

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA




**HELD IN RANDBURG**

Case No.: LCC88/2019

Before: **The Honourable Justice Ncube**

Delivered: 18 February 2021

<b>DELETE WHICHEVER IS NOT APPLICABLE</b>	
(1) REPORTABLE: <del>YES</del> / NO	
(2) OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO	
(3) REVISED: <del>YES</del> / NO	
<b>18-02-2021</b>	
DATE	SIGNATURE

In the matter between:

**ISEDOR SKOG N.O.**

1<sup>st</sup> Applicant

**REINETTE SKOG N.O.**

2<sup>nd</sup> Applicant

**HENRIK COLLINS GERRYTS N.O.**

3<sup>rd</sup> Applicant

and

**KOOS AGULLUS AND 25 OTHERS**

1<sup>st</sup> to 26<sup>th</sup> Respondents

**DRAKENSTEIN MUNICIPALITY**

27<sup>th</sup> Respondent

**HEAD: WESTERN CAPE PROVINCIAL DEPARTMENT  
OF RURAL DEVELOPMENT AND LAND REFORM**

28<sup>th</sup> Respondent

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**JUDGMENT**

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## NCUBE AJ

### Introduction

- [1] This is an application for the eviction of the first to twenty sixth respondents ("the respondents"). The application is opposed. The affected land is the remainder of farm number 1458, Drakenstein Municipality, Paarl Division, Western Cape ("the farm"). The respondents are staying together as family units, comprising of nine (9) households, with adults and children. None of the respondents is currently employed on the farm. In each family unit, resides a person who was previously employed by the applicant ("Trust") or Trust predecessor in title.
- [2] The respondents were in occupation of the farm in 2010 when the Trust took ownership thereof. The eviction proceedings were previously instituted in the Wellington Magistrate Court ("Magistrate Court") in 2013 and the application was refused in that Court. In the Magistrate's Court, the applications were separated per family and only the family head was cited. Children were not cited. In *casu*, all the occupants of each family unit have been cited including children.
- [3] The first respondent has resided on the farm for over ten years and he is suffering from stroke. The second respondent also has been on the farm for over ten years. The eleventh respondent is 77 years. The twelfth respondent is 69 years. the twenty first respondent is 60 years old. All five respondents mentioned qualify to be long term protected occupiers in terms of the Extension of Security of Tenure Act<sup>1</sup> ("the Act"). The eviction of these five respondents should be approached differently from the rest of the

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<sup>1</sup> Section 8 (4) Act 62 of 1997

respondents. The Trust did not adopt a different procedure in respect of the five above-mentioned respondents.

- [4] The Trust's case is premised on the breach of the relationship between the Trust and the respondents in their entirety as provided for in the Act.<sup>2</sup> The Trust further avers that it needs the cottages occupied by the respondents in order to accommodate the Trust's current employees as contemplated in the Act<sup>3</sup>. Respondents deny that there has been a fundamental breach of a relationship between the Trust and themselves. The respondents also raised two points *in limine*. Firstly, respondents aver that the matter is *res judicata* as the matter was finally dealt with at the Magistrate's Court. Secondly the founding affidavit was not properly commissioned.

#### Background Facts

- [5] The Trust purchased the farm in 2010. It purchased the farm from the Armen Trust (in liquidation) ("Armen"). The respondents were already in occupation of the farm. Most of the respondents were ex-employees of Armen and according to their contract of employment, they were provided with accommodation on the farm. The employee respondents were entitled to reside on the farm with their dependants. When the Trust took the farm over, it entered into new agreements with the employee respondents. In terms of those agreements, the employee respondents were entitled to continue residing on the farm with their dependants as long as they were still employed by the Trust.

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<sup>2</sup> Section 10 (c)

<sup>3</sup> Section 10 (3)



- [6] In June 2011 the employee respondents absented themselves from work as they were engaged in a strike. Notices were served on the employee respondents to return to work and that if they failed to do so, they and their dependants would be required to vacate the farm. Respondents did not return to work. On 24 June 2011, employee respondents were served with notice of termination of employment and they were called upon to vacate the farm with their families by the 23 of July 2011, Respondents did not vacate the farm. Later two of the employee respondents asked the Trust to give their jobs back. The Trust re-employed them but were given accommodation elsewhere as the cottages they occupied had been dilapidated. The Trust indicated that it was still prepared to accept all other employee respondents back. Other respondents did not take the offer.

#### Complaints against the respondents

- [7] The Trust complains that cottages occupied by the respondents are dilapidated. The sewerage system has been destroyed as a result of baby nappies and large amount of toilet paper being flushed down the toilet. The electric installation at the cottages has been destroyed. Some of the respondents dispose of household waste adjacent to the cottages. The Trust complains further, of water and human waste being disposed of below the cottages.
- [8] It is averred further that tin cans, glasses, plastic bags and other items are dropped on the ground. Some of the respondents, it is alleged, keep dogs on the farm, therefore, the farm is strewn with canine waste. Many unknown

people walk up and down the farm. Those people are believed to be visitors or guests of the respondents. It is alleged, criminal activities like theft, violence, domestic violence, malicious damage to property, alcohol and substance abuse. The Trust does not know who is responsible for causing all these problems. However, because of the above-mentioned problems, the Trust has seen it fit to bring application for the eviction of all the respondents based on the fundamental breach of the relationship between the Trust and the respondents collectively.

### Res Judicata

- [8] I turn now to look at the special plea raised by the respondents. The respondents have raised a special plea of *res judicata*. A plea of *res judicata* may be raised if the matter has been finally decided between the same parties concerning the same subject – matter and founded on the same cause of action.<sup>4</sup> Therefore, the requirements of *res judicata* are threefold. Firstly, it must be shown that the previous judgment was given in an action or application by a competent court, between the same parties. Secondly the previous judgment must have been based on the same cause of action. Thirdly the judgment must have been in respect of the same subject – matter.<sup>5</sup>
- [9] In the present case, parties cited at the Magistrate's Court are not the same as the parties cited in this court. At the Magistrate's Court, only heads of the different households were cited, not the children. Therefore, whilst the

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<sup>4</sup> Horowitz v Brock 1988 (2) SA 160 (A) at 178 H-I.

<sup>5</sup> Bafokeng Tribe v Imapla Platinum Ltd 1995 (1) 653 (SCA)

applicants are the same as at the Magistrate's Court, respondents are not the same. For that reason, parties in the magistrate's proceedings are not the same as parties cited in the present proceedings, but the other two requirements are indeed satisfied. The proceedings are based on the same cause of action in respect of the same subject matter.

- [10] The present application is not premised on the new facts and law as Mr Wilkin, Counsel for the Trust seems to suggest. The subject matter and cause of action are the same as those raised in the Magistrate's Court proceeding. It is only parties as I have said who are not the same and for that reason this point *in limine* cannot stand. The second point *in limine* raised by the respondents is that the founding affidavit of Mr Dillon Bailly – Botha is not properly commissioned as the commissioner of oaths is not properly identified.
- [11] The founding affidavit is signed by both the deponent and the Commissioner of Oaths. The Commissioner of Oaths certificate, to the effect that the deponent signed his affidavit before the Commissioner of Oaths is there. The only problem is that the Commissioner of Oaths did not write his full names, address and the area for which he is appointed as a Commissioner of Oaths. Noticing that the respondents have taken issue with the manner in which the founding affidavit is commissioned, Mr Bailey Botha, the deponent to the founding affidavit, obtained an affidavit from the Commissioner of Oath to that effect. Such affidavit is attached to the replying affidavit.



[12] The founding affidavit was commissioned by an attorney Mario Laubscher. He has deposed to an affidavit explaining that the absence of full particulars on Mr Dillon Bailey –Botha’s affidavit was an omission on his part. It is important to note that we are not here dealing with unsworn affidavit. Mr Dillon Bailey – Botha was sworn in by a competent Commissioner of Oaths. The court has a discretion to either accept or reject the affidavit which does not comply with the regulations.<sup>6</sup> This is one of those cases where the court should exercise its discretion in favour of the Trust. This point *in limine* also cannot stand.

[13] I turn now to the merits of the application. The Trust relies on the fundamental breach of the relationship between itself and the 1st to 26th respondents. The breach is premised on the provisions of Section 10 (1) (c) of the Act. The Trust alleges that all 26 respondents, without exception, have committed a fundamental breach of the relationship between them and the Trust.

#### Provisions of the Act

[14] The Act provides: -

**“10 order for eviction of person who was an occupier on 4 February 1997.**

(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if: -

- (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;
- (b) the owner or person in charge has complied with the terms of any agreement pertaining to the occupiers right to reside on the land and has 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

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<sup>6</sup> Cape Sheet Metal Works (PTY) LTD v J J Calitz Builders (PTY) LTD 1981 (1) SA 697 at 698

able to comply with such term, and has not remedied the breach despite being given one calendar months' notice in writing to do so;

- (c) the occupier has committed such a fundamental breach of 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;
- (d) .....

### Discussion

[15] It is clear from the provisions of the Act that for section 10 (1) (c) to kick in, the occupier must have committed a fundamental breach of the relationship which exist between the occupier and the owner or the person in charge. This is not the type of the case which can detain me for a long time. There is just no proof that any of the atrocities or transgressions complained of were caused by any of the respondents. It is clear and it is accepted that there are rules which are to be observed by all the occupiers on the farm. However, the respondents in their answering affidavit as Mr Wilkin says, do not deny that the rules might have been transgressed but they say they are not responsible for those transgressions. The Trust also cannot point at any of the respondents as being the person responsible for the breach of the rules.

[16] It is wrong for the Trust to paint all the respondents with the same brush. Rules have been breached by unknown people. Miss Dzai, Counsel for the 1<sup>st</sup> to 26<sup>th</sup> respondents correctly argued that the Trust is making general allegations against the respondents. There is nothing specific. It is alleged by the Trust that dogs are straying on the farm, not properly constrained. There is no proof that those dogs belong to any of the respondents. There is also an



allegation that respondents allow visitors on the farm without consent having been obtained from the Trust or person in charge. It is not stated who, amongst the 26 respondents, invited a visitor or visitors.

[17] the Land Claims Court is a court of justice and equity. It can never be just and equitable to order a mass eviction of families, parents and children from the farm based on a blanket, unfounded and unsubstantiated allegations of breach of a relationship between the occupiers and the Trust. It must be clear who did what.

[18] It is understandable that the Trust needs the cottages occupied by the respondents to accommodate its employees. However, the correct procedure must be followed. If the Trust relies on section 10 (1) (c), the Trust must be in a position to say which of the 26 respondents is guilty of the atrocities relied upon for the eviction to succeed.

[19] I am mindful of the Probation Officer's and Municipality's reports filed. The Drakenstein municipality was also represented in court. According to the municipality report, the respondents do not qualify for an emergency housing assistance in terms of the municipal policy. According to the Probation Officer's report, respondents have no suitable alternative accommodation. However, as stated earlier in this judgment, it will not be just and equitable for this court to order the eviction of 7 households, comprising of 24 adults and 18 minors from the farm based on unsubstantiated allegations.

#### Costs

[20] Mr Wilkin did not insist on costs. Although Miss Dzai, in her Heads of Argument, asked for the dismissal of the application with costs, she, also did not insist on costs in her argument in court. In any event, it is the practice in this court not to make cost orders unless there are good reasons to do so. That practice was confirmed by the Supreme Court of Appeal in *Haak Douthmbly Boerdery cc v Mpela*.<sup>7</sup>

Order

[21] In the result, I make the following order: -

- (1) Both points *in limine* are dismissed.
- (2) The application for the eviction of the first to twenty sixth respondents from the remainder of farm number 1458, Drakenstein Municipality, Paarl Division, Western Cape is dismissed.
- (3) There is no order as to costs.



**T M Ncube**

Judge of the Land Claims Court

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<sup>7</sup> 2007 (5) SA 567 (SCA) at 618

### Appearances

For the Applicants: Adv. L. F. Wilkin *instructed by Meyer Sarkas Inc, 8 Kloof Street, Gardens, Cape Town.*

For the 1<sup>st</sup> to the 26th Respondents: Adv. Dzai *instructed by Wakaba & partners Inc, 29 Guillaume Avenue, Bordeaux, Randburg*

For the 27<sup>th</sup> Respondent: Mr Craig *instructed by the Drakenstein Municipality*