions were concluded.

[5] De Klerk further contends in the founding affidavit that it later became apparent that the grave visitations were only a smokescreen

and the real intention was to occupy the immovable property as these people started erecting structures thereon. This became clear during the second meeting on the 7th July 2016 when they were supposed to sign the agreement and they refused. Unfortunately, subsequent meetings proved fruitfulness

and De Klerk alleges that the last meeting in the range of meetings took place on the 22 September 2016.

[6] On the 28th September 2016, as it is alleged, a group of fairly unlawful trespassers once again unlawfully entered the property and began to

erect the structures. As the group became more and more aggressive, a case was opened at Rustenburg Police Station under case number 1151/09/2016. It appears that no arrest was made up to the launch of this main application. At the time when the actual unlawful erection of structures commenced on the 28th September 2016, the applicant was already abroad. She purportedly authorized De Klerk and Mr Gustav du Toit Heuer to launch

an urgent interdict. They further claimed that this was also precipitated by the fact that one of the people working on the farm was threatened including Mr Heuer. According to them there was also a real risk to the property being damaged and even loss of life. The boundry fence appeared to have been cut to make an access road for vehicles to the property.

[7] According to Mr Molefe who is the first applicant in the Rescission application, some of the 38 applicants cited therein including

himself were residing on the property for a long time in memorial and had established structures at the time when they were evicted and their houses demolished. Molefe also alleges that they were residing on the property with the consent of the applicant in the main application and/or previous owners or persons in charge of the property.

[8] They claim that after the Rule Nisi was granted, the Sheriff assisted by the police evicted them from the property and demolished their houses where they had all along resided in. Because the Order granted was executed against them, they assumed that they are the persons whom applicant intended to cite as the first respondents in the main application. They further allege that the execution of the Rule Nisi against them was unlawful as they were occupiers in terms of Section 1(1) of the Extension of Security of Tenure Act 62 of 1997 (ESTA). They further claim that they had consent to reside on the property. In particular, the deponent to their answering affidavit Mr Molefe, indicated that he was born in 1966 and grew up on the farm when it was owned by Mr Smith who employed his parents and various other people on the farm.

[9] He further alleged that Mr Smith also gave them compounds to live in. After his death in 1970 it was taken by Tomie Gate who also did not have any problem in them residing there and also employed them. After Tomie Gate died in 1976, no one took over the farm. As a result, some people left the farm as they were unemployed to look for jobs elsewhere. Others remained,

including the deponent, as they were doing piece jobs in the neighbouring farms and around Rustenburg. He further claims

that after the property was bought by the applicant in +- 1984, they struggled to get hold of her and even resorted to the police and the Municipality to trace the owner. They only managed to get hold of her in May 2016 and informed her of their wish to own the farm amongst other reasons for the fact that the graves of their families are there. They promised to get hold of relevant authorities to help them purchase the property. The respondents claim in their second application that they received express or implied consent from the applicant since they at the least occupied the property as from May 2016 permanently, freely and openly without any objection from the applicant.

LACK OF AUTHORITY

[10] The respondents' Counsel submitted in Limine that the deponent to the founding affidavit on behalf of the applicant, Mr De Klerk, did not have the necessary authority to institute the proceedings. De Klerk deposed to the founding affidavit on behalf of the applicant and alleged that he was authorized to institute the proceedings on behalf of applicant together with a certain Mr Heuer. He also attached a so-called authority for him to act on behalf of the applicant as annexure "EB1". However, this document does not authorize Mr de Klerk. It authorized Mr Heuer but Mr Heuer was not the one who made the application and deposed to the founding affidavit. The respondent's Counsel argued that there was clearly no authority

and the ex-parte application was a nullity from the beginning and for this reason alone, the Rule Nisi cannot be confirmed. The respondents further used this submission to also support their counter-application or the Rescission of the Order of the Rule Nisi contending that this lack of authority was not pointed out to the Court that granted the Rule Nisi otherwise that Court would not have granted the Order. They contend this is a deficiency which could have been pointed out to the Court.

[11] The respondents' Counsel further submitted on their behalf that in ex parte proceedings there is a special duty on an applicant to disclose all the material facts and to act in the utmost good faith. He referred this Court to a Book of H. Daniels: Becks Theory and Principles in Civil Actions, 6th Edition, p. 214. According to him this includes a duty to point out deficiencies in the papers. He maintained that the applicant's legal representative at the time had to explain to this Court why the lack of authority was not pointed out to the Court that granted the Rule Nisi and why the Order wrongly records that the first respondents were represented and consented to the Order, when they were absent.

[12] He submitted further that the Order was wrongly sought and granted in the following respects:-

12.1 The first respondents did not consent to the Order and the person who allegedly appeared on their behalf was not authorized;

12.2 The person who made the application on behalf of the applicant was not authorized.

[13] A perusal of the respondents' papers reveals that Paragraph 4.5 of their answering affidavit is couched as follows:- "that both Johannes Hendrick Lubbe De Klerk and Gustav du Toit Heuer have no locus standi in this matter and do not have the necessary authority to bring this application on behalf of the applicant. [My Emphasis]

This is what is pleaded in their papers and they cannot during submissions in Court attempt to change this contention.

[14] In addition, in motion proceedings, the deponent to an affidavit need not be authorized by the party concerned to depose to an affidavit. It is the institution of the proceedings and the prosecution thereof that must be authorized. See:- Ganes and another v Telecoms Namibia Limited 2004 (3) 615 (SCA).

[15] In the founding affidavit of the applicant it has been set out that because the applicant was in Australia at the time of invasion, the deponent had to be mandated to hurry to litigate the proceedings. They also attached Annexure "EB1" to the founding affidavit which is the mandate. A confirmatory affidavit by Heuer who had a clear mandate to initiate the proceedings is also before Court. As to who deposed to the affidavit does not matter because the deponent to an affidavit is a witness. This submission that both De Klerk and Heuer do not have locus standi as correctly pointed out by Counsel for the applicant does not have merit. As indicated above, this issue later changed as it became clear that now the authority or the locus standi of only one person De Klerk, was questioned and not both of them. This

argument still cannot assist the respondents for the same reasons already given above.

[16] The same applies to the submission that developed from the above which is to the effect that the person that deposed to the

confirmatory affidavit is not the same as the person that was authorized in terms of the mandate. Firstly, this issue was

only raised during the submissions in Court. Secondly, it is true that the mandate only refers to “Gustav Heuer” and not to “Gustav du Toit Heuer” as depicted in the one confirmatory affidavit to the main application nor to “Gustav Adolf Heuer” as inscribed in the other confirmatory affidavit in the Rescission application. In my view, this inconsistency with regard to the middle name “Adolf” and “du Toit” is neither here nor there because the deponent of the two confirmatory affidavits in particular stated that he stays at the farm Waterkloof, which confirm what De Klerk in his founding affidavit had indicated that Mr Heuer had been staying in the farm.

Secondly, Mr Heuer indicated in both affidavits that he read the contents of the affidavit of the deponent to both the founding and replying affidavit of the main application and confirms what the deponent says in relation to him. In my view, to uphold this submission by the respondent will be putting form over substance. A complete answer to this issue is found in paragraph 4.6 of the respondents’ answering affidavit wherein they say:- “Mr Heuer only deposed to a confirmatory affidavit”. This confirms that they also regarded Adolph to be the same du Toit. But the crux of this issue is that this is not the case the applicant was called to answer, otherwise he will have dealt with this issue in his papers.

[17] The respondents also relied heavily on the case of *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) for their proposition that the applicant had failed to disclose that the deponent to the founding affidavit has no authority to institute the legal proceedings on behalf of the applicant. However I find that the facts of this case are distinguishable from the facts of our matter. In our matter, the mandate which only referred to Gustav Heuer formed part of the papers that served before the Court. The Court that granted the Order considered the founding affidavit of De Klerk together with this mandate. It cannot from the facts of this case where De Klerk disclosed the fact that the applicant herself was abroad in his founding affidavit be said that the Court did not apply its mind properly to the papers before it when granting the Order. One cannot simply conclude that had the Court been made aware that the mandate it read only referred to one person and not two, it would not have granted the Order. This conclusion is strengthened by the consideration I had already made above that it is trite law that a person that deposed to an affidavit does not necessarily have to be the person that is being given the authority to institute the proceedings.

[18] Rule 42(1)(a) of the Rules reads as follows:-

“42

(1) The court may, in addition to any other powers it may have,

mero motu or upon the application of any party affected, rescind or vary:

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby”.

[19] The requirements for the granting of a rescission in terms of Rule 42(1)(a) are:-

- the judgment must have been erroneously sought or erroneously granted;
- the judgment must have been granted in the absence of the applicant;
- the applicant’s rights or interest must be affected by the

judgment.

[20] The argument which remains to be answered will then be: (1) did the court make a mistake by admitting the mandate or authority which was attached on the papers. (2) were there any facts which the Court was not aware of which could have made it not to grant the judgment?

[21] The following which was said in the case of Eden Security Services CC and Others v Cape Peninsula University of Technology and Others, [2014] ZAWCHC 148, a judgment delivered on 8 September 2014 by Dlodlo J in the Western Cape High Court Division are apposite in this matter.

[63] “When the law entrust a functionary with a discretion it means that the law gives recognition to the evaluation made by the functionary to which the discretion is entrusted, and it is not open to a Court to second-guess his evaluation. See: MEC for Environmental Affairs and Development Planning v Clairison’s CC supra par. 18. Importantly, the weight or lack thereof to be attached to the various considerations that go to making up a decision is that given by the decision-maker. The Court will merely require the decision-maker to take the relevant consideration into account, it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision maker’s discretion. See MEC for Environmental Affairs and Development Planning v Clairison’s CC supra at par 20 and 22.”

[22] The Court clearly exercised its discretion to accept the mandate/authority and one cannot say that it exercised this discretion wrongly. This conclusion also disposes off the first leg that the respondents relied upon in as far as the Rescission application is concerned that it was erroneously sought.

[23] The issue regarding the respondents being represented by Mr Mmolawa at the previous hearing and that the Order was obtained by consent can be summarily disposed off by accepting the explanation made by the applicant that this was a mistake simply because normally in ex parte application only one party and his/her representative appear before Court. In our case, the respondents could not have been expected to be there because they were referred to as unknown individuals in the application. Besides, because of the nature of ex-parte proceedings, one will not have expected the unknown individuals to have been

represented at the particular time and even agreed to the Order.

EX PARTE APPLICATION

- [24] The respondents in their answering affidavit also raised an issue about non service of the ex-parte application and submitted that there are no valid reasons why the application was not served on them before it was granted on the 3rd of October 2016.
- [25] This point also is ill conceived. A case was made out in paragraphs 30-34 of the founding affidavit of the main application

why the initial application was brought on an ex-parte basis, which the Court granting the Rule Nisi considered, applied its mind and allowed the application to proceed on an ex-parte basis. No misdirection can be detected from the discretion the Court exercised. This also disposes the issue raised in their counter application (the Rescission application) that the Order was granted in their absence.

EXECUTION OF THE ORDER

- [26] It is common cause that the dispute the respondents are bringing out and which also forms the gravamen of their Rescission application relates to the manner in which the Order was executed. The respondents claim that habited/occupied structures wherein they were living were demolished hence they claim that they were unlawfully evicted without the provision of ESTA being followed. The applicant denies the eviction and demolition of the habited/occupied structures. The wording of the Rule Nisi inclusive of the return of Sheriff therefore has to be thoroughly considered. I am saying this because the applicant filed several confirmatory affidavits from her neighbours to the effect that there were no people staying there in 2016 and the respondents also on the other hand filed confirmatory affidavits to the effect that some of them were living there.
- [27] A thorough perusal of the papers reveals that the Rule Nisi granted by the Court is clear to the effect that no eviction Order was granted. The interdict was granted to demolish uninhabited or incomplete structures. The Order was clearly informed by the prayers sought which were clear to the effect that it sought an interdict to stop persons from entering the property, erecting any structures and further that the uninhabited structures to be demolished.
- [28] The return of the Sheriff in relation to the execution of the Order indicates that only uninhabited structures were demolished. It refers to 110 unoccupied structures that were demolished. It also refers to the fact that there were only 11 people that were found at the area and many others came when they were busy demolishing.
- [29] It is a well-established legal principle that a Sheriff is independent and is not an agent of any party. See: Sheriff's Act 90 of 1986 Section (3) thereof.

- [30] The return of Execution of the Sheriff (in this case indicating that only uninhabited structures were demolished) constitutes prima-facie evidence of the facts stated therein. See:- Section 43(2) of the Superior Court's Act 10 of 2013.
- [31] Unfortunately, the respondents' Counsel resorted to poking holes in the Return of Execution of the Sheriff by trying to give an interpretation of the words the Sheriff used therein instead of dealing with the facts that can rebut the prima-facie case established by the return during his submission. In the case of *Sussman and Company Pty Ltd v Schwarzer* 1960 (3) SA 94 (O) at page 94 it was decided that if you dispute the accuracy of the Sheriff's return, you need to disprove the content.
- [32] Respondents' Counsel submitted that the Return of Execution talks about "Eviction" that was agreed with the attorney of the applicant. Further that the Sheriff uses the words "occupiers" not "invaders". According to him all these words strengthen the fact that the respondents who were living in the farm were evicted, and that occupied structures were demolished. He further submitted that he does therefore not agree with the submission that there is a dispute as to whether occupied structures were demolished because of what the Sheriff had said. I must point out that the last part of submission came as a surprise because in his supplementary heads of arguments filed on the 30 August 2017 he submitted that "at the onset there are fundamental disputes of fact which should upon the well-known *Plascon Evans* principle the application should be adjudicated on the first respondent's version."
- [33] Be it as it may, the limited interpretation of the two words "Eviction" and "Occupiers" cannot assist the respondents either. The word "evict", in its dictionary meaning can also mean for example, chasing out of people in a work place or to recover property or title to the property. It does not only necessarily mean taking people out of their houses/structures. The same applies to the word "occupiers" – It does not necessarily refer to the people who are living/occupying structures only, but also to people who were occupying land but were not residing there. The word "occupy" can also mean to "take and hold possession of". I fully agree with the submissions by the applicant's Counsel that what is important in this matter is what the Sheriff demolished, which is unoccupied structures.
- [34] The Order sought was a proper Order and it was forwarded to the Sheriff to execute. Whether the conduct of the Sheriff was unlawful or not, cannot be attributed to the applicant. During the submission Counsel representing the respondents, again attempting to rely on poking the purported mistakes in the return of Execution, submitted that the return indicates that the applicant herself was there when the structures were demolished. When asked by the Court to point a sentence that say applicant was present, he then relied on a sentence in the return of the Sheriff that was couched as follows:- "after demolishing the structures they were handed to the applicant". Again here we are dealing with interpretation and semantics of what the Sheriff wrote which also cannot assist the respondents.

What makes matters worse for the respondents is that this submission contradicts and flies against what the respondents said in their Counter-Application (Rescission application) at para 34 where they said that:- “I do not know who instructed the Sheriff to demolish the habituated structures. Instruction must have been issued by applicant”.

[35] I am of the view that as correctly submitted by the applicant’s Counsel, this Court cannot refuse to confirm the Rule Nisi even if the Court can accept the fact that the Sheriff did something that he was not supposed to do, which fact I do not find. The other fact that persuade me to make this conclusion is that, Annexure “EB1, which contains the mandate, does not refer to Eviction, but invasion. Even if the Sheriff demolished their habited structures, they have recourse available in our law and/or appropriate remedy that they can follow or use. This brings me to deal with the next last issue that was raised.

THE COUNTER APPLICATION / APPLICATION IN TERMS OF ESTA

[36] The respondents launched a separate application for the Rescission of the Rule Nisi including their reinstatement on the property, the erection of demolished structures as well as interdicting the applicant from evicting them as indicated above. I have already considered and disposed of the grounds that the respondents relied upon for the Rescission of the Rule Nisi above, and need only to deal with the second part of this application, their reinstatement into the property and their structures.

[37] Counsel representing the respondents submitted in this regard that the first respondents put up sufficient facts to show that they are occupiers on the property as defined Section 1(1) of the Extension of Security of Tenure Act, Act 62 of 1997 (“ESTA”). As already mentioned, they had consent to reside on the property and none of them had an income of more than R5000 per month. The property is also clearly within the ambit of Section 2(1) of ESTA.

[38] The argument continued, despite their status as occupiers under ESTA, the first respondents were evicted from the land and their houses were demolished. This was ostensibly done in terms of the Court Order that was granted on an ex parte basis. It is the contention of the respondents’ Counsel that the version of the respondents about their eviction and the destruction of the homes must be accepted.

[39] Counsel for the respondents indicated further that it is clear from the founding affidavit that the applicant was aware of the presence of the respondents on the property because she had negotiated with them. Further that, the effect of the applicability of ESTA in this matter is that this Court did not have jurisdiction to have made the Rule Nisi in terms of Section 17(1) of ESTA.

- [40] The respondents' Counsel further submitted that the applicant did not file any affidavits by the persons who were involved in the execution of the order, in particular, the Sheriff, to refute the respondents' version. Only a bald and unsubstantiated denial is made in paragraph 19.3 of the replying affidavit by someone who was not present. There is furthermore no affidavit by the applicant herself as to what instructions she gave with regard to the execution of the Order, including the applicant's attorney.
- [41] He lastly urged the Court to grant the Counter application/ Rescission application in its current form as according to him the respondents made out a proper case that they are occupiers in terms of ESTA and not people who unlawfully invaded the land.

Secondly that, what the applicant did is clearly an abuse of the Court process.

- [42] The respondents are clearly clutching at straws and also blowing hot and cold at the same time. Whilst on the one hand they claim to be occupiers in terms of the ESTA, they want this Court to proceed to consider the matter when they are also at the same time claiming that this Court did not have jurisdiction to have made an Order in terms of Section 17(1). They lose sight of the fact that this proposition confirms the submission by the applicant's Counsel that;-

- the counter-application or the Rescission application should not have been in this Court in its current form;
- ESTA provides a mechanism for what they claimed has been done by the applicants and the Sheriff under section 14(3).

- [43] I fully agree with the submission by the applicant's Counsel that the Rescission application should not have been in this Court in its current form. Firstly, the order that was issued was a Rule Nisi which the respondents were supposed to and required to reply to. They had two options to do that namely:- to anticipate the return date of the Order granted in terms of the Uniform Rules of Court if they felt their side of the story needed any urgent attention or to oppose the granting of the final order.

- [44] Secondly, taking from their own mouth that they are occupiers in terms of ESTA, which fact I do not find at this stage, this Court does not have any jurisdiction to deal with their matter because not even a single party to this proceedings consented to the jurisdiction of this Court. Section 17 (2) of ESTA provides:-

"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 situated"

It further boggles one's mind to accept the fact that the respondents could not trace the owner of the land from 1984 –

2016 when they were residing on the same land.

[45] Thirdly, ESTA provides mechanism for what they claim was done by the Sheriff in Section 14(3) thereof. See also the case of Minister of Health NO v New Clicks 2006(2) SA 311 (SCA) at paragraph 95-97 364 and 365 where it was said:-

“95. PAJA is the national legislation that was passed to give effect to the rights contained in s33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so.

96. A litigation cannot avoid the provisions of PAJA by going behind it, and seeking to rely on s33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in s33 to be given effect to the means of national legislation.

97. Professor Hoexter sums up the relationship between PAJA, the Constitution and the common law, as follows:-

“The principle of legality clearly provides a much-needed safety net when the PAJA does not apply. However, the Act cannot simply be circumvented by resorting directly to the constitutional rights in s33. This follows logically from the fact the PAJA gives effect to the constitutional rights. (The PAJA itself can of course be measure against the constitutional rights, but that is not the same thing). Nor is it possible to sidestep the Act by resorting to the common law. This, too, is logical, since statutes inevitably displace the common law. The common law may be used to inform the meaning of the constitutional rights and of the Act, but it cannot be regarded as an alternative to the Act. (Footnote and emphasis omitted). I agree.

Although the case quoted above deals with the provisions of PAJA, the remarks are apposite in the facts that deals with the provisions of ESTA.

[46] Lastly, I find it strange and confusing that the respondents are applying for a Rescission of the Rule Nisi and also opposing the Rule Nisi at the same time coupled with an application in terms of Section 14(3) of ESTA. During arguments Counsel for the respondents

somersaulted and indicated that in fact what happened is spoliation. A question that comes into mind to this belated proposition is whether the conduct by the Sheriff irrespective of it being lawful or not can amount to spoliation. All of the above indicates that the respondents are just clutching at straws and fail to make an answer to the case that is before this Court.

[47] It is clear from the Notice of Motion of the main application that applicant only sought relief in relation to uninhabited structures and the demolition thereof. The Court also granted the relief in relation to what was sought. The relief was appropriate under the circumstances to curtail an unlawful land invasion. In my view, even if the Rule nisi can be confirmed, the wording of the Order will not change and the final Order will still only make provision for the demolition of uninhabited structures. It is a matter of public interest that illegal land grabs should be halted. The conduct is a threat to the rule of law. See:- Groengras Eiendomme (Pty) Ltd and Others Elandfontein Unlawful Occupants and Others, 2002 (1) SA 125 (T) paragraph 30.

- [48] I am of the view that the respondents do not advance any cogent reasons why the Rule nisi curtailing an unlawful land invasion should not be confirmed. At best there is a complaint in relation to what allegedly transpired during the execution process. The submission that the Sheriff should have filed an affidavit refuting what the respondents had said does not have merit because the Return of the Sheriff about the execution is attached and he indicated that he demolished uninhabited structures. The same applies to the submission that the applicant should have filed an affidavit explaining what instruction they gave to the Sheriff. This is not necessary as the Sheriff is an officer of the Court and derives his instructions from the Court through the Court Order not the litigants
- [49] Since the relief sought and granted only relates to uninhabited structures, the provisions of the Extension of Secure Tenure Act, 62 of 1997 ("ESTA") can never apply in casu as ESTA only applies to primary residences. See: Kiepersol Poultry Farm (Pty) Ltd v Phasiya, 2010 (3) SA 152 (SCA) at par. 8 and 9.
- [50] In *Lester v Ndlambe Municipality & Another*, 2015 (6) SA 283 (SCA) on page 290 the Supreme Court of Appeal held that the protection in terms of Section 26 of the Constitution of the Republic of South Africa, 1996 is not available in demolition cases where alternative housing is available. All of the deponents clearly have alternative

residences. In any event, it is the applicant's case that they were not resident on the relevant land.

ORDER

[51] Consequently the following order is made:-

51.1 The Rule Nisi granted on the 3 October 2016 is hereby confirmed;

51.2 The application for Rescission of the Rule Nisi granted on the 3 October 2016 and its ancillary reliefs is dismissed;

51.3 The individuals who deposed to the answering affidavits to the main application and/or founding and confirmatory affidavits in the Rescission application are ordered to pay the costs of the two applications jointly and severally.

A.M. KGOELE

JUDGE OF THE HIGH COURT

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