



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA  
HELD AT RANDBURG**

**CASE NO: LCC57/2020**

**Before:** The Honourable Acting Judge President Meer

**Heard on:** 11 August 2020

**Delivered on:** 25 August 2020

<b>DELETE WHICHEVER IS NOT APPLICABLE</b>	
(1) REPORTABLE: YES / <del>NO</del>	
(2) OF INTEREST TO OTHER JUDGES: YES / <del>NO</del>	
(3) REVISED: <del>YES</del> / NO	
<u>25 / 08 / 2020</u> DATE	<u>P. J. N. H. H. H.</u> SIGNATURE

In the matter between:

**THEUNIS JOHANNES DE JAGER**

First Applicant

**THEUNIS DE JAGER TRUST**

Second Applicant

and

**NONHLANHLA MAZIBUKO**

Respondent

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## JUDGMENT

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### MEER AJP

[1] On 9 July 2020 the Applicants launched an urgent application against the Respondent for urgent interim interdictory relief restraining the Respondent from carrying on building construction on the Applicants' farm Nooitgedacht, ("the farm"), Klip River, Kwa-Zulu Natal outside her demarcated residential area, without the Applicants' written consent. The notice of motion in relevant part stated:

"2. That a *rule nisi* be issued calling upon the Respondent to show cause, if any, before this Court on a date, time and venue to be determined by this Honourable Court in terms of Rule 34(3)(b), why an order in the following terms should not be made final:

2.1 That the Respondent, together with her family, all persons acting under their authority and any other unknown persons including builders and/or contractors who have unlawfully entered upon and/or commenced with construction and erection of illegal structures, marked "A" on annexure "X" hereto, on the Applicants' farm described as the Remainder of the farm Nooitgedacht No 1326, district Klip River, KwaZulu-Natal ("the farm"), are interdicted and restrained from performing and/or carrying out and/or causing to perform any construction work on the farm outside the demarcated area and/or in future, without the Applicants written consent;

2.2. That the Respondent, together with her family members and any other unknown persons including builders and/or contractors who are in the process of erecting the structures on the farm, be and are hereby directed to forthwith rehabilitate the area where construction has commenced, to demolish all unlawful structures erected on the area depicted on annexure "X" referred to in paragraph 2.1 above and to remove all building

materials, including but not limited to bricks, fencing, cement, poles, sand and building equipment, which have been unlawfully brought onto the farm, within 7 days of the service of this order;

2.3 That the Respondent be and is hereby ordered and directed to demolish the structures erected outside the demarcated area and marked B on annexure X hereto;

2.4 That in the event of the Respondent failing to comply with the order in paragraphs 2.1, 2.2 and 2.3 above, the Sheriff or his deputy, with the assistance of the South African Police Services, alternatively the Applicants with the assistance of their own contractors, are granted leave to immediately ensure compliance with the provisions of this order;

2.5 That leave be granted to the Applicants to approach this Court for further relief against any other persons and to join such persons, should it become known that other role-players other than the Respondent are party to or are in any manner involved in the construction of the structures referred to above, and to supplement their papers where necessary.

3. That pending the final determination of the *rule nisi*, paragraphs 2.1, 2.4 in respect of compliance with paragraph 2.1 and 2.5 above shall operate forthwith as an interim interdict.

4. That Respondent, alternatively any other Respondent who opposes the relief, be ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved, on a scale as between attorney and client.”

The First Applicant is the person in charge of the farm and the Second Applicant is the owner of the farm. The First Applicant and his mother are trustees of the Second Applicant. The Respondent is an occupier in terms of the Extension of Security of Tenure Act, No. 62 of 1997 (“ESTA”) on the farm.

[2] On 10 July 2020 an interim order and a *rule nisi* were issued by this Court interdicting the Respondent and any persons acting under her authority from performing



any construction work on the farm without the Applicants written permission pending the final determination of the *rule nisi*.

[3] Mr D Xulu of the Department of Rural Development and Land Reform (“DRDLR”), Ladysmith intervened to assist the Respondent to attempt to resolve the matter with the Applicants as directed by this Court at a telephone conference on 14 July 2020, soon after the application was issued. He thereafter resolved not to provide legal funding to the Respondent by virtue of her alleged contravention of the interim order of 10 July 2020.

[4] Thereafter the Respondent’s current legal representatives, J. V. Mathonsi Attorneys, placed themselves on record on 24 July 2020. It is noted that this firm of attorneys also represented the Respondent in previous proceedings in the Magistrate’s Court, Ladysmith between the parties. There too the Applicants sought to interdict the Respondent from building on the farm without consent. An interlocutory application was launched by the Applicants in this Court on 17 July 2020 seeking *inter alia* to find the Respondent in contempt of the court order of 10 July 2020. The contempt application is dealt with in a separate judgment.

### **Point in limine**

[5] The Respondent contends in the main and interlocutory applications that the Second Applicant has not properly authorised the First Applicant to institute these applications and accordingly that the applications are a nullity and must be dismissed. I do not agree. The Second Applicant comprises of three trustees, one of whom has recently passed away. The remaining trustees are the First Applicant and his mother, Mrs E De Jager. Mrs De Jager has filed a confirmatory affidavit wherein she confirms and ratifies the fact that the First Applicant was authorised by herself and the First Applicant to represent the Trust. As is correctly contended by Ms Roberts for the Respondents such ratification has retrospective effect. See *Smith v Kwanonqubela*

*Town Council* 1999 (4) SA 947 (SCA) at 719A-C. It is moreover so that a Court may permit a litigant to put up evidence of authority in a replying affidavit. See *Merlin Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd* 1994 (1) SA 659 (C) at 660I-J. Accordingly, the First Applicant has the required authority and standing to institute both applications. In any event the First Applicant, as the person in charge of the farm, has the required standing to institute both applications. This is so in terms of sections 1 and 6 of ESTA.

## **Background**

### **Common cause facts**

[6] The Respondent came to reside on the farm about twenty years ago after 4 February 1997 when she married Bongani Mazibuko. The Mazibuko family was permitted to occupy and use a demarcated area on the farm for residential purposes and such consent was confirmed by the First Applicant. The Respondent and her husband were permitted to erect and occupy three structures within the Mazibuko homestead area. The Respondent has occupied three structures within the demarcated area with her family. On her version, the family originally comprised nine members but has since expanded to approximately twenty-eight members. She contends that the three structures are in a condition of extreme disrepair, not fit for human habitation, cannot accommodate all family members and this has necessitated the need to erect further dwellings. According to the Applicants however, twenty-eight people do not live in the three structures. They are occupied by the Respondent together with her six children and four grandchildren. The other members of the extended Mazibuko family occupy other structures in the demarcated area. This is not disputed. It is also not disputed that there is a dispute between the Respondent and other members of the Mazibuko family and that this is the reason for her building a homestead outside the demarcated area.

[8] Be that as it may, it is common cause that the Respondent was aware that she only had a right to reside and use the three structures situated within her demarcated

homestead area and that she was not permitted to occupy or reside on any other part of the farm without express permission from the Applicants.

[9] In fact, on 4 April 2018, the Respondent consented to an order being granted in the Magistrate's Court, Ladysmith to the effect that she had no consent to erect dwellings outside her demarcated homestead area. In her answering affidavit in the proceedings in the Ladysmith Magistrate's Court, the Respondent also alleged that she had consent to erect dwellings outside the demarcated area and further that one structure was in a state of disrepair. As is contended by the Applicants, this is on all fours with her current answering affidavit in which she states that the First Applicant granted her consent to erect the dwellings in order to preserve the peace on the farm. This is denied by the First Applicant in reply.

[11] The Mazibuko family, including the Respondent, has consent to keep livestock within a grazing camp which surrounds the demarcated homestead area. The additional structures are being constructed by the Respondent within this grazing camp outside the demarcated residential homestead area.

[12] The Respondent has already constructed two additional structures outside the demarcated area which she currently occupies. She has not demolished any of her other dwellings situated inside the demarcated homestead area. She is also in the process of constructing a further two dwellings of an excessive size according to the Applicants, which total square meterage will equate to approximately 120 metres, constituting an additional residential area. This is not disputed.

[13] The Applicants dispute ever giving consent to the Respondent to build outside the demarcated homestead area. They further dispute her contention that the three dwellings within the demarcated area are in such a state of disrepair that they are not fit



for human habitation. It is further denied that the First Applicant reduced the demarcated homestead area at any stage.

## Discussion

[14] Section 6(1) of ESTA provides that occupiers shall have the right to reside and use land as has been agreed upon with the owner or person in charge. Section 6(2) provides that the rights of the owner or person in charge and the occupier must be balanced. The right to use land afforded to an occupier is therefore not, as is contended by the Applicants, an open-ended, unlimited or unfettered right. See *Nkosi and Another v Buhrmann* [2001] ZASCA 98 at para 48 where Howie JA stated:

“As far as s 6(1) is concerned, it confers the rights of residence, ‘use’ and services, subject to the owner’s consent or agreement.”

[15] The evidence makes clear that the Respondent knew that she was only permitted to reside and use the dwellings within her demarcated homestead area. From the evidence no real and genuine dispute exists regarding the fact that consent was not given by the First Applicant to the Respondent to erect additional structures outside the demarcated homestead area. As is stated by counsel for the Applicants, the Respondent makes extremely bold and vague averments that when the First Applicant approached her on 3 June 2020, she informed him that he recently gave her consent to erect the structures. This is denied and disputed. The following timeline and sequence of events makes it highly improbable that the First Applicant approached the Respondent recently and prior to 3 June 2020 and obtained consent:

1. The First Applicant approached the Respondent during January 2017, July 2017, December 2017, November 2018 and 3 June 2020 to stop the building constructions.
2. Letters dated 12 January 2017, 11 July 2017, 14 November 2018 and 2 July 2020 were served on the Respondent raising concerns about her building operations.

3. On 4 April 2018 the Respondent consented to an order that she would not build on the farm.
4. The Respondent does not deny that the First Applicant approached her prior to 3 June 2020, as far back as 8 November 2018, and refused consent.

This illustrates, as contended by the Applicants, that a duration of one-and-a-half years had lapsed where no communication took place between them prior to the alleged recent consent contended for by the Respondent.

[16] It is noted, as pointed out by the Applicants, that the same bare averments regarding consent were made by the Respondent in the Magistrate's Court proceedings, whereafter the Respondent conceded that she had no consent from the First Applicant to build.

[17] In view of the above, the Respondent's bare denials regarding the alleged consent do not assist her, are highly untenable and must be disregarded.

### **Conditions of Respondent's current dwellings and her right to human dignity**

[18] Section 5 of ESTA recognises the right of occupiers to *inter alia* human dignity, equality and freedom. In *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) the Court considered whether an occupier has a right to make improvements to a dwelling to make it suitable for human habitation. Madlanga J stated at paragraph 31:

“The occupier's right to reside must be consonant with the fundamental rights contained in section 5, in particular – for present purposes – the right to human dignity. Put differently, the occupation is not simply about a roof over the occupier's head. Yes, it is about that. But it is about more than just that. It is about occupation that conduces to human dignity and the other fundamental rights itemised in section 5.”



[19] The facts of this case are distinguishable from those in *Daniels* in that the Respondent is not engaged in improving her current dwellings, but she is erecting new buildings outside the demarcated area for her to live in, without the consent of the land owner. Her case is not about the right to make improvements to her current dwelling.

[20] There is a dispute of fact as to whether her current dwellings comprising three structures are fit for human habitation. I deal with that aspect below. However, were her current dwellings not fit for human habitation and in dire need of improvement, neither ESTA nor *Daniels* authorises her to engage in building operations anywhere on the farm without prior engagement with the Applicants. The evidence clearly suggests this has not occurred. Furthermore, if, in addition to the three dwellings in the demarcated area being in poor repair, they cannot accommodate the expanded family, and if the Respondent wished to build elsewhere on the farm, she was obliged to engage with the Applicants before embarking on constructing buildings. This, from the evidence, she also did not do.

[22] I am inclined to agree with the Applicants that the actions of the Respondent amounts to a deprivation of the Applicants' property without any consent by establishing a completely new and additional homestead outside the demarcated homestead area. The construction of the new additional structures and the two further additional structures already occupied are in my view contrary to the Respondent's rights as an occupier on the Applicants' farm as set out in section 6(1) of ESTA. In *Daniels* at paragraph 64 it was stated that when an occupier intends to improve her current dwelling she needs to meaningfully engage with the owner to balance conflicting rights and interests of occupiers and owners or persons in charge. So much more, in my view when what is contemplated are not improvements but the building of a new structure. It is not disputed that there was no engagement in the current matter by the Respondent with the Applicants prior to the commencement of the building outside the demarcated area. The Respondent did not approach the Applicants to inform them that her current dwellings were in bad repair and it was necessary either to improve or build new structures. She must do so and if an inspection of the premises by the

parties reveals that the dwellings are in need of urgent repair, such repair or improvements must be conducted in accordance with the principles established in *Daniels*.

[24] The Applicants contend that any demolition order sought as set out in the notice of motion would not infringe any of the Respondent's rights as she has sufficient dwellings situated within her demarcated homestead area wherein she currently resides. The Applicants contend that the Respondent will be afforded an opportunity to remove the building materials to repair and/or rebuild any structure situated inside the demarcated area that requires improvement. This would also not constitute an eviction within the meaning of ESTA as the Respondent has suitable accommodation within the three dwellings in the demarcated homestead area. I agree this would not constitute an eviction. Whether or not the accommodation is suitable must be determined upon proper engagement between the parties as aforementioned in accordance with the *Daniel's* principles. The Respondent, from the evidence, is not opposed to improvement within the demarcated area.

[25] In view of all of the above I am satisfied from the evidence that the Applicants are entitled to the relief they seek.

### **Costs**

[25] The Applicants contend that by virtue of the dishonest conduct and vague denials by the Respondent, the general rule regarding costs must be disregarded and costs be granted to the Applicants. Alternatively costs *de bonis propriis* should be granted against the Respondents attorneys. Notice was given to the latter in respect of such costs.

[26] In support of the claim for costs *de bonis propriis*, the Applicants submit that J.V. Mathonsi Attorneys represented the Respondent in similar proceedings in the



Magistrate's Court and that the bold and vague defences alleged there were exactly the same. J.V. Mathonsi Attorneys in the previous proceedings, despite the Respondent alleging vague consent to erect structures, advised her to consent to an order that no building could take place. It was only after the Respondent sought legal representation on 24 July 2020 that the vague averments of purported consent were made, despite J.V. Mathonsi Attorneys already in 2018 knowingly accepting that the Applicants refused consent. This, it is contended by the Applicants, is on all fours with the Respondent's opposition in the Magistrate's Court matter.

[27] The 2018 proceedings in the Magistrate's Court should not, in my view, be considered as reason enough for an award of costs *de bonis propriis* in this matter. While the circumstances may be similar, these are two separate cases and I am not inclined to rely on a 2018 case in a different court, for such an award of punitive costs. The situation might have been different if the previous case was also in this Court or if I had adjudicated the previous case. The same does not apply in respect of the cost order sought against the Respondent. The evidence clearly suggests that the Respondent did not have consent to build outside the demarcated area, yet she did so. Despite her consent to a court order not to build, she continued building in violation thereof. Similarly, in violation of the interdict granted by this Court on 10 July 2020, the Respondent continued building. In all the circumstances her conduct justifies a deviation from the practice of this Court not to grant costs.

[28] I accordingly grant an order in terms of prayers 2.1 to 2.4 of the notice of motion, as set out below, with costs against the Respondent, such costs to be on a party and party scale.

2.1 The Respondent, together with her family, all persons acting under their authority and any other unknown persons including builders and/or contractors who have unlawfully entered upon and/or commenced with construction and erection of illegal structures, marked "A" on annexure "X" hereto, on the Applicants' farm described as the Remainder of the




farm Nooitgedacht No 1326, district Klip River, KwaZulu-Natal (“the farm”), are interdicted and restrained from performing and/or carrying out and/or causing to perform any construction work on the farm outside the demarcated area and/or in future, without the Applicants written consent;

2.2. The Respondent, together with her family members and any other unknown persons including builders and/or contractors who are in the process of erecting the structures on the farm, be and are hereby directed to forthwith rehabilitate the area where construction has commenced, to demolish all unlawful structures erected on the area depicted on annexure “X” referred to in paragraph 2.1 above and to remove all building materials, including but not limited to bricks, fencing, cement, poles, sand and building equipment, which have been unlawfully brought onto the farm, within 7 days of the service of this order;

2.3 The Respondent be and is hereby ordered and directed to demolish the structures erected outside the demarcated area and marked B on annexure X hereto;

2.4 In the event of the Respondent failing to comply with the order in paragraphs 2.1, 2.2 and 2.3 above, the Sheriff or his deputy, with the assistance of the South African Police Services, alternatively the Applicants with the assistance of their own contractors, are granted leave to immediately ensure compliance with the provisions of this order;

2.5 Leave be granted to the Applicants to approach this Court for further relief against any other persons and to join such persons, should it become known that other role-players other than the Respondent are party to or are in any manner involved in the construction of the structures referred to above, and to supplement their papers where necessary.



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**Y S MEER**

Acting Judge President

Land Claims Court

**APPEARANCES****For the Applicants:**

Adv E Roberts

*instructed by*

Christopher, Walton and Tatham Inc.

**For the Respondent:**

Mr J Hlatshwayo

J.V. Mathonsi Attorneys