

SOUTH AFRICA / JUDGMENT

Rula Tecno Park (Pty) Ltd v Mahlangu and Others (LCC66R/2015) [2015] ZALCC 10 (23 November 2015)

[2015] ZALCC 10

COURT

Land Claims Court

BEFORE

Ngcukaitobi

CASE / FILE NUMBER

LCC66R/2015

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IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Case No.: LCC66R/2015

DATE: 23 NOVEMBER 2015

In the matter between:

RULA TECNO PARK (PTY) LTD.....Applicant

Registration number: 2010/004343/07

And

MOSES KHUZWAYO MAHLANGU.....1st Respondent

ID Number: [4.....]

(and all those who occupy through him)

NANA ELIZABETH.....2nd Respondent

ID Number: [5.....]

(and all those who occupy through her)

WIANIE NOBELUNGU.....3rd Respondent

ID Number: [7.....]

JABULANI.....4th Respondent

ID Number: [9.....]

KHOHLISANI MGOBOYI NKOMO.....5th Respondent

HLANGANANI MAPHOSA.....6th Respondent

ATTAH NKOMO.....7th Respondent

ID Number: [5.....]

MATTHEW MAHLANGU.....8th Respondent

EDWARD DEURO.....9th Respondent

REUBEN NCUBE.....10th Respondent

MLUNGISI NKOMO.....11th Respondent

MUGOVE MAPETESE.....12th Respondent

LOVENESS SIBANDA.....13th Respondent

WINILE KUNENE.....14th Respondent

GIDEON MPOFU.....15th Respondent

JETHRO SIBANDA.....16th Respondent

VIMBAI GADZIKWA.....17th Respondent

RONALD.....18th Respondent

MAKESURE.....19th Respondent

MATTHEW MAHLANGU.....20th Respondent

FANALAKE MLILO.....21st Respondent

ID Number: [2.....]

CLEMENT MABHENA.....22nd Respondent

ID Number: [2.....]

CARLTONE MAHLANGU.....23rd Respondent

ID Number: [6.....]

JOTHAM MNGUNI.....24th Respondent

ID Number; [6.....]

EDWARD DZORO.....25th Respondent

GCOBONE SAMUEL KHWATSHA.....26th Respondent

ID Number: [6.....]

ELLIOT NGWENYA.....27th Respondent

DLAMINI EUSABETH.....28th Respondent

ID Number: [6.....]

CAVON MTHUMBU.....29th Respondent

ID Number: [6.....]

DAVIDE MTHUMBU.....30th Respondent

ZINHLE PATRICIA.....31st Respondent

ID Number: [7.....]

ALL ILLEGAL OCCUPIERS OF:.....32nd Respondent

ERF 13 ALSEF AH, ROODEPOORT TOWNSHIP, commonly known as: 13 JOHAN ROAD, ALSEF AH,
ROODEPOORT

(and all those who occupy through them)

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY.....33rd Respondent

THE HEAD: PROVINCIAL OFFICE OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND
REFORM.....34th Respondent

JUDGMENT:

AUTOMATIC REVIEW

Ngcukaitobi AJ:

1 On 29 October 2015 the Magistrate's Court for the district of Roodepoort granted an order evicting the 1st to 32nd respondents (hereinafter referred to "occupiers"). The eviction order comes before this Court pursuant to the provisions of section 19(3) of the Extension of Security of Tenure Act 62 of 1997 ("the Act").

2 In terms of section 19(3) of the Act, this Court has the power to: (a) confirm the order by the Magistrate's Court; (b) set aside such order; (c) substitute such order; or (d) remit the case to the Magistrate's Court with directions in regard to how the matter must be dealt by the Magistrate's Court. Given the approach to the evidence, adopted by the Magistrate, it is necessary to set out in some detail the evidence which was before the Magistrate when the order of eviction was granted.

3 The applicant approached the Magistrate's Court by way of motion proceedings. The relief sought was the eviction of the occupiers from the property described as [Erf 3.....] [A.....] [A.....] [H.....], Roodepoort Township, commonly known as [1....] [J.....] [R.....], [A.....] [A.....] [H.....], Roodepoort ("the property"). The applicant is the registered owner of the property.

4 The 33rd and 34th respondents are the City of Johannesburg and the Department of Rural Development and Land Reform. No order was sought against them. The applicant stated that it had cited them "for purposes of procedure only".

5 The applicant alleged that on 22 October 2012, it purchased the property from [1.....] [A.....] [A.....] [H.....] (Pty) Ltd. and annexed copy of the sale agreement to the papers. The registration of the property in the name of the applicant took place on 17 October

2013. The applicant was informed by Alsef that there was a lease agreement with one Moses Khuzwayo Mahlangu, which had expired on 31 July 2012.

6 A copy of the lease agreement was annexed to the Founding Papers. In terms of the lease agreement, the company 13 Alsef Agricultural Holdings (Pty) Ltd was the lessor and Mr Moses Khuzwayo Mahlangu was the lessee. The applicant alleges that Mr Mahlangu has since passed away.

7 The lease agreement acknowledged that there were seven other persons occupying the property. In terms of clause 5 thereof, the lease commenced on 1 February 2012 and should have expired on 31 July 2012. Clause 5.2 stated that the lessee has the option to renew the lease for a further unspecified period. Clause 5.3 stated that if on the termination of the lease period the lessee remained in occupation with the lessor's express or tacit consent, the parties would be deemed to have entered into a period lease agreement on the same terms and conditions as the expired lease except in the event of a breach of failure to pay rent pursuant to clause 14.2. In terms of clause 5.31 and 5.32 the lessee could terminate the agreement on one month's written notice and the lessor could do the same on two months written notice.

8 The rental amount was R10 per month, subject to an escalation of 10% on a twelve month period after the commencement of the lease.

9 While the applicant claims that the lease agreement expired on 31 July 2012, it appears that the lessee remained on the property after that date. In that event, the provisions of clause 5.3 would come into operation, implying that the parties would be deemed to have entered into a periodic lease agreement on the same terms and conditions as the expired lease.

10 The applicant alleges that upon the registration of the property the respondents were verbally engaged "on numerous occasions" to vacate the property, but they refused.

11 On 30 August 2013 the applicant addressed a letter to some of the occupiers, namely: Fanalake Mlilo, Clement Mabhena, Hlangana Maphosa, Carltone Mahlacu, Reuben Ncube, Mugove Mapetese, Jotham Amnguni, Edward Dzoro, Gcobane Samuel Khwatsha, Mlungisi Nkomo, Moses Khuzwayo Mahlangu, N. M. Ncube, Khohlisani Mgoboyi Nkomo, Attah Nkomo, and Elliot

Ngweya. The letter stated that their lease had expired on 31 July 2012 and their ongoing occupation of the property had been on a month-to-month basis. It informed them that the property had been sold and transferred to a third party and the new owner wanted the property vacant. Accordingly, the named occupiers were given 60 days written notice to vacate the property by no later than 31 October 2013.

12 No evidence was produced to show that this letter was in fact received by the named occupiers or it was delivered to all of the respondents or occupiers in the property.[1]

13 The applicant claims that the respondents have caused damage to the property; are conducting illegal businesses therein; and have brought hazardous material onto the property. Further, it is claimed that the occupiers have established new dwellings and structures without the authorisation of the Municipality, resulting in the Municipality issuing warning notices and letters to the applicant.

14 On 10 December 2013, a notice was addressed by the applicant recording the notice of contravention of building regulations which had been issued by the City of Johannesburg. The notice also stated that the unauthorised structure should be demolished within 30 days of the notice. The applicant gave notice that the “unauthorised buildings” should be demolished by 10 January 2014 “this giving you sufficient time to arrange alternative accommodation”. A handwritten annotation records that the residents refused to sign the letter.

15 It is not clear to whom the letter was addressed and in what manner the applicant attempted to bring the letter to the attention of the respondents.

16 The applicant alleged that the respondents were not paying rent. In regard to alternative accommodation, it was alleged that there was sufficient alternative accommodation should the respondents be evicted since “Roodepoort and the surrounding areas have places for rental.”

17 When the applicant could not secure the eviction of the respondents on its own, it engaged a security services firm. On 5 August 2014 the applicant appointed Jambo Security Services to “assist it in facilitating the negotiations for vacation of the property by the respondents.” It is said that this was done because the respondents threatened the officials of the applicant. No specific allegations of the threats appear from the papers.

18 On 8 August 2014 Jambo Security Services had a meeting with the respondents. There were 15 occupiers present. The minutes of that meeting show that the representative of Jambo Security Services informed the occupiers that the reason for the eviction was so that the owners could develop the land. The occupiers informed Jambo Security Services that they had been occupying the land for years prior to the purchase of the property by the applicant. Also, the occupiers stated that they had been paying rent to stay on the property and that the applicant had failed to renovate or repair the property resulting in the occupiers paying from their

pockets for the renovations and repairs. Jambo Security Services claimed not to have been aware of the payment of rental but undertook

to discuss the matter with the owner.

19 On 12 September 2014 the applicant addressed a notice to the respondents to vacate the property by 30 September 2014. The papers do not show how the contents of this letter were brought to the attention of the occupiers, if at all. The occupiers remained on the property. The applicant notes that it bought the property for “business purposes”. The fact of the presence of the occupiers in the property, it is alleged, adversely affects the value of the property.

20 The applicant alleged that the respondents had also vandalised the fence around the property and a new fence had to be installed at a significant cost.

21 The application was opposed. The occupiers set out the background to the occupation as follows:

21.1 The first group of occupiers who moved onto the property in 1991, worked for the owner at the time. Over time, they have dug up pit latrines which serves as sanitation and they get water from a borehole pump which is on the property. There has been electricity on the property since the first group of occupiers came into the property.

21.2 They have, over the years, paid electricity to City Power. The last amount appears to have been paid around August 2013. They stopped paying when the Municipality stopped sending them electricity invoices.

21.3 From the 1990s until 2012, there was a rent collector on the property one Jotham Mnguni, who also lived on the property and collected the rent on behalf of the previous owners of the property, being Alsef. Mr Mnguni appears to have been killed in a shooting in 2012.

21.4 There are children living in the property. They go to school and many of the adults work in the area surrounding the property. There is a business conducted in the property which is fixing of cars and the making of trailers by some of the occupiers.

21.5 In February 2012 Alsef came with certain documents, which it appears were lease agreements. Some occupiers signed the lease agreements.

21.6 Since the applicant acquired the property, it has been asking the occupiers to vacate and attempting to evict the through “several extra judicial means”. The occupiers say that they told the applicant that they had nowhere else to go. These extra judicial means are described thus:

“First, in 2013, people who introduced themselves as representative of the applicant came onto the property. This was in the early hours of the morning. These people began knocking on residents’ doors and demanding that we produce some form of identification. They came with dogs. Those residents who held asylum-seekers permits were taken into custody and were released without being charges, after spending 48 hours in detention. Then, in August 2014, Jambo Security Services (Jambo) came to the property. They addressed the residents who were present, explaining that they were working for the owner and taking care of his interests on the property. A few days later, Jambo came onto the property and started clearing trees. We did not disrupt them in their work as we had been instructed not to do so. On their third visit, which was also in August 2014, Jambo came onto the property and started

confiscating trailers from the property. These are the trailers which many of my fellow residents are commissioned to build. We tried to lay charges of theft but were unsuccessful.”

21.7 The respondents point to the two distinct categories of occupiers. The first category is those who were in occupation by 4 February

1997. These are Khohlisani Nkomo, Samuel Khwatsha, Caron Mthembu, David Mthembu, Jethro Sibanda and Nkosinathi Chauke.

21.8 The occupiers denied that they have at any stage caused damage to the property. They claim that the only damage caused to the property was by people unknown to them who smashed their windows. They point out that it would not make any sense for them to damage a property which they use as their primary residence.

21.9 The second category is those persons who came to the property after 4 February 1997, but not later than 2010. These are: Warren Maphosa, Bhekumuzi Maphosa, Esthe Thwala, Clement Mabena, Hlanganani Maphosa, Canaan Mphofu, Bukhosini Mpofu, Roland Mpofu, Clever Sibanda, Jethro Sibanda, Mlungisi Nkomo, Sibonile Mpofu, Makesure Tshuma, Sihambile Tshuma, Willard Ncube, Thembinkosi Ndlovu, Zinhle Patricia Mnqayi, Mnqayi, Meshack Chirwa, Newman Molisi, Simphiwe Dlamini, Fanalakhe Mlilo, Naomi Ngwenya, Reuben Ncube, Edward Dzoro, Attha Nkomo, Samantha Khumalo, and Ndabezinhle Maseko.

21.10 In respect of this latter category it was submitted that they have lived in this property for substantial periods of time. They maintain it as their permanent home. The property is large and they occupy a very small portion of the total space of the property. They also allege that the applicant gave no reasons for seeking the ejectment from the property, other than that they needed it for business purposes.

22 There was a replying affidavit filed, the import of which is considered later in this judgment.

23 In the Magistrates’ reasons for judgment, it appears that the grounds for the eviction order are the following.

23.1 The first respondent, being the main deponent to the answering affidavit relied on 36 powers of attorney which were furnished to him by 36 respondents. On this basis, the Magistrate concluded that the remainder of the respondents, being the balance of the 47 adults living on the property were not properly before her.

23.2 25 respondents failed to deliver affidavits to confirm the allegations made by the first respondent which are of relevance to their situation.

23.3 The consequence of all of this, according to the Magistrate is that “I am left with the first respondent’s answering affidavit and his defence and I do not have any facts before court to deal with the many other respondents.”

23.4 In respect of the first respondent, the Magistrate recorded that he is 71 years old and has been residing on the property for 24 years. The Magistrate stated that the fact that certain businesses were conducted on the property was not disputed. And so was the allegation that new dwellings had been erected on the property. Furthermore, the Magistrate recorded in reference to photographs that certain scrap was brought into the property, rubbish was illegally dumped and shacks were illegally built on the property.

Based on these, the Magistrate concluded that the first respondent had acted in breach of section 6(3) of the Act and such breach was material.

24 The Magistrate concluded that all of the occupiers should be evicted and failing which, the Sheriff was authorised to effect the ejectment.

25 The starting point in considering the judgment is the statement by the Magistrate that “none of the confirmatory affidavits were signed by the respondents and 25 respondents failed to deliver confirmatory affidavits.” In the record of proceedings which were before the Magistrate there are 32 signed confirmatory affidavits filed by the 1st to 32nd respondents. It is noted that the signatures appear in the first page of each confirmatory affidavit, not above the word “Deponent”. But cannot be a ground to exclude the confirmatory affidavits, which are duly signed in accordance with the applicable Regulations. The finding by the Magistrate that there were no signed confirmatory affidavits filed is accordingly not borne out by the facts.

26 The decision of the Magistrate, in excluding the confirmatory affidavits constitutes a grave misdirection of law and fact. It is of a sufficiently serious nature that this Court is entitled to set aside the judgment and to evaluate the case afresh, based on the available evidence.

27 It will be recalled that the applicant mounted the application for the eviction on the grounds that the occupiers had no legal right to reside on the property; had committed certain acts of misconduct; and the property was required for business purposes.

28 The basis upon which an occupier can be evicted from property is contained in sections 10 and 11 of the Act. As the answering affidavit explains, some of the respondents have been in occupation prior to 4 February 1997. These occupiers must be dealt with according to section 10 of the Act. The theme which runs through the provisions of section 10 is that long term occupiers can only be evicted if there is evidence of wrongdoing on their part, which is serious enough to warrant their ejectment from property.

29 In *Joosternburg v Brummer*[2] Meir AJP distilled the applicable principles in relation to sections 10(1)(a),(b) and (c) of the Act as follows:

29.1 A material breach must damage the foundation of the relationship in order to satisfy the test of materiality under section 10(1)(a).[3]

29.2 “A material term apropos section 10

- (1) (b) of the Act has been described as a vital term that goes to the root of the contract, the breach of which is such as to render it purposeless to carry on under the contract. See *O'Connell v Flischman* 1948 4 SA 191 (T) 194.”

29.3 “This Court has in a number of judgments considered the meaning of a fundamental breach as referred to at Section 10 (1) (c) of the Act. In *Ovenstone Farms (Pty) Ltd v Arendse and Others* [2002] JOL 9941 (LCC) Gildenhuys J at paragraph 12, after stating that the fundamental breach of a relationship between an owner and an occupier at section 10 (1) (c) relates to a social rather than a legal relationship, went on to find that there will be a fundamental breach of such a relationship if it is practically impossible for the relationship to continue due to a lack of mutual trust. At paragraph 14 he stated that even though behaviour might be sufficient to justify a dismissal of an occupier, it is not necessarily, bearing in mind the social interest objectives of ESTA, sufficient reason to justify an eviction under Section 10 (1). The circumstances set out in Section 10 (1), he stated all relate to serious misbehaviour which the two incidents of arriving at work under the influence of alcohol in that case, might not necessarily have been.”

29.4 “In *Statutis Trading (Pty) Limited v Sibanyoni and Others* an as yet unreported judgment of this Court in LCC 86/2014, dated 12 June 2015 Ngcukaitobi AJ at paragraph 60, commenting on the meaning of the term fundamental breach in the context of Section 10 (1)

- (c) stated as follows:

“The adjective, ‘fundamental’, has been used to qualify the term ‘breach’. This is an indication that the starting point is to consider whether the breach is material or serious. In order to constitute a fundamental breach, the conduct in question must damage the foundation of the relationship, which is trust. Thus, it is within the contemplation of the statute that certain breaches will not be punishable by eviction because they do not meet the threshold of fundamentality.

Precisely when a breach is fundamental is a question of fact to be decided on a case by case basis, a court must first consider whether the breach in issue is of a fundamental nature.

Once it has been decided that the breach is fundamental, the statute requires a further enquiry to assess whether it is not possible to remedy the breach. This enquiry is not focussed on the nature of the breach, but to the conduct and the reaction of the parties to pursuant to the proven breach.”

30 The Magistrate concluded that on the evidence, the first respondent had violated section 6(3) of the Act, resulting in an irreparable breach of the relationship between him and the applicant. It is not clear on what grounds this conclusion was reached. No evidence was produced by the applicant pointing to the first respondent as having committed a breach, let alone a material one and, if not remedied could constitute a basis for ejection from property. The allegations relating to the first respondent are contained at paragraphs 10, 11 and 14 of the founding affidavit. In those paragraphs, the applicant refers to the lease agreement concluded with the first respondent and records that the lease agreement had lapsed by the time it purchased the property. Furthermore, in paragraph 14 the applicant states “I have not met Moses Mahlangu or

any of his family members. However, I was informed by the people living on the property that the said Moses Mahlangu has since passed away.” Clearly, having taken the stance that the first respondent had “since passed away”, it is illogical to conclude that the first respondent would have been responsible for any actions causing a breach of the relationship.

31 The problem, however, as I see it is that the applicant has failed to make out a case based on section 10(1) for the ejectment of those occupiers who were in occupation by 4 February 1997. An occupier falling within this category can only be evicted if the requirements of section 10(1)(a) to (d) are met. In bringing an application, which makes broad and unsubstantiated allegations of misconduct, the applicant failed to identify any of the occupiers who could have allegedly committed a breach of the relation falling in one of the categories in section 10(1)(a) to (c).

32 It is so that allegations have been made about the erection of illegal structures; the conducting of an illegal business on the property; and the bringing of hazardous material to the property. But sight should not be lost of the fact that these were motion proceedings. The test in *National Director of Public Prosecutions v Zuma*

[2009] ZASCA 1; 2009 (2) SA 277 (SCA) applies. According to this test:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.”[4]

33 The version of the respondents was that they did not cause any damage to the property. The only damage they are aware of was caused by unknown persons who smashed their windows. They admit that some occupiers repair cars and make trailers on the property. However, this has not resulted in any damage to the property. They assert, of course, that they would not damage a property which is their home where they live with their children. They disputed bringing hazardous materials to the property.

34 While it is common cause that there is a business being run on the property, nothing suggests that it is illegal. And it is not as if the occupiers are engaged in a lucrative commercial enterprise at the expense of the applicant. As the answering affidavit explains “the only business conducted on the property is the fixing of cars and making of trailers by some of the residents”. The applicant attached photographs in the replying affidavit, which show some scrap and four vehicles in the property. These pictures, on their own, do not prove that the occupiers are wrong in asserting that there is a car mechanic at the property. If anything, they confirm the version of the respondents in this regard. The existence of scrap is explained by the fact that a mechanic is operating from the property.

35 The replying affidavit also refers to shacks and illegal structures on the property which “are not fit for human habitation”. It is not clear which of the occupiers are responsible for the erection of any illegal structure. There are also allegations of an illegal waste site on the property. But these allegations must suffer the same fate as the others. I do not know fully the circumstances in which the rubbish came to be dumped at the property. In any event, my view is that the mere fact that rubbish was dumped on the site would not constitute sufficient grounds to evict all the occupiers without evidence linking them to the alleged illegal act.

36 In conclusion on this point, the fact that some of the occupiers who were already living on the property by 4 February 1997 and are older than 60 years is a weighty consideration. In order to justify their eviction the conditions in section 6(3) of the Act must be met. That section provides that

“(3) an occupier may not –

- (a) intentionally and unlawfully harm any other person occupying the land;
- (b) intentionally and unlawfully cause material damage to the property of the owner or person in charge;
- (c) engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or\
- (d) enable or assist unauthorised persons to establish new dwellings on the land in question.”

37 It has not been shown by reference to the evidence which of the occupiers who fall within the protections of section 10 are guilty of the conduct described in section 6(3) of the Act. As noted, the mainstay of the applicant’s justification for seeking the eviction the section 10 occupiers are alleged violations of section 10 of the Act. The allegations are diffuse and lacking in specificity. The same applies to the findings of the Magistrate. It is not easy to discern from the judgment what misconduct has been committed by which occupiers. Nevertheless, on the law as stated above, there is no basis for the finding that the occupiers have breached section 10 of the Act.

38 It is clear that the Magistrate did not have regard to the case law of this Court when granting the eviction order. There was no meaningful enquiry into the allegations of misconduct against the occupiers. The result is that the conclusions reached by the Magistrate are not supported by the evidence which was before the Court. A proper enquiry would have, at the very least, required a consideration of the specific identities of the occupiers alleged to have committed misconduct. If the misconduct was proven,

the court should have considered whether the conduct was sufficiently serious to justify eviction from the property. The failure to conduct a proper enquiry as mandated by law was accordingly a material error of law, which would justify an interference by this Court.

39 In relation to the section 11 occupiers (i.e. those who came to the property after 4 February 1997), two distinct scenarios are provided for. The first pertains to an occupier who resides on the land with consent of the owner but which consent terminates upon a fixed or determinable date.

In those circumstances, a court may grant an eviction order if it is just and equitable to do so. The second scenario relates to other circumstances but the test for eviction remains whether in the opinion of the court it is just and equitable to evict. In deciding whether it is just and equitable to evict certain factors must be taken into consideration. These include: (a) the period of residence on the land in question; (b) the fairness of the terms of any agreement between the parties; (c) whether suitable alternative accommodation is available to the occupier; (d) the reason for the proposed eviction; and (e) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land.

40 In applying these factors, although the applicant claimed that the occupation was only with effect from 2012, the facts point to the fact that the occupation began in 1991. I have already addressed myself in relation to the pre-1997 occupiers. The section 11 occupiers allege that they have been in occupation of the property since 2010. This has not been credibly denied in the replying affidavit. This means that by the time the eviction was granted, the occupiers had been in occupation for at least five years. This is a significant period of time. The occupiers have settled on the property. Their children attend school in the surrounding area. The occupiers also work in the surrounding area and others, as noted above, conduct a business from the property itself.

41 The terms of the agreement allegedly concluded between the applicant and the occupiers are not disputed. However, the circumstances

surrounding the conclusion of the agreement are in dispute. The occupiers point out that people came through to the property in about February 2012 and insisted that they should sign certain documents, which turned out to be lease agreements. They were informed that if they did not sign such documents, they would be evicted from the property. They claim that they do not know the terms of the documents which were signed. Bearing in mind that by 2012, the first set of occupiers would have lived on the property for approximately 20 years, it seems manifestly unfair to drastically alter the terms of their occupation by reducing their tenure to six months, without meaningfully engaging with them about the occupation and the consequences of the eviction on themselves and their families.[5] Similarly, those occupiers who had lived on the property since 2010 would have experienced the prejudicial effect of a short-term lease agreement, which as they say was done without obtaining their proper and informed consent.

42 The applicant alleged that there was sufficient alternative accommodation which could be rented in the area of Roodepoort. But this submission overlooks the fact that the majority of the respondents who have set out their personal circumstances allege that they cannot afford rental accommodation or any accommodation, for that matter, without the assistance of the State. The municipality filed a report, in which it was made clear that there is no available accommodation at this present moment.

43 The reasons for the proposed eviction are clear. The applicant requires the land in order to develop it for “business purposes”. This is not an illegitimate reason per se. But it should be balanced against two other considerations. First, the occupiers state that they occupy only a

small portion of the land. The applicant has not specified which part of the land is required for development. The nature of this development is also not clear. It is possible, that the applicant could be relocated to another area within the property which is not immediately required for development. But the applicant has not put any clear evidence as to the specific part of the property which is required for its purposes. The other consideration is that the occupiers have constitutional rights protected by section 26(1) and (3) of the Constitution.[6] The Act, it has been held, must be interpreted in a manner consistent with the provisions of section 26. In *Lebowa Platinum Mines Limited v Viljoen*[7] the Supreme Court of Appeal held that “courts are nonetheless enjoined to consider the colour-blind provisions of s 26(3) of the Constitution when interpreting ESTA.”[8]

44 Absent any clear evidence about the manner in which the continued occupation of the property by the occupiers will adversely impact the financial and commercial interests of applicant in developing the property, it is inappropriate to endorse an order whose effect is to nullify the occupier’s constitutionally entrenched rights.

45 I have come to the conclusion that the order by the Magistrate should be set aside and replaced by the order dismissing the eviction application. The applicant failed to prove that the circumstances contemplated in section 10 or section 11 of the Act are present.

46 Moreover, the right of residence of the occupiers does not appear to have been properly cancelled or terminated. The notice which purports to cancel the right of residence on 30 August 2013 was addressed only to some of the occupiers, not all of them. Yet the provisions of section 8 are mandatory. That section provides that an occupier’s right of residence may be terminated on any lawful ground, provided that such termination is just and equitable having regard to all relevant factors.

47 The difficulty herein is that save for the occupiers mentioned in the notice, there is no evidence that the right of residence of the remaining occupiers was lawfully terminated or terminated at all. A right of residence, as noted, can only be terminated if it is just and equitable to do so having regard to the five factors listed in section 8(1)(a)-(e). There is no indication on the papers that any attention was given to the provisions of section 8, when the eviction order was granted. In terms of section 9(2)(a),

an order for eviction can only be made in respect of a person whose right of residence has been terminated in a manner consistent with section 8. Absent evidence to show that this was indeed the case, I am unable to confirm the eviction order.

48 Finally, something needs to be said about the Probation Officer’s report. In terms of section 9(3), read with section 9(2)(c) of the Act, it is mandatory for any court considering an eviction application to request a Probation Officer’s report, which addresses the matters listed in section 9(3)(a)-(d). The record does not contain a Probation Officer’s report. This is not an indication that no request was made. I am aware of many instances in this Court where requests for these reports are made by

judicial officers and no responses are received. This is a matter which requires the urgent attention of the relevant State Department,

being the Department of Rural Development and Land Reform.

49 The failures by the Department to make available these reports, when requested by judicial officers, has profound implications for the administration of the Act. First, it is a violation of a statutory duty. When the Act says it is mandatory for judicial officers to request these reports, there is a corresponding duty on the Department to produce these reports expeditiously. Second, it also frustrates the ability of the Land Claims Court to discharge its adjudicatory function. There is a clear reason why the consideration of these reports is entrenched in statute: the reports must (a) indicate availability of alternative land in the event of an eviction;

(b) the impact of the eviction on the affected occupiers, including their children; and (c) any undue hardship which will be caused by the eviction. In cases of eviction, when a court must consider an eviction without a report by a Probation Officers, it is hard to determine where the equities lie – an outcome which may render hollow the protections granted to occupiers by legislation. The third reason is that the absence of these reports negatively affects the interests of occupiers. It can be seen from the provisions of section 9(3) that the purpose of the statute is to protect occupiers from unlawful evictions and where evictions are inevitable to ameliorate their adverse impact. The Registrar of this Court will be requested to deliver a copy of this Judgment to the Department.

50 The order of the Magistrate is not confirmed. It is substituted with the following order: “The application is dismissed.”

TEMBEKA NGCUKAITOBI

Acting Judge of the Land Claims Court

23 November 2015

[1] In terms of section 9(2)(a) of the Act, this Court may make an order for the eviction of an occupier if their right of residence has been terminated in terms of section 8. Section 8 sets out the circumstances in which the right of residence of an occupier may be terminated.

[2] LCC 16R/2014, unreported

[3] Aucamp v Morton 1949 3 SA 611 (A) 619 at 620

[4] At para [26]

[5] See: Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others 2008

(3) SA 208 (CC)

- [6] Section 26(1) guarantees the right of access to adequate housing and section 26(3) states “[no] one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances [and] no legislation may permit arbitrary evictions.”
- [7] 2009
- (3) SA 511 (SCA)
- [8] At para 13
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