

SOUTH AFRICA / JUDGMENT

Khumalo and Others v Botha and Others (LCC 161/2020) [2021] ZALCC 3 (25 March 2021)

[2021] ZALCC 3**COURT**

Land Claims Court

BEFORE

T M Ncube

CASE / FILE NUMBER

LCC 161/2020

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Source record**IN****THE LAND CLAIMS COURT OF SOUTH AFRICA****HELD****AT RANDBURG****CASE****NO: LCC 161/2020****Heard****on:****Delivered****on:****In**

the matter between:

JOHN
KHUMALO
First Applicant
THOLANOMSINDO
JOHANNES KHUMALO
Second Applicant
SPHIWE
KHUMALO
Third
Applicant
BUSISIWE
GLORIA KHUMALO
Fourth
Applicant
MATSHIDISO

MOLOI
Fifth Applicant
PHINDILE
KHUMALO
Sixth Applicant
and
MARTHA
CATHARINA BOTHA
First
Respondent
PIERRE
HENRY BOTHA
Second Respondent
THEUNIS
FILMATER
Third
Respondent
MINISTER
OF POLICE
Fourth
Respondent

JUDGMENT

NCUBE AJ

Introduction

- [1] This is an application brought before me on urgent basis. The Applicants seek the following relief:
- (a) Declaring that the eviction of the Applicants from Dunbar farm is unlawful under the Extension of Security of Tenure Act, 62 of 1997 (the “Act”);
 - (b) Declaring the deprivation of use of land by the Respondents (i.e. divesture of ploughing fields, grazing camps, removal or reduction of livestock, demolition of houses/homestead/building structures) unlawful under the Act;
 - (c) Directing the Respondents to forthwith restore all ploughing camps, rebuild the demolished house/homestead/building structures to the Applicants and as permissible under the Act.
 - (d) Interdicting or restraining the Respondents from harassing, assaulting and insulting or using foul language against the Applicants; and
 - (e) Costs of the application.

- [2] The First, Second and Fourth Respondents oppose the application. The Third Respondent did not participate in the proceedings and did not oppose the application. The affected land is the Remaining Extent of the Farm Dunbar 236 (“the farm”).

Parties

- [3] The First Applicant is John Khumalo (“Mr Khumalo”). He is 93 years old. He is the father to the Second, Third, Fourth and Sixth Applicants. He is the father-in-law to the Fifth Applicant. Mr Khumalo is the occupier on the farm.
- [4] The First Respondent is Martha Catharina Botha (“Mrs Botha”). The Second Respondent is Pierre Henry Botha (“Mr Pierre”), the biological son of Mrs Botha. The Third Respondent is Theunis Filmater (“Theunis”). Theunis is the prospective buyer of the farm. The Fourth Respondent is the Minister of Police (“the Minister”).

Referral to Oral Evidence

- [5] Having read the papers and listened to arguments I ascertained that there were numerous disputes of fact which could not be resolved on the papers. I then made an order referring the application to oral evidence on the following

issues:

“(a) Whether the First Applicant ever worked for Mr Henry Botha.

- (b) Whether the deceased (Henry Botha) compensated the First Applicant on his retirement for his services by allocating to him a piece of land and defined the boundaries thereof.
- (c) Whether the First Applicant only or Applicants collectively resided on Dunbar farm around 2015 or 2016.
- (d) Whether the brick house was constructed to completion.
- (e) Whether the Second Respondent partially demolished the brick house in June 2020 and completely demolished it on 31 August 2020.”

Background

Facts

- [6] Mr Khumalo arrived on the farm in 1972. He was employed by Mr Jappie Boshoff (“Jappie”), the then farm owner. He was given consent to reside, cultivate and graze livestock on the farm. Mr Khumalo and his late wife Nora built their own homestead on the farm. They had children. The Second, Third, Fourth and Sixth Applicants are some of their children. They stayed together on the farm as a family unit. All the children have attained majority.

- [7] In 1993/1994, Mr Henry Botha (“Mr Botha”) purchased the farm from Jappie. Mr and Mrs Botha carried on with beef farming operations on the farm. In 2007, Mr Botha passed on. Mrs Botha continued with farming alone until
2013. In 2013, Mrs Botha leased the farm to Mr Johannes Boshoff (“Johannes”), the nephew of Jappie. Johannes is currently subleasing the farm to one Mr Poggenpoel until April 2021. At some stage, Mr Khumalo retired but continued residing on the farm. It is not clear whether Mr Khumalo retired during the time of Jappie or during the time of Mr Botha. He maintains it was during the time of Mr Botha, which is denied by Mrs Botha, Pierre and Johannes.
- [8] Mrs Botha and Pierre stay in Johannesburg and visit the farm once a month. Johannes, the lessee, also did not stay on the farm, he visited the farm once a week. In the absence of Mrs Botha and Johannes, Steven Mofokeng would be in charge on the farm. Steven worked for the Botha’s and Johannes as a herdsman.
- [9] Mr Khumalo’s homestead consisted of a rondavel, a hut and a three roomed house with a thatched roof. At some stage, Mr Khumalo asked his children to build a cement brick house, which they did. Mr Khumalo fell sick and left the farm in order to get treatment at Uitvaal. Mandla Kubheka remained on the farm looking after cattle. Other children also remained on the farm. The Khumalo’s brick house was demolished without a court order. Mr Khumalo could not return to his homestead as his children had received an instruction from Cloete and Neveling Attorneys to vacate the farm. Letters were written to Mandla Kubheka, Johannes Khumalo and Mbuyiselwa Moloi. They were told they had no permission to stay on the farm and keep cattle there and were instructed to leave the farm. These individuals are now staying wherever they can find accommodation. At some stage Mr Khumalo was staying at his son-in-law’s place and at some stage at his daughter’s place.
- [10] On 21 January 2020, Pierre arranged for 32 head of cattle grazing on the farm to be impounded. The cattle were taken to Harrismith Pound. This happened after Pierre gave notice to Mr Khumalo to remove his cattle on 8 November 2019. The cattle were subsequently returned to the farm. Again, on 11 June 2020, Pierre arranged for the cattle to be impounded. Cattle were removed from the farm and taken to Ladybrand Pound on the advice of Captain Shannon from the Harrismith Stock Theft Unit. On the second occasion, only 30 cattle were impounded.
- [11] The Second Applicant opened an assault case against Theunis for allegedly assaulting him on 1 September 2020. A criminal case was opened under Harrismith CAS 09/09/2020, which case has not yet been finalised.

Issues

- [12] The bone of contention in this whole saga is that Mr Khumalo avers that he was working for Mr Botha. When he retired, Mr Botha allocated him a piece of land where he could reside, cultivate crops and graze his cattle. Mr Khumalo therefore contends that he does not need consent from Mrs Botha and Pierre to construct a brick house on the land which was

allocated to him. He contends further that he was given consent to keep an unlimited number of cattle on the portion of the farm allocated to him. He contends that he resides on the farm with his children and other members of his family and has always stayed with his children on the farm.

- [13] On the contrary, the Bothas deny that Mr Khumalo was ever employed by Mr Botha. They aver that when the Bothas bought the farm, Mr Khumalo was old and already retired. They contend further that Mr Khumalo, as the only occupier, voluntarily left the farm in about 2015 or 2016. According to their knowledge, Mr Khumalo was staying alone on the farm, and therefore, when he left the farm, no person remained at the Khumalo homestead. Further, Pierre seems to suggest that Mr Khumalo's cattle were not marked and branded and therefore he was justified in removing them from the farm in terms of section 7 of the Act.

Oral Evidence

- [14] Three witnesses testified on behalf of the Applicants – Mr Khumalo himself and his two sons, Sphiwe and Thulani. Four witnesses testified on behalf of the Respondents – Mrs Botha, Pierre, Johannes and Steven Mofokeng.
- [15] Mr Khumalo testified that for many years he worked for Mr Botha. He stopped working when he went on pension in a year which he could not remember. He testified that his son Thulani built a brick house for him. The brick house was subsequently demolished when he was away where he was getting treatment as he is a sickly person. As a result of the demolition of the brick house, which he had not occupied as yet, he is now staying at Brakwell at his son-in-law's place. Mr Khumalo testified that his brick house was built on the piece of land allocated to him. He also had cattle which were grazing on the farm. His late wife and children were buried in his yard in the place allocated to him. Mr Khumalo conceded in cross examination that Johannes was farming with Mr Botha. He received his pay either from Mr Botha or Johannes. Mr Khumalo, old and sick as he was, was a very impressive witness. He was honest and reliable. There are very few immaterial facts which he could not remember because of old age and sickness.

- [16] Sphiwe, one of the seven children of Mr Khumalo, also testified. When he was growing up, Mr Khumalo was working for Jappie. Sphiwe also worked on the farm at some stage. He worked with Mr Khumalo, Manqoba and Mbongeni. As proof that he worked on the farm, he referred to a shed which they built. He denied that Mr Khumalo voluntarily left the farm around 2015 or 2016. Mr Khumalo, he said, is now staying with his daughter at Bretvaal since 2019 after the brick house was demolished. Sphiwe further testified that the people staying on the farm were himself, Mr Khumalo, Thulani, Gugu and Mandla Kubheka. They were staying as a family. They had cattle and were cultivating the land given to them for that purpose.

- [17] After the brick house was demolished, Sphiwe testified, he took Mr Khumalo to stay at Sphiwe's in-laws, moving him to St Chads and to Ephakeni. Sphiwe was also honest and reliable. His evidence cannot be faulted; even cross-examination could not put him off his stride.
- [18] Thulamsindo (Thulani) Johannes, one of Mr Khumalo's children, also testified. He stays at the farm with his siblings. He testified that the family had built a brick house to completion, which was demolished on two occasions: September 2019 and August 2020.
- [19] Thulani, testifying about the first demolition, stated that in September 2019 at about 18h00 he went to the bush to collect firewood. He heard a noise which he thought was a tractor. He hid himself in the bush and looked where the noise was coming from. He saw a TLB which was driven by a person he could not recognise at the time. He saw Pierre driving another vehicle. Pierre opened the gate for the TLB to drive through. Pierre instructed the driver of the TLB to push the house from the sides with the TLB. The house was pushed and it partially collapsed. Pierre took danger tape from his vehicle and pasted a board on the wall of the partially demolished house which said "stop working immediately". Pierre's cell phone number was also written on the board.
- [20] Thulani witnessed the second demolition whilst he was hiding in the toilet. He testified that Pierre, Theunis and Theunis's son came. The three of them pushed the walls of the partially demolished house. Before they pushed the walls, they shouted "Hey boy, Hey boy." Thulani did not respond. He testified that Pierre and Theunis also pushed the municipal tank and spilt water and broke the water tap. The toilet from which Thulani was watching the demolition is made of corrugated iron and it is 20 paces away from the house which was being demolished.
- [21] Thulani's testimony was clear and straight forward. I find no fault with his evidence. His evidence is, to a certain extent corroborated by Annexure JK5, a picture of a board fixed to the dilapidated brick house with the writing: -

"BUILDING NOT PERMITTED STOP ALL WORK IMMEDIATELY CONTACT OWNER 082 650 1588."

Annexure "PBO" is a picture of the dilapidated house with the same board. The toilet in which Thulani was hiding is also shown in this picture.

- [22] The first witness for the Respondents was Mr Johannes Boshoff. He testified that he became involved with the farm in 2002. He formed a joint venture with Mr Botha. They were farming with beef cattle. Mr Botha passed on in 2007 but Johannes continued farming with Mrs Botha. He testified that he knew Mr Khumalo. He knew the other Applicants by sight and not by their names. Johannes denied that Mr Khumalo worked for him and Mr Botha from 2002 to 2020. He testified that Mr Khumalo was using a camp which was 45 hectares in size, that Mr Khumalo was staying on the farm, but he did not see him after

2017. He cannot say whether he had permanently left the farm. Johannes could not testify about the working relationship between Mr Khumalo and Mr Botha prior to 2002. He could not give evidence about the demolition of the brick house as he never witnessed it.
- [23] The First Respondent, Mrs Botha, gave evidence. She is the widow of the late Mr Botha. Mrs Botha testified that they bought the farm in
1995. Mr Khumalo and his wife Nora were already staying on the farm. Mrs Botha knew that Mr Khumalo and Nora had children staying with them as a family, but she had never met the children. She denied that Mr Khumalo worked for the Botha family. They had only two workers – Jack and Steven Mofokeng.
- [24] Mrs Botha became aware of the brick house being constructed at Mr Khumalo's homestead in 2019. She had gone to the farm on 8 November 2019 and saw the brick house in a dilapidated state. She heard that the house collapsed. In cross examination Mrs Botha testified that Pierre informed her the house was blown away by the wind. She testified further that Mr Khumalo was allowed to keep only five head of cattle and he was allocated a grazing camp of ten hectares, being two hectares a cow. Mrs Botha conceded that two children from Mr Khumalo's family, Mbongeni and Simon, worked for the Bothas occasionally twice in a year. She agreed that there are graves on Mr Khumalo's homestead. The graves are for Mr Khumalo's deceased family members.
- [25] Mrs Botha denied, in cross-examination, what Pierre stated in the answering affidavit, that Mr Khumalo was allowed ninety hectares of grazing land, although she confirmed the said affidavit. She also denied that Johannes reduced the camp from ninety to thirty-five hectares.
- [26] Pierre Henry Botha (Pierre) testified. His father was the owner of the farm in question. Pierre knew Mr Khumalo and the Second and Third Applicants, but not the Fourth, Fifth and Sixth Applicants. He testified that when Mr Botha bought the farm, Mr Khumalo was staying on the farm. Pierre could not see Mr Khumalo between 2016 and 2017 when he visited the farm. He heard from neighbours that Mr Khumalo was sick and had gone to stay with his daughter. He agreed that he used to see people at Mr Khumalo's homestead. After Mr Khumalo disappeared, Pierre used to see Mandla Kubheka on the veld looking after the cattle.
- [27] Pierre denied that Mr Khumalo worked for his father and that he was allocated one hundred and thirty-three hectares of land. According to Pierre, Mr Khumalo had five cattle which used to graze near his homestead in summer. In winter, those cattle grazed all over the farm. He denied that Mr Khumalo used certain piece of land for cultivation. Pierre became aware of the house being constructed in June 2019. When he visited the farm in 2019 he noticed that the house was dilapidated and he took a photo of it. That photo was attached to the papers and marked "PBO".

- [28] Pierre testified further that after Mr Khumalo had disappeared, he used to see Johannes and Moloi on the farm and he asked the Sheriff to tell them to leave the farm as they were not allowed to be on the farm. In cross-examination Pierre agreed that thirty-two cattle were impounded.
- [29] Steven Mofokeng (“Steven”) was the last witness for the Respondents. Steven testified that Mr Khumalo was staying on the farm with his children. He no longer sees Mr Khumalo on the farm and does not know when and why Mr Khumalo left the farm. Steven confirmed that Mr Khumalo never worked for Mr Botha. He had seen the brick house being constructed. He said the brick house was constructed by people from Qwaqwa. The house was built to completion. The house is no longer there and Steven does not know what happened to it, but he saw sheets of corrugated iron from the roof at the neighbour’s house.
- [30] Steven told the Court during cross-examination that after Mr Khumalo had left the farm, Mandla Kubheka remained behind looking after the cattle which Mandla said belonged to Mr Khumalo. In re-examination Steven told the court that after Mr Khumalo left, Mandla remained behind looking after the cattle. Steven did not stay at Dunbar farm but at Danskrans farm and he only went to Dunbar farm when he was herding cattle. Both Dunbar and Danskrans farms were owned by Mr Botha.

Discussion

- [31] Up to this stage, it is not clear whether Mr Khumalo ever worked for Mr Botha or not. There are two mutually destructive versions in that respect. In such cases the disputed issue must be decided on probabilities. In *Stellenbosch Farmers’ Winery Group Ltd and Another v Martell Et Cie and Others*,^[1] Nienaber JA expressed himself in the following terms: -

“On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.”

- [32] In my view, it is no longer necessary to make a definite finding on whether or not Mr Khumalo worked for Mr Botha and was compensated with a piece of land. Human memory is notoriously fallible. It is worse when that fact is considered in light of Mr Khumalo’s advanced age. At one stage during the hearing of this matter, Mr Khumalo could not even remember the names of his own children. It might well be that Mr Khumalo, because of fallibility of human memory, is confusing Mr Jappie Boshoff with Mr Henry Botha.

[33] It is undisputed that Mr Khumalo is an occupier on the farm. It is equally undisputed that he was given consent to establish his homestead there to stay and actually stayed on the farm with his children and other members of the family. Mr Khumalo was also allocated land on the farm where he grazed his cattle. It is common cause that consent given to Mr Khumalo has not been withdrawn. Pierre testified that Mr Khumalo is welcome to return to the farm if he wants to.

[34] In my view, the First and Second Respondents only have qualms with the presence of Mr Khumalo's children on the farm. However, if we accept that Mr Khumalo is an occupier in terms of the Act, we must equally accept that he is entitled to enjoy all the rights endowed on him in terms of the Act. Section 6(2)(d) of the Act grants the occupier the right to family life in accordance with the culture of his family.

[35] Section 6(2) provides in relevant part that:

“(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 –

...

(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

(dA) to bury a deceased member of his or her family who, at the time of that person's death, was residing on the land on which the occupier is residing, in accordance with their religion or cultural belief, if an established practice in respect of the land exists...”

[36] The assertion that Mr Khumalo alone, to the exclusion of his children, may return to his homestead deprives him of his right to family life in accordance with the culture of his family. Mr Khumalo is old and sickly – he cannot stay alone on the farm. He needs to stay with his children who will take care of him at his own home and when he dies, he might wish to die at his home and be buried next to his wife and other members of his family in accordance with the culture of his family.

[37] Dealing with the definition of the term “family” in *Hattingh and Others v Juta*, [2] Zondo J said:

“As it was said by this court in Dawood, families come in different shapes and sizes. There is no need to attempt to define the term “family” with any precision

other than to say that it cannot be limited to the nuclear family. ... In my view, whatever notion of family is contemplated in section 6(2)(d) will include the children of the occupier. I do not think that the attainment of the age of majority as being independent of parents takes a person out of the ambit of his or her parents’

family.”[3]

[38] In the same case,[4] Zondo J dealt with the meaning of the term “family life” and said:

“It will be difficult to define with any degree of certainty the occupiers ‘right to family life in accordance with the culture

of that family’ for which provision is made in section 6(2)(d). However, it seems to me that the reference to ‘family life’ in section 6(2)(d) suggests that the purpose of conferment of this right on occupiers was to ensure that, despite living on other people’s land, persons falling within vulnerable section of our society would be able to live a life that is as close as possible to the kind of life that they would lead if they lived on their own land. This means as normal a family life as possible, having regard to the landowner’s rights. Most people who fall into this section of our society are people who, under apartheid, were denied certain rights by landowners including the right to live a normal family life with their family. In this regard, I note that the preamble to ESTA does suggest that ESTA seeks to deal with a situation that ‘is in part the result of past discriminatory laws and practices’. The object was to give this section of our society human dignity which they were denied under apartheid.”

[39] In *Klaase and Another v Van Der Merwe N.O. and Others*[5] Matojane AJ said:

“It follows that an occupier exercising his or her right to family life can live with members of his or her family on the farm even without the consent of the owner provided this is just and equitable. Section 6(2)(d) requires consent of the occupier and not that of the owner for a family member to reside with an occupier on the property of another but, once again, this is limited by what is just and equitable on a proper balancing of the rights of the occupier and owner.”

[40] Mr Khumalo relies on his right to family life conferred on him by section 6(2)(d) of the Act. This is clear from his founding affidavit, although the section is not specifically stated.

In paragraph 12 of his founding affidavit, Mr Khumalo states:

“I am suffering and my current accommodation environment makes me a beggar as I cannot give instructions nor freely do as I wish

including sustaining myself and my family with food through sustenance farming and cattle breeding. These were fruits of my toil

and my hard earned retirement benefits which I enjoyed with my family living under a proper shelter as was the case at Dunbar farm. The communal living supporting my family and each other through the land and shelter is what in a nutshell I and we as a family we are seeking.”[6]

Demolition of the house

[41] I turn now to deal with the demolition of the brick house. First and Second Respondents have denied flatly that they demolished Mr Khumalo’s house. Therefore, in deciding that issue, I shall be guided by credibility and reliability of the testimony of factual witnesses. Thulani was an eye witness to the demolition of Mr Khumalo’s house on both occasions – September 2019 and August 2020 – and his evidence on this has been recounted above.

- [42] I have no reason to reject Thulani's evidence. Thulani was honest and reliable. He was not evasive and did not contradict himself. He was subjected to long, tedious and aggressive cross-examination which did not put him off his stride.
- [43] The First and Second Respondents were less worthy of credence. Pierre denied having demolished the house. However, he gave an instruction to his attorney to address a letter to Mr Khumalo's children and tell them that he was going to demolish the house. The extent of his dishonesty is such that he now denies the instruction he gave to the attorney in this regard. As attorney is an officer of the court – he or she cannot write something which the client never said.
- [44] The attorney wrote two letters on 13 February 2020. The first letter, "JK9(1)", was addressed to Johannes Khumalo calling upon him to vacate the farm which, according to the Respondents, he was unlawfully occupying. The last paragraph of the same letter states:
- "It is also our instruction that our client will proceed to demolish any unlawful structure that you might have erected or attempt to erect on the property."*

The contention by Miss Oschman, Counsel for the First and Second Respondents, that the letters or one of the letters were written

after the demolition, cannot help Pierre. These letters show that Pierre had the intention to demolish Mr Khumalo's house without a court order. The second letter was addressed to Mbuyiseni Moloi and the third one to Mandla Kubheka. All three letters end with the same paragraph above.

- [45] Another anomaly in Pierre's evidence is that he avers that he could not have been on the farm in June 2020 since it was during the lockdown period. However, Pierre was on the farm in June 2020 during the impoundment of Mr Khumalo's cattle. In his answering affidavit Pierre states that it does not make sense that the house which was demolished in September 2019 would have been built within a short space of time for it to be demolished again in August. This is despite the evidence that the house was partially demolished in September 2019 and the demolition was completed in August 2020, the following year.
- [46] Mrs Botha testified that Pierre told her that the brick house was blown away by the wind. Pierre denied this but later said it was plausible it was blown away by the wind. Earlier in his affidavit Pierre said the house collapsed due to poor workmanship. Pierre denied that the house was completed when it collapsed. However, Mr Steven Mofokeng, their witness, confirmed the version of the Applicants that the house had been completed and furnished when it was demolished. The picture "PB7" clearly shows furniture inside the demolished house. The Respondents also lied about the absence of graves at Mr Khumalo's homestead. In their answering affidavit they said there were no graves there. However, later in Court, they confirmed that indeed graves are there. Pierre in his answering affidavit said Mr Khumalo was allocated 90 hectares of land. Mrs Botha denied this and said he was allocated 10 hectares only for 5 head of cattle being two hectares per cow. Pierre said Johannes

reduced Mr Khumalo's land to 45 hectares. Mrs Botha denied this. All this proves that Mrs Botha and Pierre were not being truthful with the Court. I cannot ascribe these contradictions to bona fide errors of recollection. They strike me as being consistent with deliberate untruthfulness.

Eviction

[47] I turn now to the question of eviction. Miss Oschman argued that it cannot be said that Mr Khumalo was evicted because he had not occupied the brick house. This is despite the fact that the lawyer addressed letters to Mr Khumalo's children calling upon them to vacate the farm. In fact, eviction does not mean eviction from the house. It is eviction from the land. Moving a person from one house to another is not eviction but relocation. Section 1 of the Act defines "evict" thus:

"'evict' – means to deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of this Act, and 'eviction' has a corresponding meaning."

[48] Mrs Botha and Pierre deprived Mr Khumalo's children against their will of residence on the farm. In so doing, they deprived Mr Khumalo of his right to family life in terms of section 6(2)(d) of the Act. Without his children on the farm, Mr Khumalo could not, as old and sick person, return to his homestead as there was no one to take care of him. Even when attending court, Mr Khumalo was brought in a wheelchair. He cannot walk. When he coughed in court, he needed someone to help him drink water as he could not hold the water bottle on his own. Pierre and Theunis made the life of Mr Khumalo and his children on the farm unbearable, ultimately forcing them to leave the farm. That is tantamount to constructive eviction. In fact, letters from the attorney clearly instructed the children to vacate the farm and a notice to vacate the farm, "JK6(5)", was issued, addressed to "All occupants of John Khumalo". All this was done without a court order and in contravention of the provisions of the Act.

Impoundment of Cattle

[49] I now deal with the impoundment of cattle. Cattle were impounded on two occasions. On the first occasion, 32 cattle were impounded and they were returned to the farm. On the second occasion, 30 cattle were impounded and never returned. Although the police were informed about the impoundment, they did not actively take part in the impoundment of Mr Khumalo's cattle.

[50] Mrs Botha and Pierre aver that the cattle were impounded since they were unmarked and unbranded and the owner could not be traced. This is not true. All along it was known that Mr Khumalo had cattle grazing in his allocated camp. He had kept the cattle since 1972. Pierre testified that in winter, Mr Khumalo's cattle grazed all over the farm. He never impounded the cattle on those occasions but now he decided to impound them whilst they were grazing within Mr Khumalo's allocated grazing camp.

[51] Steven Mofokeng testified that Mandla Kubheka was looking after Mr Khumalo's cattle. On 11 March 2020, the Respondents' attorney wrote to Mandla Kubheka, "JK9(3)", and said:

"It is further our instructions that you take care of a number of cattle which are currently grazing in the pastures of the property. It is our instruction that you do not have our client's permission and/or any other legal cause to have the cattle on our client's property. It is further our instruction that you have alternative housing in Van Rheen where you and your family permanently reside."

Therefore, it cannot be true that the owner of the cattle was unknown. It was known that Mandla Kubheka was taking care of Mr Khumalo's

cattle. What is equally disturbing is that all the cattle were impounded despite the fact that Mr Khumalo had consent to keep at

least five head of cattle on the farm.

[52] Mrs Botha and Pierre cannot rely on section 7 of the Act to justify the impoundment, as Miss Oschman seems to suggest. Section 7 permits the owner or person in charge to impound trespassing animals. Mr Khumalo's cattle were not trespassing, they were grazing on Mr Khumalo's allocated camp. Even if they were outside that camp, the Respondents had previously allowed the cattle to graze all over the farm, as Pierre said in his evidence. To confirm that Pierre knew that the cattle belonged to Mr Khumalo, in paragraph 58 of his answering affidavit, Pierre says:

"At this meeting the First Applicant was notified to remove the cattle allegedly belonging to him from the farm because he no longer resided on the farm and the grazing was required for the farming activities of the lawful (sub) lessee, Mr Poggenpoel. The First Applicant refused and/or failed to remove the cattle tended to by Mr Mandla Kubheka from the farm."

Costs

[53] It is the practice in this Court not to award costs unless there are good reasons to do so. In this matter, no good reason has been shown justifying the awarding of costs.

Order

[54] In the result, I make the following order:

1. It is declared that the eviction of the Applicants from Dunbar farm was without a court order and therefore unlawful under the Extension of Security of Tenure Act, 62 of 1997.
2. It is declared that the demolition of Mr Khumalo's family's brick house by Pierre Henry Botha and Theunis Filmater without a court order was unlawful.
3. It is declared that the removal and subsequent impoundment of Mr Khumalo's cattle without a court order was unlawful.

4. It is declared that the deprivation of the Applicants of the use of land, which includes the ploughing fields and grazing camp, by the First and Second Respondents was unlawful.
5. The First and Second Respondents are jointly ordered to restore to the First Applicant all ploughing fields and grazing camps originally allocated to him forthwith.
6. The First, Second and Third Respondents are jointly ordered within sixty (60) calendar days to rebuild Mr Khumalo's brick house which Pierre Henry Botha and Theunis Filmater demolished without a court order.
7. The First and Second Respondents are ordered to return at their own expense all the cattle which they removed from the farm and impounded in June 2020 within ten (10) calendar days of the service of this order upon them.
8. Mr Theunis Filmater is hereby interdicted and restrained from harassing, assaulting and insulting or using foul language against any of the Applicants.
9. It is declared that all the Applicants have a right to return to their homestead in Dunbar farm within five (5) calendar days if they so wish.
10. No order is made against the Fourth Respondent.
11. There is no order as to costs.

T M NCUBE

Acting Judge

Land Claims Court

APPEARANCES

For Applicants:

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[1] 2003

(1) SA 11 (SCA).

[2] 2013

(3) SA 275 (CC) at para 34.

[3]My own emphasis.

[4] Para 35.

[5] 2016

(6) SA 131 (CC) at para 63.

[6] My own emphasis.

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