IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Delivered on: 03 June 2016

CASE NO: LCC44/2015

In the matter between:

DRAKENSTEIN MUNICIPALITY	Appellant
And	
CJ CILLIE EN SEUN (PTY) LTD	First Respondent
JACQUES ADAMS	Second Respondent
LIEZEL HENDRIKA ADAMS	Third Respondent

JUDGMENT

INTRODUCTION

[1] This is an appeal by the Drakenstein Municipality ("appellant") against paragraphs (c) and (d) of the judgment and order granted by Additional Magistrate Vogt ("the Magistrate") in the Wellington Magistrate's Court on 8 January 2015.

[2] The Magistrate's order reads as follows:

"*Ten einde die munisipaliteit kans te gee om 'n sekere perseel te allokeer en ook tyd vir die applikant om 'n Wendy huis vir eerste en tweede respondent op te rig maak die hof die volgende bevel:*

(a) Die aansoek om uitsetting van eerste en tweede respondent word toegestaan en eerste en tweede respondent word bevel om die plaas Onverwacht/Vrugbaar Nr 265 gelee te Bo-vlei in die Landdros distrik van Wellington te verlaat voor of op 20 April 2015;

(b) In dien eerste en tweede respondent nie die woning verlaat het op 20 April 2015 nie sal uitvoering van die bevel geskied op 24 April 2015.

(c) Dat Drakenstein Munisipaliteit grond beskikbaar stel vir noodbehuising

(d) Dat die applicant die Wendy huis oprig vir eerste en tweede respondent op die grond soos beskikbaar gestel deur Drakenstein Munisipaliteit.

(e) Geen koste bevel word gemaak nie.

Hierdie bevel word opgeskort hangende bekragtiging deur die Grondeise Hof."

[3] The matter was then referred to this Court on automatic review in terms of section 19(3) of the Extension of Security of Tenure Act, 62 of 1997 ("ESTA"). On 10 April 2015, Mpshe AJ confirmed the Magistrate's Order.

[4] The grounds upon which the appellant attacks the judgment and order of the court *a quo* are discussed in more detail later on in this judgment.

[5] The first respondent,("the landowner") brought proceedings in terms of ESTA to evict the second and third respondents from a worker's house on its farm, Onverwacht ("the farm") in the Wellington Magistrate's Court, on 7 July 2009.

[6] The second and third respondents ("the occupiers") opposed the application for their eviction and on 8 March 2011 launched an application to join the appellant in the proceedings. The occupiers also sought orders directing the appellant to, *inter alia*, file a report stating: (a) what steps it had taken, intended to take or was able to take in order to provide emergency housing or accommodation for the occupiers in the event of their eviction, (b) when such accommodation or housing would be provided and (c) advice on the status of the occupiers' application for housing submitted in August 2009.

[7] The appellant was then joined as a party to the proceedings and duly filed the report during March 2011. The appellant reported, *inter alia*, that:

7.1 although it had budgeted for the acquisition of land to provide for emergency housing, such accommodation would be rudimentary and temporary, as the land first needed to be acquired and developed;

7.2 until the land was acquired and developed, it could only offer ad hoc solutions in cases where the emergency arose;

7.3 although the occupiers qualified for the provision of a subsidised house, they were unlikely to receive same

anytime soon given that the waiting list for such housing stretched back to the 1990s.

[8] Following a meeting with the appellant's officials on 31 January 2013, the landowner's attorney, Mr Cronje, accepted that the land which was to be set aside for the emergency housing was not yet available and was consequently, for the foreseeable future, not an option for the occupiers.

[9] A further report was filed by the appellant during August 2014. It is not necessary, for purposes of this judgment, to deal in detail with the contents of this report, save to note that the appellant reiterated its stance that it could not provide alternative land or accommodate the occupiers for the foreseeable future.

[10] The appellant was not represented at the hearing of the eviction application. It is not apparent from the record why this was the case.

GROUNDS OF APPEAL

[11] There are three main grounds on which the appeal is founded. Firstly, the appellant contends that the Magistrate should not have found that the appellant was obliged to provide the occupiers with land for alternative accommodation in the absence of proper evidence concerning whether the occupiers could themselves afford alternative accommodation. In support of this contention, Mr Borgstrom, for the appellant, argued that the scant information

about the occupiers' financial position on the papers (which was dated by approximately 5 years when the matter was argued), was contradicted by the information presented from the bar, by the landowner's attorney during argument, reflecting that the occupiers had a household income of approximately R5000.00 per month. There was (a) no detail on the household's expenses save for a bald statement that their expenses exceeded their income, and (b) no evidence as to the cost of alternative accommodation except for an assertion that the occupiers could not afford same, nor were they able to find such accommodation on neighbouring farms. The Magistrate should have required further investigation into the occupiers' financial status, called for information on the cost of alternative private accommodation and their expenses, so the argument went.

[12] Mr Magardie, for the occupiers, contended that the appellant had failed to raise the issue of inadequate financial information in the report it filed in August 2014. Secondly, the appellant's June 2014 Emergency Housing Policy obliged it to conduct an investigation of the occupiers' financial status in order to determine their eligibility for emergency housing. The appellant failed to conduct the aforesaid investigation and it was therefore not up to the appellant to now require the matter to be referred back to the court a quo to conduct such an enquiry, so the contention continued.

[13] I agree with Mr Magardie that Mr Borgstrom's argument is untenable. The appellant, who was a party to the eviction proceedings, chose not to raise the question of the inadequate financial information during the proceedings in the court *a quo.*

Moreover, the appellant failed to comply with its own Emergency Housing Policy which required it to conduct an assessment of the occupiers' total monthly income. In its March 2011 report, the appellant gave a comprehensive account of the occupiers' employment status including their total monthly income. The same does not appear to have been done in the report the appellant filed at court during August 2014. The Magistrate cannot, in my view, be faulted for not interrogating the financial information handed to her from the bar by the landowner's attorney. The Magistrate's Court, unlike this Court (the Land Claims Court), is, to my mind, not empowered to play an interventionist role in eviction matters.

[14] Mr Borgstrom also argued that the Magistrate ought to have called for a probation officer's report in terms of section 9(3) of ESTA to consider the availability of suitable alternative accommodation. He contended that such a report should, in considering the question of the occupiers' accommodation upon eviction, not only deal with the availability of municipal accommodation but also private accommodation including whether the occupiers could afford same.

[15] There is merit to this argument. Section 9(3) of ESTA is cast in peremptory terms. Although the offer by the landowner to provide the occupiers with a Wendy house probably played a major role in the Magistrate not calling for a probation officer's report as required by section 9(3) of the Act, she erred in not doing so. A Court must request a probation officer's report where an eviction is in terms of sections 10 or 11. The importance of requesting a probation officer's report cannot be over-emphasised. First, when

the Act says it is mandatory for judicial officers to request these reports. Second their absence 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 Officer, 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.

[16] The second substantive ground of appeal is that the Magistrate's order was underpinned by an erroneous finding that the appellant had alternative land available. Mr Borgstrom contends that the finding was based on a misreading of the August 2014 Report as same does not state that the appellant has land available for emergency housing purposes.

[17] I do not agree that the Magistrate based her finding on the aforesaid report. That contention is not borne out by a reading of the judgment or the paragraphs Mr Borgstrom bases his argument on. The August 2014 report does not, in clear terms, state that the appellant is unable to provide alternative land but rather

emphasizes that it is unable to provide emergency housing (as opposed to land) in the foreseeable future.

[18] To my mind, it is more probable that the finding that land has been made available for emergency housing was based on the averments of Mr Cronje, the landowner's attorney. Mr Cronje, following a meeting with the appellant's officials during January 2013, deposed to an affidavit which forms part of the record. In paragraph 6 of the affidavit, Mr Cronje states, *inter alia*, that "*Ek is egter wel meegedeel, dat die Munisipaliteit onlangs a stuk ground beskikdaar gestel het vir noodbehuising. Die doel van die stuk grond sal wees om persone wat haweloos is, onder andere weens die feit dat hulle in terme van Hofbevele uitgesit is, tydelik te huisves.Sulke persone sal tydelike structure op die grond kan oprig, terwyl hulle wag om verskuif te word na permanente behuisingskemas."* The Magistrate was, in my view, therefore correct in finding that alternative land was available.

[19] The third ground of appeal raised by the appellant is framed under the heading "The reasonableness of the Municipality's plans" has more substance. The essence of this ground of appeal is the contention that it was not open to the Magistrate to order the appellant to immediately provide alternative land for the benefit of the occupiers, particularly as there was no indication that such relief would be sought against it. Consequently, the court *a quo* erred in granting the parties relief they had not sought and because the evidence did not support it, grant a mandatory order against the appellant, so the contention continued.

[20] In support of the contention that the Magistrate was not entitled to grant relief not requested or fully argued by the parties, Mr Borgstrom referred us to the following authorities: *City of Cape Town v South African National Roads Authority Limited and others* [2015] 2 All SA 517 (SCA) at para 10 ("SANRAL"); *Fischer and another v Ramahlele and others* [2014] 3 All SA 395 (SCA) at para 13-14 and *South African Police Service v Solidarity obo Barnard (Police and Prisons Civil Rights Union as Amicus Curiae)* 2014 (10) BCLR 1195 (CC) at para 202-203 and 210-220 ("Barnard").

[21] Ponnan JA, in *SANRAL supra*, re-stated the rule set out in *Fischer* above, that a Court cannot raise new issues not traversed in pleadings or affidavit. In *Barnard supra*, where the issue was whether Ms Barnard should be permitted to raise a new cause of action, Jafta J confirmed that a party must plead its cause of action in the court *a quo*. This was to warn the other parties of the case they had to meet and the relief sought against them.

[22] A perusal of the record confirms Mr Borgstrom's contention that paragraphs (c) and (d) of the Magistrate's order (set out in paragraph [2] above) were not requested by the parties in their arguments in the court of first instance nor in their papers. Although in their application to join the appellant as a party to the eviction proceedings, the occupiers specifically pray, *inter alia*, for an order directing the appellant to report on "*what steps it has taken and what steps it intends or is able to take in order to provide emergency accommodation and/or other housing or accommodation for the applicants in the event of their eviction as prayed in the main application."*, they do not directly ask for the

relief granted in the impugned portions of the order. Neither does the landowner's attorney, Mr Cronje, in his affidavit referred to in paragraph [18] above. The answers to the questions raised by the occupiers in their joinder application were provided to the court in the appellant's March 2011 and August 2014 reports.

[23] The respondents should, to my mind, have amended their pleadings in order to seek the relief set out in the impugned portions of the order after the appellant was joined as a party, possibly after receipt of its August 2014 report. This would have enabled the parties, including the appellant, to argue the matter fully before the Magistrate.

[24] In the result and the light of the authorities set out in paragraph [20] above, I find that the appellant had no warning that a mandatory order would be granted against it and that the Magistrate has indeed erred in granting the relief set out in paragraph (c) and (d) of her order. The appeal should therefore be upheld.

[25] As this Court deals with issues of social justice, it would not be just and equitable to simply strike down paragraphs (c) and (d) of the order issued by the court of first instance without giving that court an opportunity of being addressed on the issues raised in this Court. Given the lapse of time since the matter was argued before the Magistrate (11 December 2014) and the handing down of this judgment, it is interests of all the parties that the matter be remitted to the court of first instance for reconsideration and, in particular, compliance with section 9(3) of ESTA.

[26] In the result, I propose the following order:

1. The appeal is upheld.
2. The matter is remitted to the Wellington Magistrate's Court for reconsideration.

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MP Canca
Acting Judge, Land Claims Court

I agree and it is so ordered

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T Ngcukaitobi
Acting Judge, Land Claims Court

Appearances:

For the Appellant:	Messrs D Bergstrom and F Reid
Instructed by:	Van Der Spuy & Partners, Paarl
For the First Respondent:	Mr Cronje
Instructed by:	Cronje's Attorneys, Bellville

For the Second and Third Respondents:	Mr S Magardie
Instructed by:	Lawyers for Human Rights, Stellenbosch