

SOUTH AFRICA / JUDGMENT

# Moller and Others v Nhatladisha and Others (LCC06/07) [2008] ZALCC 11 (4 June 2008)

[2008] ZALCC 11

## COURT

Land Claims Court

## BEFORE

Gildenhuys

## CASE / FILE NUMBER

LCC06/07

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**Source record****IN THE LAND CLAIMS****COURT OF SOUTH AFRICA****HELD AT MAKOPANE****CASE NUMBER: LCC06/07****Heard: 5 and 6 May 2008****Decided: 4 June 2008**

## In case between:

LAMBERTUS JOHANNES MÖLLER  
1st  
Applicant  
L J MÖLLER TRUST 2nd  
Applicant  
GERBIE STRYDOM FARMING  
ENTERPRISES (PTY) LTD t/a BALTIMORE  
RANCH 3rd  
Applicant  
and  
SEBITHI FILIPOS NHATLADISHA 1st  
Respondent  
LIESBETH PHUTI SEBETHA 2nd  
Respondent  
NKONE FRANS MOLOTO 3rd  
Respondent  
ELISA SEBETHA 4th  
Respondent

## JUDGMENT

Gildenhuys J

## Background

- [1] This is an application for the eviction of the respondents and all persons claiming a right of residence through them from the farm Mazbalt No 190 LR, Limpopo Province, which they currently occupy. The application is brought in terms of the Extension of Security of Tenure Act No 62 of 1997 ("ESTA").
- [2] There are three applicants. The first applicant bought portion 4 of the farm Schoemansdal No 94 LR and the remaining extent of portion 1 of the farm Baltimore No 139 LR on 4 March 1999 from Mr G P and Mrs C M Janse van Rensburg on 4 March 1999. The two properties were later transferred to the second applicant, a family trust of the first applicant.
- [3] During the year 2000 the second applicant purchased portion 5 of the farm Mazila 97 LR. In the same year, the second applicant consolidated the remaining extent of portion 1 of Baltimore with portion 5 of Mazila, to become the farm Mazbalt No 190 LR.
- [4] On 30 March 2006 the second applicant sold the farm Mazbalt, together with portion 4 of the farm Mazila 97 LR and portion 4 of the farm Schoemansdal 94 LR, as a single unit to the third applicant. Clauses 18.4 and 18.5 of the Deed of Sale read as follows:

*"18.4 Daar word uitdruklik tussen die partye ooreengekom dat die KOPER nie een van die arbeiders tans werksaam te die verkoper sal oorneem as arbeiders nie. Die VERKOPER sal derhalwe die arbeiders afbetaal of alternatiewe werk verskaf en sal enige bedrae geld wat aan sodanige arbeiders betaalbaar is deur die VERKOPER aan die arbeiders betaalbaar wees. Indien so verkies, sou die KOPER met enige van die arbeiders kon onderhandel om nuwe diensooreenkomste te sluit.*

Die VERKOPER gee hiermee aan die KOPER die volgende ondernemings:

...

...

Dat die VERKOPER sal toesien dat alle okkupeerders van die EIENDOM by ondertekening van hierdie ooreenkoms van die EIENDOM verwyder word en vrywaar die VERKOPER die KOPER van enige kostes en uitgawes om sodanige verwydering van okkupeerders te bewerkstellig.

Die VERKOPER so gou as moontlik na die ondertekening van hierdie ooreenkoms voort te gaan om die nodige stappe en indien nodig regsaksies in te stel ten einde die okkupeerders van die eiendomme van die EIENDOM te laat verwyder. Die VERKOPER sal aanspreeklik wees vir alle kostes vir sodanige aksies en/of aansoeke en die KOPER onderneem gelyktydig hiermee dat die KOPER ten volle samewerking sal gee met betrekking tot ondertekening van dokumentasie welke nodig mag wees om sodanige aansoeke te loods indien nodig.”

- [5] The farm Mazbalt has already been transferred into the name of the third applicant. The first and second applicants are involved in this application consequent upon the second applicant’s obligation to achieve the eviction of the respondents from the farm, as envisaged in paragraphs 18.4 and 18.5 of the Deed of Sale.
- [6] There are four respondents. The first respondent is married traditionally to his wife, the second respondent. The third respondent has a relationship with the fourth respondent. They are not formally married. However, the fourth respondent regards the third respondent as her husband. The fourth respondent is the second respondent’s aunt. They are both from the Sebetha family.
- [7] The farm Mazbalt is traversed by the N11 public road. A 30ha triangular portion of Mazbalt, on the south-western side of the farm, has been cut off by the road. That triangular portion was, before the consolidation, part of portion 1 of the farm Baltimore. The rest of Mazbalt is on the north-eastern side of the N11, and is used as a game farm. The triangular portion, in turn, is bisected by another public road, the Marken road, which joins the N11 at a T-junction on the triangular portion. East of the Marken road and south-west of the N11 is a small fenced-off camp which the respondents say they occupy. It is part of the triangular portion. It is accessed from the Marken road. It is referred to as “the road camp” since it was previously occupied by road workers.
- [8] To the south of the road camp is the farm Cosmopolite No 141 LR. It is a very large farm. There are workers’ houses on Cosmopolite, right next to the road camp. On another part of Cosmopolite, north-east of the N11, is an area known as Slegverby. It is some distance away from the road camp, towards a small mountain. Up to 1976, so the second and fourth respondents testified, the Sebetha family lived at Slegverby. Mr and Mrs Van Rensburg were previous owners of Cosmopolite. They sold Cosmopolite to Mr Norman O’Neil during 1998. He subsequently went bankrupt. The farm was thereupon bought by Mr Kobus van Staden.
- [9] At a pre-trial conference held on 20 February 2008, the following disputes were referred to oral evidence:

Whether the respondents were living in their present homes on or before March 1999 (the month during which the first applicant bought the land where the homes are situated); and

Whether the second and fourth respondents are occupiers in their own right.

[10] I conducted an inspection in loco of the road camp on 4 May 2008, and prepared a record of the inspection. I was shown several concrete slabs in the road camp.

Long ago, the slabs accommodated houses where the erstwhile road workers lived. Two brick two-roomed houses, each approximately 3, 5 metres by 8 metres, were pointed out. Both were built on these concrete slabs. The first house was occupied by the second

respondent and her family, the second house allegedly by the fourth respondent and some family members. I was also shown the remains of a third brick house on one of the concrete slabs. Apart from the brick houses, a number of newly erected corrugated iron structures

were pointed out during the inspection.

#### Witnesses

[11] The first applicant, Mr G L Strydom (representative of the third applicant) and Mr F Joubert (a remote sensing expert) testified in support of the eviction application. Mr G P Janse van Rensburg made an affidavit in support of the first applicant's replying affidavit. He was not called to give evidence. I was told by Mr Havenga (who appeared on behalf of the applicants) that he is incapacitated by Alzheimer's disease.

[12] Only the second and fourth respondents testified to oppose the eviction application. The second respondent states that the first respondent was not called as a witness because he lives in Pretoria and she does not have his address. The address is, however, contained in the Notice of Motion and in the Probation Officer's report. The fourth respondent says the third respondent was not called as a witness because he was ill. He did, however, deliver an opposing affidavit.

#### Mr F Joubert (remote sensing expert)

[13] Mr F Joubert, an expert in the determination and classification of land use by remote sensing methods such as aerial photography, was called by the applicants to give oral evidence. He obtained aerial photographs showing the road camp taken during 1972, 1983 and 2002. He testified that, according to the photographs, there was nothing on the road camp during 1972. In 1983 there were three roofed houses and a small fourth structure, some 1, 5 metres by 3 metres. In 2002 there were only two roofed houses and one ruin.

#### Mr G L Strydom (representative of the third applicant)

[14] Mr Strydom is the duly authorised representative of the third applicant, the present registered owner of the farm Mazbalt. In his founding affidavit, he associated himself with and supported the eviction application. He confirmed in his oral evidence that none of the respondents were given permission by the third respondent to stay on the farm.

#### Mr G P Janse van Rensburg (previous owner of Baltimore and Cosmopolite)

- [15] Mr Janse van Rensburg stated in his affidavit that when he sold portion 1 of the farm Baltimore (which contains the road camp) to the first applicant, nobody resided there. The labourers were housed on Cosmopolite, near the mountain.

The first applicant (Mr L J Moller)

- [16] According to the first applicant's founding affidavit, there was nobody living in the road camp when he bought the land on 4 March 1999. There were two brick houses in the road camp. Both were unoccupied. There was also a dilapidated third brick house, not fit for human habitation.
- [17] The first applicant stated in his founding affidavit that immediately after he purchased the farm, he scouted around for someone to employ as a foreman. He needed a foreman who was familiar with the farm. He managed to obtain the services of the first respondent, who at the time worked for Norman O'Neil on Cosmopolite. As part of his conditions of service, the first applicant provided the first respondent with accommodation in one of the two habitable houses in the road camp. It was an express term of the employment agreement that he would only be entitled to make use of the accommodation on the farm for as long as he was employed on the farm. He moved into the house in the road camp together with his wife and family. The first applicant says that, in his time, no parents or grandparents lived in the house with them. The second respondent was never employed by any of the applicants and had no independent right to reside on the farm.
- [18] The second habitable house, according to the first plaintiff, was over time occupied by four consecutive employees, each of whom vacated the house when their employment came to an end.
- [19] The first applicant says that he employed the third respondent in 2003. He moved into the second habitable house in the road camp after the first respondent showed it to him. The fourth respondent did not move in with him. She worked on a neighbouring farm for Sirkel N Boerdery and resided on that farm. The third respondent joined her at Sirkel N Boerdery during weekends. As with the first respondent, the third respondent's right of residence arose solely from his employment agreement, and was dependent on its continued existence.
- [20] During 2003, when written agreements with farm workers became compulsory, the first applicant recorded the terms of employment of the first and third respondents in written contracts. Both contracts contain the following term (clause 13):

*“Die werknemers sal voorsien word van akkomodasie teen ‘n nominale huur van R 0 per maand. Hierdie akkomodasie mag slegs beset word vir solank die werknemer in diens van die werkgever is.”*

Both the first and the third respondents signed their contracts on 1 March 2003.

- [21] According to the applicant, the first respondent absconded from his employment. He left the farm during February 2005, as a result of family problems. He now works in Wierda Park, Pretoria. He left his wife and family behind. The second respondent testified that the first respondent “ran away” and that she has no contact with him.
- [22] The first applicant avers that the third applicant resigned during February 2006. He left the road camp at the end of February 2006 and took up employment elsewhere. Notwithstanding that he left Mazbalt, some of his belongings remained in the road camp house. Although the fourth respondent now seems to have moved into the house, the first applicant was adamant that nobody was living there two weeks before the Court inspection.
- [23] After the first respondent absconded, the first applicant employed one Abraham as foreman. The second respondent refused to vacate the foreman’s house. Abraham then fixed up the third brick house and moved into it. The third house was demolished when Abraham left. Abraham took the salvageable material with him.
- [24] Before bringing the present application, the first applicant caused notice to be given to the second applicant to vacate the house. She refused. The first applicant also offered to build her a house at Steilloop into which she could move. She refused the offer. He did not make a similar offer to the third and fourth respondents because (according to him) they were already living elsewhere. He stated that he personally cancelled the third respondent’s right of residence in the road camp and called upon him to remove his belongings from the house.

The second respondent (Mrs Liesbeth Sebetha)

- [25] The second respondent testified that the Sebetha family (including herself) were moved from Slegverby to the road camp by Van Rensburg in 1976. The second respondent says in her answering affidavit (paragraphs 3.2 and 3.3):

*“My family was moved together with other families namely:- Mojela (x2), Letsoalo, Seanago and Magayi. The other families later moved [from the road camp] and my family remained. My family was allocated three houses by the Van Rensburg family. My grandfather, Mr Jan Sebetha was the head of the family. He passed away in 1992 and was buried on the farm. My grandmother, Mrs Dinah Sebetha is now the head of the family.”*

Whilst the other families stayed in the road camp, so the second respondent testified, they lived in mud huts. All of them have since moved away.

- [26] The second respondent furthermore avers in her answering affidavit (paragraph 3.4):

*“My grandmother, mother, aunts, uncles, nieces, nephews and my children are all living on the farm [the road camp]. The first respondent moved in with us after he fall in love with me. He is not the owner of the house we are occupying nor was the house allocated to him. He moved in because of me and he found my family there. The first respondent just like the rest of us used to work for the Van Rensburg family and he moved in with my family before the first respondent bought the farm.”*

- [27] The second respondent says she was about 9 years old when her family was moved to the road camp. She moved into one of the houses together with her mother and grandparents. The second house was allocated to the fourth respondent, who is her aunt. She moved into the house and is still living there. The third respondent subsequently moved in with her. When the first applicant bought the farm, the third respondent was already there. The third house was allocated to Grace Sebetha, also an aunt. According to the second respondent Grace Sebetha still lives in the road camp, but no longer in the house. The house has been demolished. She now lives with her brother Johannes in one of the recently built corrugate iron sheds.
- [28] According to the second respondent, the first respondent and his sister also moved to the road camp in 1976. The first respondent stayed in a mud house, some distance away from the brick houses where the Sebetha family lived. The first respondent moved in with the second respondent during 1985. The second respondent said under cross-examination that, apart from the three brick houses, there were several shacks in the road camp, all built during 1976.
- [29] During cross-examination, the second respondent said that the third respondent was offered employment by the first applicant in 2003 because the fourth respondent was already living on the farm. She conceded that prior to 2003 both the third and the fourth respondents worked for Sirkel N Boerdery, and stayed on that farm. The fourth respondent came back to the road camp during weekends to clean her house. After the third respondent left the first applicant, he took up employment on the farm Sydney. The second respondent testified that the third respondent returns to the house in the road camp every night, but also said that the third and fourth respondents have a corrugated iron shack on Sydney where they sleep. According to the second respondent, the fourth respondent no longer works.

The fourth respondent (Mrs Elisa Sebetha)

- [30] The fourth respondent testified that she moved with her family to the road camp in 1976. Previously she lived “at the berg” [Slegverby]. About four other families moved with them to the road camp. There were already three brick houses in the road camp when they arrived. All three were allocated to the Sebetha Family. The other families were given corrugated iron sheets to build their own houses. All of them have since moved away.
- [31] The fourth respondent says that she worked for Van Rensburg whilst staying in the road camp. She started a relationship with the third respondent in 1981. He moved in with the fourth respondent in the road camp when he started working for the first applicant in

2004. Previously he only visited.

- [32] According to the fourth respondent, she and the third respondent worked for Sirkel N Boerdery on the farm Schoemansdal before the first applicant employed the third respondent. They “slept under a tent” and went home to their house in the road camp over weekends. When the third respondent was hired by the first applicant, she stopped working.
- [33] After the third respondent left the first respondent, he took up employment on the farm Sydney with Mr Frans Durant. He sleeps at the road camp, and travels to work daily. Sydney is about 1,5 km away from the road camp. The third respondent was not given a house on Sydney.

The third respondent (Mr M K Moloto)

- [34] The third respondent did not give oral evidence. He delivered an opposing affidavit. He says in his affidavit that he started working for the first applicant around 2003. At that stage he was already living with the fourth respondent in a house in the road camp. Although he left the first applicant’s employ in February 2006, he continued living with his family in the same house. The house was given to the fourth respondent by her parents.
- [35] The third respondent admits that he and the first respondent signed employment contracts with the first applicant on 1 March 2003, but says that “the contents of the whole document were not explained to us” (paragraph 11 of his opposing affidavit).

Mr A G Mabata (Department of Land Affairs)

- [36] Mr Mabata, a senior legal administration officer with the Department of Land Affairs, submitted a report dated 22 March 2007, as required in terms of section 9(3) of ESTA. I will refer to it as the Probation Officer’s Report. Mr Mabata attended Court at my request and confirmed the contents of his report under oath. He said that, for purposes of his report, he consulted with the old and the new owners of Mazbalt, as well as with all four the respondents. Mr Havenga and Mr Malumbete were given an

opportunity to put questions to Mr Mabata. Very few questions were put.

- [37] Mr Mabata confirmed that appropriate notices as required in terms of section 9(2)(d) of ESTA were served on the respondents, the municipality and the provincial director of the Department of Land Affairs. This is not in dispute between the parties.

Techniques to be used in resolving factual disputes

- [38] The above summary of the evidence before the Court demonstrates that the different versions of the respondents’ occupation of the road camp are irreconcilable. The technique to be used for resolving such factual disputes has been described by Nienaber JA in *Stellenbosch Farmers’ Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) as follows (at 14I-15E).

*“The technique generally employed by court 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. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’ candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’ reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c)

the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

- [39] I will proceed to evaluate the evidence presented by the parties in accordance with the techniques set forth in the Stellenbosch Farmers’ Winery judgment (supra).

#### Evaluation of the evidence

- [40] The first applicant was a fine witness. He has a good recollection of the facts and gave straightforward and candid evidence. The second respondent, although

very assertive on some issues, gave muddled evidence on others. The fourth respondent was evasive in some respects and, at times,

aggressive. In evaluating the evidence of the two respondents, I will bear in mind that they are not sophisticated persons and might have been overawed by the Court proceedings. Their evidence was presented through an interpreter, which made it difficult to grasp the nuances thereof. I will also bear in mind that the second and fourth respondents seem to be under the impression that the road camp is situated on Cosmopolite, not on Baltimore. Until about ten years ago, both farms belonged to Mr and Mrs Van Rensburg.

- [41] Paragraphs 3.2 and 3.3 of the Probation Officer’s report contain the following statements:

*“According to first Respondent, third and fourth Respondents used to reside at Sirkel N Boerdery owned by Mr O’Neil. At that time third and fourth Respondent were working for Mr O’Neil.”*

It is not contested that the third respondent worked for Mr O’Neil at Sirkel N Boerdery on the farm Schoemansdal before he was employed by the first applicant. The Probation Officer’s report then continues as follows:

*“According to first Respondent after Mr Lambertus Möller employed third respondent he allocated him accommodation. First respondent remembers this because he is the one who went to show third Respondent the house allocated to him. This is the house the third and fourth respondent still occupies today.”*

This accords with the first applicant’s evidence, and is in stark contrast with the evidence given by the second, third and fourth respondents.

[42] According to the Probation Officer (paragraph 4.1 of his report), the second and fourth respondents told him that the grandfather, Mr Jan Sebetha (who died in 1992), was buried at Slegverby. He was not buried at or near the road camp as the second respondent averred in paragraph 3.3 of her opposing affidavit. If in 1992 the Sebetha family has already left Slegverby, the question arises why Mr Jan Sebetha had been buried there.

[43] According to paragraphs 2.2.3, 2.2.4 and 2.2.5 of the Probation Officer’s report, he was informed by the first respondent that:

*“Mr Van Rensburg moved the families residing next to the ‘Kopie Slegteverby’ to where second, third and fourth respondents now resides. The families moved were that of Sebetha, Mojela, Seanego, Ramukgonami and Kgabo. Mr Van Rensburg then sold Schoemansdal farm to Mr Nick O’Neil. Mr Van Rensburg then moved the families who were residing in Schoemansdal to where the respondents now resided. The families moved were that of William Nhatladisha, Moses Magae, Samuel Nhatladisha and Thulare. All this families went to occupy houses that were built and left behind by a company called Laboria Construction that was busy working the tarred road at the time.”*

None of the witnesses who testified before me said that the road builders left any houses behind. The three brick houses, according to the second and fourth respondents, were built in 1976 especially for them.

[44] The Probation Officer’s report contains the following statement (in paragraph 2.2.8):

*“The grand-parents of second respondent left the farm before Mr Van Rensburg sold the farm to Mr Lambertus Möller. At the time second respondent’s mother was staying at a place called Kgalakwena.”*

This is in direct conflict with the second respondent’s evidence.

[45] If a large number of families did indeed move from Slegverby to the road camp and subsequently left, the following questions come to the fore:

Why were only three brick houses built?

Why were all three the brick houses awarded to the Sebetha family and the other families required to build their own shacks?

Why does the 1983 aerial photograph show only three roofed houses and a fourth small structure? What happened to the structures which allegedly accommodated the other families? There is no trace of them in the 1983 aerial photograph.

When did the other families leave the road camp, and under what circumstances?

- [46] The signed service contracts support the first applicant's version that occupation of the houses were awarded to the first and third respondents to live in for so long as they remained in the employ of the first applicant. It is possible, however, that the first and third respondents did not understand what they were signing.
- [47] The building and occupation of additional shacks during October 2008 (one month before the hearing) is indicative of an intention by the second and fourth respondents (and maybe also the third respondent) to retain possession of the road camp at all costs.
- [48] The notice of motion in this matter was served at 12:15 on Monday 29 January 2007 on both the third and fourth respondents at Sydney farm. The fourth respondent said in cross-examination that she was only "visiting" Sydney farm when the documents were served. If the fourth respondent did live in the road camp at the time and if the third respondent did return to the fourth respondent at the road camp every evening, the fourth respondent's visit to him at Sydney farm during working hours is peculiar.
- [49] There are also unexplained aspects in the applicant's version. If all Mr Van Rensburg's labourers were housed at Cosmopolite, why were the three brick houses in the road camp built at all. If at some time Mr Van Rensburg accommodated labourers in the houses, when and why did they leave?
- [50] I must also bear in mind that the second applicant entered into a contractual obligation towards the third applicant to have the occupants of the road camp removed. On the one hand, he would hardly have undertaken the obligation if the respondents' version was correct. He would have realised that it might be difficult, if not impossible to have them evicted. On the other hand, it could be very important to him to have them removed in order to comply with his contractual obligations towards the third applicant.
- [51] I have more confidence in the credibility and the reliability of the first applicant and the other witnesses who gave evidence for the applicants than in the credibility and reliability in the second and fourth respondents. The information given to the Probation Officer when he interviewed the respondents differs in several material aspects from the evidence which they presented to the Court. The differences, for the most part, support the applicant's version. I therefore conclude that the respondents did not live in the road camp during March 1999. They moved in later. This finding disposes of the first dispute which was referred to oral evidence. I turn to the second dispute, viz whether the second and fourth respondents are occupiers in their own right.

### Applicable legal provisions

- [52] It is by now trite law that family members of an occupier are not occupiers in their own right. See *LandbouNavorsingsraad v Klaasen* 2005
- (3) SA 410 (LCC) at paragraphs [22] – [36]. As pointed out by the court in that judgment, the right to family life accorded to an occupier does not include a right, enforceable against the landowner, of family members to reside on the land. There is no legal nexus between the landowner and the family members (see paragraph 25 of the *Landbou Navorsingsraad* judgment). Family members have family rights against the occupier, not against the owner. See *Venter NO v Claasen & Andere* 2001
- (1) SA 720 (LCC) paragraphs 9, 10 and 11 and *Dique NO v Van der Merwe & Andere* 2001 (2) SA 1006 (T) at 1011D-I. These cases were confirmed by the Supreme Court of Appeal in *Mpedi and Others v Swanevelder and Another* 2004 (4) SA 344 (SCA) at paragraph [10]. In that case, the wife of an employee argued that, when permission was granted to her husband to reside on the farm, she was accorded tacit consent to reside there as well. The Supreme Court of Appeal found the argument to be flawed, since her right of residence originated from her marriage relationship with her husband and not from any right of her own against the employer.
- [53] I have already found that the second and fourth respondents were not in occupation of any of the houses in the road camp when the first applicant bought the property. They took occupation when their husbands were employed by the first applicant by virtue of their family relationship with their husbands. Neither of them had ever been employed by any of the applicants.
- [54] Any entitlement of the second or fourth respondents to stay in the road camp are enforceable against their husbands and not against the landowner. The legal basis for their continued occupation of the road camp fell away when their respective husbands resigned and their rights of occupation were cancelled. As pointed out by the court in the *LandbouNavorsingsraad* judgment, there are sufficient indications in *ESTA* to support the view that an eviction order against an occupier is operative also against family members deriving their rights of residence from the occupier (see paragraphs [26]–[28]).

### Are the respondents occupiers in their own right?

- [55] The second and fourth respondents rely for their quest to remain in the road camp on the fact that they have been on the farm since they were young and that they regard the farm as their home. It might be that they equated *Cosmopolite*, where they were born and where family members are buried, with *Baltimore / Mazbalt*. Even if it was the same farm, this would not assist the respondents. This court said the following in an appeal judgment in the case of *Magodi and Others v Janse van Rensburg LCC* 29R/1, an unreported judgment delivered on 29 November 2001, at paragraph [11]:

*“The fact that the first appellant was born on the farm, and during all his life might have regarded the farm as his home, does not make him an ‘occupier’ as defined in the Act.”*

In that case the respondent argued that while he was working on a neighbouring farm he was residing on the farm with his mother and sister and that nobody raised any complaint. The court rejected this argument, stating:

*“Such residence would be by virtue of his family relationship with his mother and sister, and would not make him an ‘occupier’ as defined.”*

[56] I conclude that the second and fourth respondents are not (and never were whilst any of the applicants owned the road camp) occupiers in their own right. The first and third respondents no longer work on the farm. The first applicant terminated their rights of residence, as he was entitled to do under their service contracts.

[57] The second and fourth respondents apparently think that they are entitled to remain in occupation of the two brick houses in the road camp even though their husbands no longer work on the farm. They also consider themselves entitled to build more houses, on the pretext that the brick houses were initially allocated to their grandfather by Mr Van Rensburg (the previous owner). Mpati D P observed in the matter of Mpedi & Others v Swanevelder & Another 2004 (4) SA 344 (SCA) at 347D:

*“A farmer does not usually give a person a potentially permanent place of residence without expecting such person to offer his labour in return.”*

Arguments which are similar to those put forward by the respondents in this case were rejected in the Magodi case, referred to above. In paragraph [29] of that judgment the court pointed out that an owner is entitled to full usage of his

property and should not be compelled to accommodate erstwhile workers (and even less so their children who never worked for him), unless the hardship, conflict or social instability to which their eviction might lead outweighs his right to unrestricted tenancy.

[58] The right to property is protected under section 25(1) of the Constitution. It was held in paragraphs 31 of the Magodi judgment (supra) that:

*“Although inroads into that right are permissible under limited circumstances, such inroads must not go further than is reasonable and justifiable. The purpose of ESTA is not only to prevent unfair evictions which could lead to great hardship, conflict and social instability, but also to give due recognition to the legitimate interests of owners (see preamble of the Act). The prerequisites for eviction orders which are contained in the Act must be interpreted and applied, taking into account not only the considerations set forth in the Act itself, but also the above general principles, and any other factor which may be relevant. In my view the hardship which the fourth appellant will suffer if she is evicted from Sandfontein will be greater than that of any of the other applicants, but it will not be so great that it must continue to override the property rights of the respondent.”*

(My underlining)

- [59] The Probation Officer pointed out that if the second respondent and some of the people who occupy the road camp under or through the respondents are evicted, they will have nowhere to go. It was stated in *Port Elizabeth Municipality v People's Dialogue on Land and Shelter*, 2001 (4) SA 759 (ECD) at 771E-F that the court did not regard “the apparent lack of availability of alternative land for the resettlement of the ... respondents to be an absolute bar to the granting of an eviction order”. Although the remarks relate to an eviction application under different legislation, they are in my view also apposite to an eviction application under ESTA.
- [60] There is no duty on the third applicant to continue providing accommodation to the respondents and their hangers-on. The respondents have a duty to search for other accommodation. They did not do so, ostensibly because they considered themselves entitled to remain where they were. It follows from the above that the third applicant is entitled to an eviction order against the second, third and fourth respondents, and all those who occupy the road camp under or through them.

The eviction order

- [61] When making an eviction order under ESTA, the court must follow subsections 12(1) and (2) of the Act. The subsections read as follows:

*“(1) A court that orders the eviction of an occupier shall—*

- (a) determine a just and equitable date on which the occupier shall vacate the land; and
  - (b) determine the date on which an eviction order may be carried out if the occupier has not vacated the land on the date contemplated in paragraph (a).
- (2) In determining a just and equitable date the court shall have regard to all relevant factors, including—
- (a) the fairness of the terms of any agreement between the parties;
  - (b) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land; and
  - (c) the period that the occupier has resided on the land in question.”

- [62] The first respondent absconded from his work. The third respondent resigned. It is not unfair that, in these circumstances, the right of residence of the first and third respondents and their families (which include the second and fourth respondents) be terminated. The interest of the owner to the full use of his land outweighs the interest of the respondents and their families to remain on the land. In an unreported judgment of his Court in the case of *Rand Water v P A Tshabalala* (LCC50/2005), it was stated in paragraph [10]:

*“This court has found in the past that it cannot be expected from land owners to provide housing indefinitely to occupiers. In the present circumstances this court finds that accommodating the first defendant and his family for more than two years for free is more than fair, especially in view of the fact that the defendants had not made any effort to try and find accommodation themselves.”*

[63] Some of the persons to be evicted have lived in the road camp for some time. Others may have moved in recently, when the additional

structures were erected in April this year. Some (particularly the third and fourth respondents) can move elsewhere. Others (particularly the second respondent) are said to have nowhere to go if evicted.

[64] It is advisable to determine the same date for the eviction of everybody. The date should allow reasonable time to find other accommodation for those who do not have it.

[65] In line with the Court’s general practice, I will make no cost order.

[66] For the reasons set out above, I make the following order:

An eviction order is granted against the first, second, third and fourth respondents;

The first, second, third and fourth respondents and all persons claiming a right of residence through or under them must vacate the farm Mazbalt 190 LR by not later than 31 August 2008;

The sheriff is authorised to carry out the eviction order on or after 3 September 2008 if the respondents or any of them, or any person claiming a right of residence through or under them, have failed to vacate the farm Mazbalt 190 LR by 31 August 2008 or have not removed all their movables from the said farm;

The respondents are authorised to demolish, on or before 31 August 2008, the shacks (not the brick houses) recently erected by the second or fourth respondents on the farm Mazbalt 190 LR, and to salvage for their own use any material retrieved from such structures;;

The applicants are authorised to demolish any structures remaining on the farm Mazbalt 190 LR after the respondents have vacated the farm;

No order is made as to costs.

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A GILDENHUYS

JUDGE OF THE LAND CLAIMS COURT

Appearances

For the applicants:

Mr H S Havenga SC

instructed by

Borman Snyman & Barnard Attorneys

Makopane

For the respondents

Mr N C Malumbete

Nkuzi Law Clinic

Modimolle

INSPECTION

RECORD OF AN INSPECTION ON 4 MAY 2008.

- [1] The first stop was at the house of the second respondent. The house is a two-roomed house, built on a large concrete slab. The second respondent says that this is the house where she lived since 1976 and is still living. Next to the house is a corrugated iron shed.
- [2] The second respondent says her grandparents and mother originally lived with her in the same house. Her mother is still living with her in the house. She was present at the inspection. The second respondent's husband joined her in the house in 1985. The first child was born in January 1986. All seven of their children also stayed in the house. There are presently 15 people staying in the house, including children and grandchildren. There are six grandchildren, four minor children of her own and five adults. There are two double beds in the house, the rest of the people sleep on the floor. The second respondent says the place where the house is, is commonly known as Cosmopolite. [It is common cause that the road camp is not situated on the farm Cosmopolite].
- [3] The house is enclosed in a fenced yard of approximately 400 square metres. The house (both rooms) is about 8 metres by 3, 5 metres in size. The first applicant says that the particular house is the house that he found empty in 1999, and that he allocated the houses to the first respondent.
- [4] About 80 yards south of the house is a fence between the road camp and the farm Cosmopolite. The fence has been cut to allow access through it. Just past the fence on Cosmopolite are the ruins of a large house and also some other smaller houses. The second respondent says that she never lived in any of those houses.
- [5] In between the house of the second respondent and the house of the third and fourth respondents is a new corrugated iron house, about 2.5 by 4 metres. This is a new house. The second applicant's uncle, Johannes Sebeth, lives there. At the time of the inspection, the house was locked. Johannes is said to have moved into the structure the previous month (April 2008).

- [6] About 40 yards north of the first-mentioned new house is a second structure, also new. The fourth respondent says she erected the house for her son to live in. He is said to have moved in the previous month (April 2008). Before then, the son was not present at the road camp because there is no high school in the area which he could attend. On his return from school, the new house was built. The size of the house is approximately 5 metres by 3 metres.
- [7] The next stop was at the house of the third and fourth respondents. It was locked at the time of the inspection. It is a brick building on a concrete slab. The house does not cover the entire concrete slab. The size of the house is also approximately 3, 5 metres by 8 metres (both rooms included).
- [8] Next to the house is a third new corrugated iron house, about 3 metres by 4, 5 metres in size. It was also erected the previous month. The house is said to be occupied by John Sebetha, the fourth respondent's son.
- [9] There is another (fourth) new house, some 40 yards away. When questioned, the fourth respondent said that she stays in the fourth new house. Before she moved in there, she stayed in her brick house.
- [10] Lisbeth, the fourth respondent's daughter lives in one of the rooms of the brick house and the grandchildren in the other room.
- [11] Next, the ruin of the third house allegedly occupied by Abraham Sebegu was pointed out. It was also built on a big concrete slab. There are only a few bricks left.
- [12] Lastly, the "koppie" or "mountain" near Slegverby was shown. It is on the northern side of the tarred road traversing Cosmopolite, some 5 to 6 kilometres away from the tarred road.

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