IN THE LAND CLAIMS COURT OF SOUTH AFRICA
(HELD IN RANDBURG)

CASE NO.: **LCC 31R/2006**

In the matter between:

ELANKOR SES (PTY) LTD **APPLICANT**

and

MZWANDILE NGCOSHOLO AND OTHERS **RESPONDENT**

DECIDED ON: 08-12-2010

JUDGMENT

NCUBE AJ

Introduction

[1] This case is a typical example of the painful history of landless people of our country. The Respondent finds himself a pariah in the country of his birth. It is not because of any fault on the part of the Applicant. The Respondent finds himself in this position because of cruel and racially discriminatory practices of the apartheid system. Under that system farm dwellers became perpetual farm labourers with no possibility of having land of their own.

[2] This case is brought before me for a review in terms of section 19(3) of the Security of Tenure Act, Act 62 of 1997. I shall hereinafter refer to this Act

as ("the Act"). It is not for the first time that the case is before me. It also served before me in 2006. The Applicant brought an application for the eviction of the Respondent and members of his family before the Magistrate sitting in Port Elizabeth Magistrate Court. The learned Magistrate granted the application, evicting the Respondent and his family members from the Applicant's farm.

Background

[3] In 2006, I remitted this case back to the Magistrate. I was not satisfied that the learned Magistrate had properly applied his mind to the availability of suitable alternative accommodation when he granted the eviction order. Because of the events that unfolded thereafter I intend repeating the relevant paragraphs of my judgment. They read as follows:

> "[14] I am of the opinion that the learned Magistrate did not properly apply his or her mind to the availability of suitable alternative accommodation as he/she is required to have done in terms of the Constitution and the Act. I would suggest that the Magistrate fully investigate this aspect. Mr Van Der Merwe may be approached to indicate if he cannot offer the Respondent and his family a house which is the size of the house which the family occupies at present, which is a six roomed house at a place where the family can carry on with its agricultural activities. The Department of Land Affairs may be requested to give the Respondent a grant to buy building material for building a house on that vacant plot which was once promised to him if it is still available. Alternatively, the Department of Land Affairs may buy a piece of land for the Respondent, where he can build a house and carry on with his agricultural activities.
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> [15] In terms of section 19(3)(d) of the Act, this case is remitted to the Magistrate to deal with it as suggested in paragraph 14 above. Thereafter any

of the parties may re-instate the matter."

[4] The Magistrate interpreted this order in terms of section 19(3)(d) to mean that his eviction order had been set aside and that he was therefore required to hear the case ***de novo***. That was not the case. His eviction order had not been interfered with. In any event, the magistrate tried the case ***de novo***. Having heard the evidence, he made a finding that there was no suitable alternative accommodation and he dismissed the application. The Applicant took the dismissal order on review, on the basis that the Magistrate was *functus officio* as his earlier order had not been set aside.

[5] On review, in the Port Elizabeth division of the High Court, it was found that my order, in terms of paragraphs 14 and 15 of the Judgment, was somehow ambiguous. The applicant was advised to approach the Land Claims Court (LCC) with an application for the clarification of the order. The review proceedings were adjourned *sine die* pending the outcome of the variation application in the LCC.

[6] The application for the variation of the order served before me on 02 April 2009. The application was granted. In terms of Rule 64(1) of the Rules of the LCC, the earlier order was varied to specifically state that the Magistrate's order was not set aside and that the matter was to be remitted back to the LCC.

[7] After the variation of the order, the Applicant returned to the High Court. That Court then reviewed and set aside the Magistrate's decision to dismiss the Applicant's application which took place on 15 December 2006. The Magistrate's order was set aside by the Eastern Cape High Court sitting at

Grahamstown on 29 October 2009. The matter was remitted to the Magistrate to comply with the order of the LCC.

[8] The Magistrate heard evidence on the availability of suitable alternative accommodation. At the conclusion of that evidence, the matter was remitted to the LCC. Hence the matter is now before me to finalize the review process.

Facts

[9] The Respondent has been residing on Portion 89 of the KraggaKamma farm since 1973. He was also working there. I shall hereinafter refer to this farm as ("the farm"). The initial owner of the farm was Mr Grant Fox (Mr Fox). The said farm was later sold to a company called Taurus Stock (Taurus).

[10] Taurus was based in Pretoria. It was because of this reason that Taurus employed Mr Fox to run the farm in Port Elizabeth. The Respondent continued working under the supervision of Mr Fox. Taurus subsequently sold the farm to the Applicant. There was a stage when the Applicant rented the farm to an entity known as Mohawk Quaries. It is not clear from the evidence if that was a company or a close corporation.

[11] Mr Raoul Van Der Merwe (Mr van der Merwe) is the director of the Applicant. The Applicant acquired the farm in 2000 or 2001. The purpose was to convert the farm into an eco-estate. A certain portion of the farm was going to be fenced off and used for game farming. The other portion would be developed into sites. The sites would be sold to private individuals, who would in turn contract with individual builders to build houses which were going to comply with a specific theme, which is African theme.

[12] When the Applicant bought the farm, the Respondent was still resident on it. He still resides there with his wife and seven children. There are five children of his own and two grand children born by his late son. The mother of the children is also late. Those two children were placed in custody of the Respondent and his wife as foster parents. The Respondent is employed by Mrs. Tracy Harris (Mrs. Harris) as a gardener. Mrs Ngcosholo is also employed by Mrs Harris as a domestic worker. She earns R800-00 per month. It is not clear how much the Respondent earns.

[13] The eldest child Frank, 25 years, is working for certain garden services in town. He resides with the rest of the family on the farm. He is struggling to get accommodation of his own. The other two children, Sonkelo, 22 years and Gangileko 19 years also work for Mrs. Harris. The last two children Nombuso and Nomvulo are minors and were still attending school in 2006.

[14] The family occupies a six-roomed house. It is divided into different rooms. It is built of a corrugated iron roof and a variety of other material. It is equipped with basic furniture. There is no running water and there is no electricity. They use drain water and cook on the open fire.

[15] When the Applicant took over the ownership of the farm, Mr Fox had undertaken to see to it that the Respondent and his family were relocated to another site. Mr Fox was prepared to assist the Respondent and his family to relocate to a place known as Sea View where the Ngcosholos were putting up a house. Eventually, there was no relocation to Sea View. It was because of this reason that the Applicant resorted to litigation which culminated into an eviction order by the learned Magistrate.

Availability of suitable alternative accommodation

[16] The Respondent and his family are willing to vacate the farm. They have nowhere to go. They can leave the farm at any given moment, provided they are relocated to a rural environment where they can establish their home and engage in agricultural activities. Mr van der Merwe is involved in low cost housing development. He had promised to get the Respondent a two- roomed RDP house either in Walmer or Motherwell township.

[17] The offer of an RDP house was rejected by the Respondent. Both the Respondent and his wife testified to the effect that they are not used to township life. They grew up on farms. They have lived on the present farm for a period of 25 or 30 years. They have never lived in a township.

[18] Many people endevoured to secure a suitable alternative accommodation for the Ngcosholo family. All was in vain. The Department of Land Affairs (the Department) got involved. Mr van der Merwe and Mrs. Harris were also involved in the process. The Department's policy is clear. It does not give out grants for people to buy building materials. The policy is to purchase a piece of land on which poor people can build their houses.

[19] The Department was willing to purchase land for the settlement of the Ngcosholo family and other families who might find themselves in the same predicament as the Ngcosholo family. The Department asked Mr van der Merwe to contribute an amount of R46 000 -00 to achieve this purpose.

[20] At first, Mr van der Merwe agreed to make a contribution of R46 000-00. Nothing happened on the part of the Department. When Mr van der Merwe

made further enquiries he was told to raise the offer to R94 000-00. He then withdrew his offer. That offer is no longer on the table as of now. Mrs. Harris was willing to sell a piece of land to the Department for an amount of R400 000-00. The Department is prepared to purchase that piece of land provided Mr van der Merwe is willing to make an undertaking to either build a house for the Respondent on that land, or to assist him with building material. No undertaking was forth coming from Mr van der Merwe. The reason as I understand it, the land was still in the process of being registered in the name of Mrs. Harris.

[21] Mr Fox was prepared to assist the Respondent by transporting his family and belongings to Sea View forest. Respondent testified that Sea View is just a bush. There are people who have established their shacks in that bush. The Respondent had started clearing up the bush. The problem, there was no water and he had no building material. His house on the farm is 25 years old. The wood is rotten. He could not use that material to build another house. All attempts at securing a suitable alternative accommodation ended up in a sombre prospect.

Order for eviction of a person who was occupier on 4 February 1997

[22] Section 10(1) of the Act[1] provides:

> "An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if —
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> a) the occupier has breached section 6(3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;
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> b) the owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has

1 Act 62 of 1997

fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar month's notice in writing to do so;

c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or

d) the occupier ——

(i) is or was an employee whose right of residence arises solely from that employment and

(ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act."

Section 10(2) provides:

"Subject to the provisions of subsection (3), if none of the circumstances referred to in subsection (1) applies, a court may grant an order for eviction if it is satisfied that a suitable alternative accommodation is available to the occupier concerned."

[23] The Act defines **"suitable alternative accommodation"**[2] as meaning: —

"Alternative accommodation which is safe and overall not less favorable than the occupier's previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to —

a) the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services;

b) their joint earning abilities and

c) the need to reside in proximity to opportunities for employment or

2 Section 1(1)

other economic activities if they intend to be economically active."

[24] Mr van der Merwe offered a two-roomed house either in Walmer or in Motherwell. The Respondent and his family members consist of a family unit of nine people. I shudder to think of nine people squashed in a two- roomed house. In any event, that house was not yet in existence. If it was in existence, it was not ready for immediate occupation. Mr van der Merwe was willing to add a third room to that RDP house. Even three rooms were not adequate. It was argued on behalf of the Applicant that the occupier of an RDP house had a possibility of extending the house. The Respondent does not have money to purchase material for such extension.

[25] Even if the Respondent had money to buy building material, that could not be described as suitable alternative accommodation in terms of the Act. The Respondent was promised various vacant sites. A vacant site is not accommodation, let alone "suitable accommodation".[3] I should not even comment on Mr Fox's offer to transport the Ngcosholos into the bush at Sea View. There was another offer of similar nature at the place called Greenbushes.

[26] The Respondent and his wife insist on accommodation in a rural environment where they can be able to crop. The Respondent testified that he wants a place where he can stay even if he is unemployed. I understand his concern. He wishes to crop in order to supplement his meagre wages which he earns. The social worker described the Respondent's house as a "shack". It might be true that it is a "shack" but it is of sentimental value to the Respondent and his family. They know of no other house but the one they stay in. They have stayed in that particular house for 25 or 30 years.

3 See Janse Van Rensburg v Khumalo and Others LCC39R/2007 (unreported) paragraph 7.

[27] In **Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter**[4], the full bench held that actual availability of alternative accommodation was not a requirement. All the court was required to do was to consider, among other factors, the availability of alternative accommodation as a factor in deciding whether to grant or refuse the eviction order. However, I must hasten to add that the case was not decided under the Act. It was decided in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[5] (PIE).

[28] The Act under discussion expressly requires suitable alternative accommodation to be available before an order for eviction can be granted in terms of section 10(2). PIE regulates evictions of unlawful occupiers from urban and rural land. The Act under discussion protects the occupation rights of persons who lawfully occupy rural land with consent of the land owner or person in charge. A person who occupies land under the Act has greater protection than he would have had under PIE.

[29] Even in PIE cases, courts have held that a court should not always be ready to grant an eviction order unless suitable alternative accommodation is available. In **Port Elizabeth Municipality v Various Occupiers**[6] Sachs J expressed himself as follows:

> " --------- there is therefore no unqualified duty on local authority to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available. In general terms however, a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only on

4 2000 (2) SA 1074 (SEC)
5 Act 18 of 1998
6 2005 (1) SA 217 (CC) at 233 G-H

> an interim measure pending ultimate access to housing in the formal housing programme."

Position of the applicant

[30] The Applicant purchased the farm in order to conduct its business operations. Mr van der Merwe testified that it is practically impossible for the Applicant to start development on the farm when the Respondent's house is still there. The Applicant has a right to property in terms of section 25 of the Constitution[7] (the Constitution). The Constitution prohibits arbitrary deprivation of property[8].

[31] On the other hand, section 26(3) of the Constitution provides:

> "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."

The Constitution enjoins the court, in eviction cases, to consider all relevant circumstances. The availability of suitable alternative accommodation is one of many such circumstances.

[32] From the above, it is clear that a person who occupies another person's farm, does not have untramelled right of occupation. The Constitution acknowledges that occupiers may be evicted, but only in accordance with the Act and after all relevant circumstances have been taken into consideration. In addition, the Act allows an order of eviction if such eviction is just and equitable.

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7 Act 108 of 1996
8 Section 25 (1)

Comparable hardships

[33] I am mindful of the fact that the Applicant is losing business. It purchased the farm in 2000 or 2001 but up until now, it does not conduct business on that farm. In my view, the presence of the Respondent's house on the farm cannot prevent the Applicant from developing the land. It is not the entire farm which is required for the stocking of game. A portion of the farm will be fenced off and reserved for game farming. The rest of the farm will be used to build houses. According to Mr van der Merwe, the rest of the farm will be subdivided into individual sites and sold to individual persons.

[34] The applicant may proceed with development whilst the Respondent is still looking for the place to stay. On the other hand, should the eviction order be granted, the Respondent and his family will have nowhere to go, unless I order their relocation to the forest. The RDP house is no longer available. Even if it was still available, the Respondent could not have occupied it. Mrs Ngcosholo testified to the effect that she prefers staying in the forest than to stay in the township where there are taverns and shebeens which will have a negative influence on her children's lives.

[35] I sympathise with the Applicant, but at the same time, I cannot throw the Respondent and his family out in the cold. In my view this case could have been peacefully settled had it been properly handled. Mrs. Harris offered a piece of land. The Department was willing to buy that land on condition Mr van der Merwe made an undertaking to help the Respondent with building material. The only reason given by Mr van der Merwe why he could not make an undertaking was because the piece of land was not yet registered in Mrs. Harris's name, although the transfer was in progress.

[36] I am alive to the fact that at some stage during cross-examination, the Respondent stated that he does not want to vacate the farm because Adele did not pay him his wages. It is not clear who Adele is. The evidence was very otiose on that aspect. I can only surmise that she was the manager of Mohawk Quaries which was renting the farm at some stage. Although the Respondent gave non payment of his wages as a reason why he does not vacate the farm, we must not lose sight of the fact that the Respondent is illiterate and because of that reason, some people take an advantage of him.

Should the eviction order be confirmed ?

[37] As stated earlier, in this judgment, for me to confirm the Magistrate's eviction order, I must be satisfied that suitable alternative accommodation is available to the Respondent and his family. There is no doubt that the Applicant owns the farm and he needs it for his business operations. On the other hand the Respondent does not and he cannot refuse to vacate the farm should suitable alternative accommodation be available to him. As of now, there is no suitable alternative accommodation. There is not even hope that it will be available in the near future.

Order

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

> In terms of section 19(3)(b) of the Extension of Security of Tenure Act, 62 of 1997, the order for the eviction of the Respondent and other occupiers granted by the Magistrate, Port Elizabeth, on 07 March 2006 in case number 12428/05 is set aside in its entirety.

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Ncube AJ
Land Claims Court

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For the Respondent
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