

SOUTH AFRICA / JUDGMENT

**Sterklewies (Pty) Ltd t/a Harrismith
Feedlot v Msimanga and Others (456/2011)
[2012] ZASCA 77; 2012 (5) SA 392 (SCA);
[2012] 3 All SA 655 (SCA) (25 May 2012)
[2012] ZASCA 77**

COURT

Supreme Court of Appeal

BEFORE

Mthiyane, Farlam, Wallis, Kroon, Boruchowitz

CASE / FILE NUMBER

456/2011

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REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 456/2011

In the matter between:

STERKLEWIES (PTY) LTD t/a HARRISMITH FEEDLOTAppellant

and

M E MSIMANGAFirst Respondent

T R MQINASecond Respondent

DF TSOTETSIThird Respondent

Neutral citation: Sterklewies (Pty) Ltd v Msimanga & others (456/11)

[2012] ZASCA 77 (25 May 2012)

Coram: MTHIYANE DP, FARLAM et WALLIS JJA, KROON et BORUCHOWITZ AJJA.

Heard: 18 May 2012

Delivered: 25 May 2012

Summary: Eviction – Extension of Security of Tenure Act 62 of 1997 – whether appellant succeeded in proving that the respondents were only allowed to stay on the farm as long as they were employed by the appellant.

ORDER

On appeal from: Land Claims Court (Mpshe AJ sitting as court of first instance) it is ordered that:

1 The appeal succeeds.

2 The order of the Land Claims Court is set aside and the following order substituted for it:

‘The order of the magistrate is confirmed save that it is amended in the following respects:

(a) In paragraphs (a) and (b) thereof the words ‘First and Second’ are inserted before the word ‘Defendants’

wherever it occurs.

(b) Paragraph (c) is deleted.

(c) Paragraphs (d) to (g) are re-lettered as (c) to (f).

(d) Paragraph (d) is amended to read as follows:

“It is declared that the Third Defendant’s right to reside on the premises described in paragraph (a) of this order and arising by virtue of his former employment by the Plaintiff has been lawfully terminated and any continuing right he may have to reside on those premises is derived from the rights of his wife to occupy a room in those premises by virtue of her employment by the Plaintiff.”

WALLIS JA (MTHIYANE DP, FARLAM JA et KROON et BORUCHOWIZ AJJA concurring)

[1] Sterklewies (Pty) Ltd, the appellant, conducts the business of a feedlot on a property in the Harrismith area. Messrs Msimanga, Mqina and Tsotetsi, the respondents in this appeal, were formerly employed by Sterklewies and resided in the hostel on their employer’s premises. I will henceforth refer to them as the former employees. At the end of internal disciplinary proceedings, they were dismissed from that employment in 2004. They challenged their dismissals unsuccessfully through the processes provided by the Labour Relations Act 66 of 1995 (the LRA). Those proceedings came to an end in the CCMA on 28 November 2007, when an application for condonation of their failure to bring those proceedings timeously was refused. They took no further steps thereafter to challenge their dismissals. Proceedings under the LRA have therefore been exhausted. The present proceedings arise because, notwithstanding their dismissal, the former employees have continued to reside in the rooms previously occupied by them in the company’s hostel. On 16 January 2008, after the conclusion of the proceedings in terms of the LRA, they were given notice of termination of their right of residence in the rooms. Between May and December 2008 the notices required by s 9(2)(d) of the Extension of Security of Tenure Act 62 of 1997 (the Act) were served and published requiring the former employees to vacate, but

they declined to do so.

- [2] Sterklewies then commenced proceedings in the Magistrates' Court at Harrismith for an order for the eviction of the former employees from the hostel. An order was granted by the magistrate on 10 February 2010, but that was subject to automatic review by the Land Claims Court in terms of s 19(3) of the Act. Mpshe AJ set aside the magistrate's order on 25 November

2011. This appeal is with his leave.

- [3] The Act provides statutory protection against eviction for occupiers of agricultural land. An occupier is defined in s 1 of the Act as:

'[A] person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so . . .'

Consent is in turn defined as meaning the:

'[E]xpress or tacit consent of the owner or person in charge of the land in question'.

In terms of s 3(1) of the Act consent to an occupier to reside on or use land shall only be terminated in accordance with the provisions of s 8. That section refers to the termination of an occupier's 'right of residence' on the land in question. Plainly that is the right to occupy that arises from the express or tacit consent of the owner of the land. In most cases that consent will arise from some agreement between the owner and the occupier, but an agreement, at least if that expression is understood

to refer to a contractually binding arrangement, is not in my view required. The Act does not describe an occupier as a person occupying land in terms of an agreement or contract, but as a person occupying with the consent of the owner. One can readily imagine circumstances in which in the rural areas of South Africa people may come to reside on the land of another and the owner, for one or other reason, takes no steps to prevent them from doing so or to evict them. That situation will ordinarily mean that they are occupying with the tacit consent of the owner and will be occupiers for the purpose of the Act. Accordingly, when in *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC) para 351 it is said that 'consent must originate from an agreement, or exist by operation of law', I think that an unnecessarily restrictive view of the provisions of the Act. It suffices that persons claiming the Act's protection show that the owner of the land has consented to their being in occupation, irrespective of whether that occupation flows from any agreement or has its source elsewhere. Whatever its origins it is the right of residence flowing from that consent that must be terminated in terms of s 8 before an eviction order can be obtained.

- [4] In the present instance the only basis upon which Sterklewies claimed to have terminated the former employees' right of residence in their rooms in the hostel was that their right to reside there flowed from their contracts of employment and, with

the termination of the latter, their right to occupy those rooms terminated. It relied upon the provisions of s 8(2) of the Act that provides that:

‘The right of residence for an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.’

[5] In its particulars of claim Sterklewies pleaded the fact of the respondents’ employment and its termination and went on as follows:

‘In terms of the Employment Agreement between the Plaintiff and the Defendants, the Defendants were granted permission to reside on the farm, only for so long as the Employment Agreement between the Plaintiff and the Defendants would remain in existence.’

This allegation met with the following response in the plea:

‘The contents of this paragraph are denied and the plaintiff is put to the proof thereof. The defendants specifically deny that there was any agreement specifying that they will reside on the farm only for so long as they are employed by the plaintiff.’

The issue thus formulated between the parties was whether the defendants’ occupation of the rooms in the hostel flowed solely from the employment agreements that had previously subsisted between them and Sterklewies. No other issue was raised in the pleadings. Sterklewies alleged that the former employees had received permission to reside in the rooms in the hostel in terms of the employment agreements it had concluded with them. The former employees not only denied this, but went further and pleaded that there was no agreement that they would reside on the farm only for so long as they were employed by Sterklewies. They did not however plead any positive basis for their right to reside there.

[6] At the commencement of the proceedings before the magistrate the attorney representing Sterklewies summarised the issues that remained in dispute between the parties. The first issue she mentioned related to the nature of the hostel premises, but the evidence established that this was a hostel of a type familiar in many places in South Africa. It consists of some 28 fairly small single rooms, with no ablution facilities or cooking facilities, those facilities being available in the form of showers and a communal cooking and dining area in the premises of the feedlot. The rooms are provided with electricity and there are some pit toilets available in the hostel. This was accepted by the end of the trial and the issue is not referred to in the heads of argument, so it can be ignored.

[7] The other two issues were said to be whether the former employees’ right of residence in and occupation of the rooms in the hostel arose solely from their employment agreements and whether alternative accommodation was available to the respondents.

In his argument at the end of the appellant’s case the respondents’ attorney sought to narrow the focus even further

by saying that the only issue was the one that arose from the following paragraph in the particulars of claim:

'In terms of the Employment Agreements between the Plaintiff and the Defendants, the Defendants were granted permission to reside on the farm, only for as long as the Employment Agreement between the Plaintiff and the Defendants would remain in existence.'

That statement was repeated in the heads of argument, and in argument before us it was accepted that it had been established on the evidence that the former employees did have alternative accommodation in the area referred to throughout the evidence as Qwa Qwa. That evidence, whilst limited, was sufficient to call for some rebutting evidence from the former employees as it related to matters within their exclusive knowledge,² but they closed their case without giving evidence.

[8] By the end of the trial before the magistrate there was thus effectively only one issue for determination, namely whether the right of residence of the former employees arose from the employment agreements. This bears emphasising because at the outset of the appeal Mr Phalatsi, on behalf of the former employees, urged us to give general guidance for magistrates and those engaged in

litigation of the present type in regard to the proper approach to the Act and the operation of s 8(2) thereof. He contended for the first time that s 8(1) is the operative provision and that s 8(2) is subordinate thereto, so that a person seeking an order for eviction under the Act cannot merely rely on s 8(2), but must also satisfy the court that the requirements of s 8(1) in regard to the termination of an occupier's right of residence are also satisfied.

[9] Were the position clear-cut I might have been inclined to decide this question in order to provide the guidance that Mr Phalatsi says is desperately needed in magistrates' courts that deal with cases of this type on a regular basis. However, it is by no means clear-cut. Section 8(1) reads as follows:

'(1) Subject to the provisions of this section, 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 and in particular to—

- (a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
- (b) the conduct of the parties giving rise to the termination;
- (c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
- (d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the

effluxion of its time; and

- (e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.’

The section thus provides that termination of a right of residence must be both lawful and just and equitable having regard to the specified factors. It would be possible to accommodate the dismissal of an employee in occupation of premises provided by the employer under the broad concept of just and equitable grounds for terminating the employee’s right of residence. That being so the question is why it was thought necessary to include s 8(2) in the Act. A consideration of its purpose is therefore necessary.

- [10] There can be little doubt that s 8(2) of the Act was inserted to deal with a situation that had frequently arisen under the labour law dispensation in operation prior to the enactment of the LRA. It commonly occurred that workers would be dismissed and a dispute would arise in regard to their dismissal. That dispute would ultimately be referred, through the appropriate mechanisms

under the then Labour Relations Act³ to the Industrial Court for determination. In the meantime the workers would continue to occupy the hostel or other accommodation provided to them by their employers. Their presence could prevent the employer from hiring a new workforce and might be seen as a deterrent to the employment of temporary or replacement labour. This proved frustrating to employers. Their response was to seek the eviction of the workers even though the dispute between them was ongoing and unresolved. Often this was an attempt to obtain an advantage in the dispute and as a means to put pressure on workers to reach a settlement before they were deprived of accommodation and shipped home to the TBVC states or the so-called homelands.

- [11] Examples of such cases are to be found in the law reports. In *Coin Security (Cape)(Pty) Ltd v Vukani Guards and Allied Workers’ Union & others*,⁴ the employer alleged that the workers had engaged in a strike and that, as a result, they had been dismissed, thereby forfeiting their right to remain in the accommodation. The court held that on the workers’ allegations the employer had been in breach of its contractual obligations to them and that this had occasioned the work stoppage. This was a legitimate response to the employer’s

breach of contract and did not constitute a strike. Accordingly the purported termination of their contracts of employment was unlawful and they were entitled not to accept it but to decline to work further until the employer remedied its breach of contract. In the result the application for their eviction failed.

- [12] That can be contrasted with *Randfontein Estates Gold Mining Co (Witwatersrand) Ltd v Forbes*,⁵ where the employee alleged that he had been unfairly dismissed on notice and had referred a dispute concerning the unfairness of his dismissal to the Industrial Court. On that ground he opposed an application for his eviction from the accommodation provided to him

by his employer. Coetzee J held that, as he had been given notice in terms of his contract of employment, the termination of his employment was lawful and, because his continued occupation of the house provided by his employer depended upon the existence of a contract of employment, his right to occupy the house had also been lawfully terminated. He cited with apparent approval⁶ an earlier dictum⁷ to the effect that the contention that in a dispute between employer and employee labour law and not the common law should apply held within it 'the seeds of a pernicious doctrine'. His conclusion⁸ was 'that this case before me does not have anything to do with the provisions of the Labour Relations Act' and that:

'The mere fact of submission of a dispute such as the one alleged by the respondent to the industrial court for determination of an unfair labour practice in terms of that Act does not take away this Court's jurisdiction to hear an application for, and grant, an eviction order.'

[13] Once the LRA came into effect the problem became of less significance in most workplaces because the Labour Court was empowered to grant urgent interim relief in terms of s 158(1)(a) of the LRA and could therefore restrain employers from seeking to terminate rights to accommodation of workers whilst the parties were locked in industrial dispute. However, it seems probable, in a statute dealing with the right to obtain eviction orders against

occupiers of land, including workers, in rural and agricultural areas, that the protection of an urgent application before the Labour Court was not regarded as adequate. Accordingly ss 8(2) and 8(3) were included in the Act to ensure that eviction orders could not be obtained against dismissed workers in these areas until all disputes about the validity of the termination of their employment had been resolved through the mechanisms of the LRA.

[14] That does not mean, however, that s 8(2) is necessarily a ground for terminating the former worker's right of residence in isolation from the broad requirement of it being just and equitable under s 8(1). It is capable of the construction that it is a possible specific instance of a just and equitable ground for termination, but that its prima facie weight as such is capable of being displaced by way of evidence that, notwithstanding the fact that the right of residence flowed from the employment agreement and that agreement had been both lawfully and fairly terminated, it would nonetheless not be just and equitable to terminate the former worker's right of residence. I accept that this would probably require a strong case, such as one based on lengthy residence, old age, ill health, the absence of reasonably equivalent alternative accommodation and evidence showing that the continued presence of the former worker on the erstwhile employer's property would not impose a burden on the latter. That would be a difficult case to advance when one was, as in the present case, dealing with accommodation in a hostel, but the possibility remains

that on appropriate facts it could be advanced.

[15] On the other hand s 8(2) could also be construed as a special provision governing a particular situation that is to be applied to the exclusion of the general provisions of s 8(1). The brocard *generalia specialibus non derogant*⁹ comes to mind. This is a difficult question, made more difficult by the fact that the point was not raised in the pleadings or at the trial

where, as I have said, the parties in very specific terms limited the issues and did not include any issue arising under s 8(1). Nor was it raised in the heads of argument in this court and we have not had the advantage that full argument on the point would provide. It is accordingly undesirable to decide it as it falls outside the issues properly raised and in dispute between these litigants. I need hardly add that it is an issue with constitutional ramifications and it remains a salutary rule, even if not always observed, that if a matter can be disposed of without reaching a constitutional issue that is the approach that the court should adopt.¹⁰ I will accordingly leave the point open and say no more than that, if it is to be raised, it must be raised by way of allegations in the plea of the former worker whose eviction is being sought and supported by evidence showing that it would, notwithstanding the termination of the former worker's employment, not be just and equitable to evict him or her from the accommodation provided by the employer in terms of the employment agreement.

[16] The Act contemplates two stages before an eviction order can be made. First the occupier's right of residence must be terminated in terms of s 8 of the Act. The manner in which this is to be done is not specified. Once the right of residence has been terminated then, before an eviction order can be sought, not less than two months notice of the intention to seek the occupier's eviction must be given to the occupier, the local municipality and the head of the relevant provincial office of the Department of Land Affairs in terms of s 9(2)(d) of the Act. That notice is required to be in a form prescribed by regulations made in terms of s 28 of the Act.

[17] The notices given to each of the former employees with a view to terminating their right of residence in the hostel read in material part as follows:

'In terms of your employment contract with our client you had a residential right to stay in the Feedlot hostel.

At termination of your employment contract it was an explicit term of the contract that such a residential right to stay in the hostel shall lapse.'

The letters went on to 'cancel' the former employees' rights of residence and gave them 30 days notice to vacate the premises failing which an application for eviction would be brought. As the former employees did not vacate their rooms further notices of intention to bring eviction proceedings were served upon them and the bodies upon which such notices must be served in terms of s 9(2)(d) of the Act. Those notices said in regard to the grounds upon which the eviction order would be sought that reliance was placed upon s 8(2) of the Act and the fact that the former employees had been dismissed.¹¹ The case was then conducted in accordance with the pleadings already referred to and the summary of the issues at the outset of the hearing before the magistrate.

[18] It was submitted that when notice is given to terminate an occupier's right of residence and that notice sets out the grounds upon which the right is being terminated the owner is irrevocably bound to those grounds and can advance no others in support of the claim for an

eviction order. I am not sure that this is correct. After all there is no obligation on the owner of the property, when terminating the right of residence to provide reasons for that decision or to set out grounds therefor. It is not even a requisite for the validity of the termination that it be in writing or comply with any formalities. There seems to be no reason why the right cannot be validly terminated by the owner informing the occupier orally that the right of residence is terminated or will be terminated after expiry of a specified period of notice. In most instances termination of the right of residence is likely to take place in a relatively informal exchange between owner and occupier. It is only at the stage where the owner intends seeking an eviction order that the owner is obliged, and then only because the prescribed form requires it, to specify the grounds upon which an eviction order is to be sought. Even then anyone with experience of the completion of similar forms – such as those that an employee referring a dispute over their dismissal to the CCMA must complete – will be aware that they can be couched with a great deal of generality.¹² A statement that the occupier was a former employee and that in terms of ss 8(1) and 8(2) it would be just and equitable for them to be evicted from the property would satisfy the requirements of the form but leave the occupier little the wiser as to the grounds for their eviction. However, for the reasons that follow, it is unnecessary to express a final view on these submissions.

- [19] The matters mentioned in the previous paragraph arose because the argument before us was pursued on the basis that the initial letter terminating the right of residence had said that it was ‘an explicit term’ of the employment agreement that the right of residence would lapse on termination of the employment. It was submitted that this coloured the reference in the s 9(2)(d) notice to the termination of the employment of the former employees and also the allegation in the particulars of claim that in terms of the employment agreement the permission to reside on the farm would subsist only for so long as the employment agreement endured. Reference was then made to the employment contracts themselves and to various passages in the cross-examination of Mr Oosthuizen, the main witness for Sterklewies, from which it appeared that there was no clause in the employment contracts that in

so many words said that the right of residence was dependent on the continued existence of the employment relationship.

- [20] In my view this places far more stress than is justified on the word ‘explicit’ in the original letter. The letter said that the right to reside in the hostel had arisen under the employment contracts and, with the termination of the latter, the right to reside there had lapsed. There was no mention of a written contract or whether the ‘explicit’ provision

was embodied in a document or had been orally agreed. It seems to me that the word 'explicit' in that context merely meant that it was clear that this was agreed as part of the contract. It is true that there were written employment contracts, but these were relatively terse, and for reasons I will expand on did not set out all the terms of the contract. In any event, I do not think that it should be inferred that the reference in the letter was to a written contract or that portion of the employment contract that had been reduced to writing.

[21] I also do not think that the word 'explicit' should be equated, as I understood the argument to equate it, with

'express', in the sense of a term spelled out specifically in the language of the written portion of the contract.

Even if the relevant provision was embodied in a tacit term it would be as much an explicit term, that is, a clear term, as if it were an express term. This is so because a tacit term, once found to exist, is simply blended into the other terms of the contract and forms an indistinguishable part of the whole.¹³ The reality is that from the outset it was made clear to the former employees that their right of residence had derived from their

employment agreements and that it terminated when those agreements were terminated. That is no doubt why, at the commencement of the trial, it was recorded that the only issue in dispute was whether the right to reside in the hostel arose from the employment agreements.

[22] Once that is accepted there can be no doubt that the obligation to vacate the hostel on termination of the contracts of employment of the former employees was one that was explicitly embodied in the obligations of the former employees under those contracts. The evidence of Mr Oosthuizen makes that clear beyond any doubt. However, even if it were accepted that the reference in the letter was to the written portion of the contracts of employment and that by 'explicit' we should understand 'express'

to be intended, I do not think that would make a difference. In my view, on a proper construction of the written portion of the

employment contracts it was indeed an express term that the right to reside in the hostel was given by the contract and would be

terminated on termination of the contract. It is trite that the terms of a contract of employment are frequently to be distilled from more than one source.¹⁴ They may be found expressly in the contract or letter of employment; in the terms of a collective agreement;¹⁵ in other documents incorporated therein by reference and in the rules and policies of the employer, as for example, with a disciplinary or grievance procedure.¹⁶ These may stand alone as memorials of parts of the contract of employment or may be incorporated therein by reference. Tacit terms

may arise from working practices. However, for present purposes I can confine myself to express terms.

[23] Clause 8 of each employment agreement reads as follows:

‘The Employee shall, for the duration of this employment with the Company, ...obey all reasonable instructions and in all respects observe the directions and requirements of the Company.’

Mr Oosthuizen gave evidence on behalf of Sterklewies and dealt with the right to reside in the hostel. He said that Sterklewies had taken over the business in 1996 from an entity called Vleissentraal and all the employees had re-applied for their jobs, so

that all contracts with Sterklewies dated from this time or later.¹⁷ He said that the company had a clear policy in regard to the right to reside in the hostel and that was that the rooms were single quarters in which employees of the company could reside, free of charge, for so long as they were employees, but on termination of employment the right to reside there ended. He was cross-examined about this evidence. He said that the policy was embodied in the rules of the company and that these rules were clearly conveyed to the employees. They are written rules that are displayed on notice boards and are furnished to employees when they enter into employment. In addition he gave evidence that he was present on a number of occasions when either the former manager or he himself communicated the policy to the workers orally. It was suggested to him that exceptions had been made to this policy but he rejected those suggestions. His evidence about the policy and rules of Sterklewies in regard to residence in the hostel was not challenged. It was put to him at one stage that the former employees would testify that it was never a term of their employment that they would only stay there as long as they were employed by Sterklewies. Mr Oosthuizen rejected this suggestion, relying on the rules and policies of the company, and the former employees did not give evidence to support it.¹⁸

[24] There was an express provision in the employment contracts of the former employees that they would observe the directions and requirements of their employer. The rules and policies published by the company from time to time and displayed on notice boards and conveyed to the workers were clearly among those directions and requirements. The former employees were accordingly obliged to observe them and comply with them. That was an express provision of the written contracts of employment. On the unchallenged

evidence of Mr Oosthuizen those rules included the rules in regard to residence in the hostel and provided that the right of residence

would terminate on termination of the employment contracts. It was accordingly an express term of each contract of employment that the former employees would vacate the hostel on termination of their contracts of employment.

[25] Once that conclusion is reached the appeal must succeed. It is however necessary to make a few comments in relation to the judgment in the Land Claims Court. I start with the passages where the acting judge purported to set out the issues that were not

in dispute. Among those he listed were that the former employees had been in the employ of Sterklewies since 1980 and had resided on its property since 1980. Those statements were factually incorrect and contrary to the unchallenged evidence of Mr Oosthuizen. Indeed, it had been put to the latter that Mr Msimanga and Mr Mqina had previously been employed by Vleissentraal on a feedlot in Vrede and had only moved to the Harrismith feedlot when the one in Vrede was closed in about 1990. Then the acting judge said that the three issues in dispute were whether the employment agreement provided for vacating of premises on dismissal; whether the employment agreement was written or oral and whether Mr Tsotetsi had been dismissed through a disciplinary procedure. The latter two were not properly issues before him. He went on to hold, in the face of the uncontroverted evidence of Mr Oosthuizen, that the former employees could not have known about the company's rules and said that there was no evidence that the rules had been provided to or read to the former employees. He held that there was no evidence that Mr Tsotetsi had been dismissed by a disciplinary enquiry even though this was not in issue. Lastly, he said that he was baffled by the fact that the magistrate had not referred to the report placed before the court in terms of s 9(3) of the Act. The short answer to that was that the report was inaccurate, entirely unhelpful and not relied on by the former employees before the magistrate.

[26] It cannot be emphasised too often that courts are generally speaking bound by the issues that the parties to litigation have formulated and it is not open to them to deal with and determine cases on a different basis. That is particularly the case where the court is a court of review of what has transpired in a lower court, as is the position with the Land Claims Court when exercising its jurisdiction under s 19(3) of the Act. As Ngcobo CJ pointed out in *CUSA v Tao Ying Metal Industries & others*,¹⁹ in the parallel situation of a review by the Labour Court of an arbitration award by the CCMA, 'the role of a reviewing court

is limited to deciding issues that are raised in the review proceedings. It may not, on its own, raise issues that were not raised by the party who seeks to review an arbitral award.' The only exception is in relation to a pure point of law that properly

arises on the facts and the papers before the reviewing court. The acting judge in the Land Claims Court disregarded these principles

and in the result erred.

[27] The appeal accordingly succeeds. Some amendment needs to be made to the magistrate's order to accommodate the position of Mr Tsotetsi, who is married to an employee of Sterklewies who is entitled to reside in the hostel and is apparently entitled to continue to occupy his room together with his wife, but by virtue of her employment. In my view a suitable declaratory order in terms of s 19(1)(b)(ii) of the Act should have been issued by the magistrate in respect of Mr Tsotetsi's situation. Mr Fischer SC, appropriately, did not seek an order for costs against the former employees. I understood that to relate also to the proceedings in the magistrates' court, and in any event do not regard it as appropriate for there to be an order for costs against the former employees in that tribunal. It is a sad sign of the circumstances in which so many of our fellow citizens find themselves that these adult

men, with wives and families, should have spent eight years resisting their eviction from rooms that are either three by two metres or four

by four metres in extent and that lack such basic amenities as running water and a toilet. To mulct them in costs would not be

right. We were asked by Mr Phalatsi to lay down a general rule in that regard. However, I do not think it appropriate to try to do so. Whilst in general it may not be appropriate in this type of litigation to make orders for costs against either the erstwhile

employer seeking eviction or the former employees, each case must turn upon its own facts. An occupier wrongly evicted as a result of an order of the Land Claims Court and compelled to seek relief in this court, for example, should not lightly be deprived of his or her costs.

[28] The following order is made:

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant: P U FISCHER SC

Instructed by:

Venter Attorneys, Harrismith

Symington & De Kok, Bloemfontein

For respondent: N W PHALATSI

of N W Phalatsi & Partners,

Bloemfontein.

¹See also para 21 and fn 28 in that judgment.

²Union Government (Minister of Railways) v Sykes 1913 AD 156 at 173-4; Marine & Trade Insurance Co Ltd v Van der Schyff 1972

(1) SA 26 (A) at 39G-H.

³Act 28 of 1956.

⁴Coin Security (Cape)(Pty) Ltd v Vukani Guards and Allied Workers' Union & others 1989 (4) SA 234 (C).

⁵Randfontein Estates Gold Mining Co (Witwatersrand) Ltd v Forbes 1992 (1) SA 649 (W).

⁶At 651 H-I.

⁷By Curlewis J in Egnep Ltd v Black Allied Mining and Construction Workers' Union & others

1985

(2) SA 402 (T) at 404J-405A.

8At 651J-652A. This conclusion was followed by Mahomed J in *Palabora Mining Co Ltd v Coetzer* 1993 (3) SA 306 (T) at 310G-311E.

9Mankayi v Anglogold Ashanti Ltd 2010 (5) SA 137 (SCA) para 39. It is referred to without comment, but with apparent approval, in *Mankayi v Anglogold Ashanti* 2011 (3) SA 237 (CC) para 61, fn 89.

10Zantsi v Council of State, Ciskei & others [1995] ZACC 9; 1995 (4) SA 615 (CC) paras 2-7. The principle has been repeatedly affirmed, most recently in *Nyathi v MEC for Department of Health, Gauteng & another* 2008 (5) SA 94 (CC) para 149. See also *Prince v President, Cape Law Society & others* [2000] ZACC 28; 2001 (2) SA 388 (CC) para 22 on the need for issues to be properly raised in the pleadings or affidavits in the court of first instance.

11‘Werknemer is ontslaan.’

12The form LRA 7.11 completed in respect of Mr Msimanga and Mr Mqina described the dispute in the following terms: ‘He dismissed

them because he said they start working at 7h15 but they are quite sure they have started at 7h00am.’ There was also a complaint that they were not allowed to talk at the disciplinary hearing. The complaint on the fairness of the dismissal bore little resemblance to the actual grounds for the disciplinary action against them.

13Wilkins NO v Voges [1994] ZASCA 53; 1994 (3) SA 130 (A) at 144B-E.

14Mark Freedland, *The Personal Employment Contract* 271 – 276; Harvey on *Industrial Relations Law and Employment* paras 21 and 22 (loose leaf issue 210); Simon Deakin and Gillian Morris *Labour Law* (5 ed, 2009) 217; André van Niekerk and others *Law@work* (2 ed 2012) 109.

15See s 23 of the LRA and particularly s 23(3) thereof.

16As in *Denel (Edms) Bpk v Vorster* 2004

(4) SA 481 (SCA).

17Section 197 of the LRA had not then come into force.

18It is difficult to see on what basis the employees could have given such evidence. As Mpati P pointed out in *Mpedi & others v Swanevelder & another* 2004

(4) SA 344 (SCA) para 7 employers do not normally provide residential facilities on their properties to persons other than employees and in some instances their families.

19CUSA v Tao Ying Metal Industries & others [2008] ZACC 15; 2009 (2) SA 204 (CC) para 67.

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