IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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CASE NO: LCC 275D/2017

In the matter between:

ZONWABILE ALFRED MAY	First Applicant
NOMABONGO SWEETNESS MAY	Second Applicant
SINAZO MAY	Third Applicant
DUMISANI ELIAS MAY	Fourth Applicant
ZOLA ERIC MAY	Fifth Applicant
ELNA BROWN	Sixth Applicant
ALL OTHER PERSONS OCCUPYING COTTAGE 2, FARM 1652, PAARL DIVISION, being the First Applicant's four minor grandchildren	Seventh Applicant

and

WINDMEUL KELDER	First Respondent

DRANKENSTEIN MUNICIPALITY
HEAD: WESTERN CAPE PROVINCIAL Second Respondent

DEPARTMENT OF RURAL DEVELOPMENT
AND LAND REFORM Third Respondent

LENE KJERSTINE MACNAB Fourth Respondent

Heard on: 07 May 2019
Delivered:12 June 2019

JUDGMENT

CANCA AJ

Introduction

[1] This is an application for the rescission of two eviction orders which were obtained by the landowner against the occupiers. The first order was granted by Molefe J on 30 April 2018 ("the first order") and the second one, by this Court, was granted by agreement between the parties on 10 August 2018 ("the second order"). The occupiers deny that they agreed to the grant of the second order. This aspect is dealt with more fully below.

[2] Relief is also sought in terms of section 14 of the Extension of Security of Tenure Act 62 of 1997 ("ESTA") in terms whereof the occupiers seek the restoration of their right of occupation, the restoration of electricity and water to the dwellings they occupied prior to their eviction as well as access to ablution services. They also seek, in terms of the aforementioned section of ESTA, the payment of damages and compensation as against the landowner.

[3] In addition to the relief alluded to above, also sought, in the event of the Court declining the order sought in paragraph [1] above, is an order directing the second respondent, the Drakenstein Municipality, to provide the occupiers with:

> *"7.1 Suitable alternative accommodation that is habitable and accessible and that does not violate their socio-economic rights, within three months from date of judgment; or*
>
> *7.2 Emergency housing that is habitable and accessible and that does not violate their socio-economic rights, within three months from date of judgment; and*
>
> *7.3 A relocation plan that respects and protects their rights, especially their right to dignity, equality and just administrative action."*

[4] The relief sought by the occupiers is opposed by the landowner and the Drakenstein Municipality. The Western Cape Provincial Department of Rural Development and Land Reform has not indicated its stance to matter and was not represented at the hearing. Ms. Macnab abides the decision of the Court.

Parties

[5] There are seven occupiers in this matter. They are:

5.1 The first applicant, Mr. Zonwabile Alfred May ("May");

5.2 May's wife, the second applicant, Mrs. Nomabongo Sweetness May ("Mrs. May");

5.3 May's daughter, the third applicant, Ms. Sinazo May ("Sinazo");

5.4 May's mentally challenged son, the fourth applicant, Mr. Dumisani Elias May ("Dumisani");

5.5 May's second son, the fifth applicant, Mr. Zola Eric May ("Zola");

5.6 Zola's partner, the sixth applicant, Ms. Elna Brown ("Ms. Brown"); and

5.7 May's four minor grand-children whose ages range from 16 to 9 years.

Some of the occupiers have, prior to their eviction on 26 March 2019, lived on the property referred to in paragraph [6] below since January 1982.

[6] Windmeul Kelder ("the landowner or Windmeul"), is the owner of the property described as Farm 1652, Paarl Division ("the farm") and the party whose eviction orders are sought to be rescinded.

[7] The Drakenstein Municipality ("the Municipality"), is a local municipality established in terms of the Local Government: Municipal Structures Act, 117 of 1998, read with the Province of the Western Cape Provincial Notice 189/2003, published in the Provincial Gazette No 6021 on 28 May 2003, with its principal place of business at Bergriver Boulevard, Paarl, Western Cape.

[8] The Head: Western Cape Provincial Department of Rural Development and Land Reform ("the Department"), is cited in her official capacity as the administrative head of and the person responsible for the implementation of decisions taken by and against the Department in the province, with its principal place of business at 4th Floor, Liberty Life Centre, 22 Long Street, Cape Town.

[9] Ms. Lene Macnab ("Ms. Macnab"), is the attorney from Chennells Albertyn Attorneys who was appointed under the auspices of the Department's Land Rights Management Facility to represent the occupiers in an application to rescind the first order. Ms. Macnab participated in these proceedings in order to address serious allegations about her professional integrity.

Background

[10] There are four sets of proceedings in or related to this matter.

10.1 Firstly, there was an order for the eviction of occupiers ("the main application"). They were not legally represented at the time, and were not present in Court when the Order was granted. The eviction dates are 30 June and 14 July 2018. The Order was never executed.

10.2 Secondly, seven of the occupiers applied for the rescission of the first eviction order in terms of the main application. The other three occupiers vacated the farm. Ms. Macnab represented the seven occupiers in the first rescission application. The application settled. In terms of the settlement, the Court varied the first, and the varied Order is referred to as the second eviction order. The settlement was negotiated by Ms. Macnab during the hearing of the first rescission application. The eviction date in terms of the second eviction order is 15 January 2019. The seven occupiers were evicted on 26 March 2019 in terms of a writ issued pursuant to the second eviction order.

10.3 Thirdly, a second rescission application dated 1 April 2019 was launched after the eviction took place. This application was not proceeded with.

10.4 Fourthly, the application launched on 8 April 2019 for the rescission of the second order ("the third rescission application") where the occupiers are represented by their current attorney, Mr. Mahomed.

[11] The occupiers allege that they did not contest the main application due to them not having funds to acquire the services of an attorney to represent them. Their appeal to the Department to be provided with same was unsuccessful, so the allegation continued.

[12] The occupiers further allege that, on receipt of the first order, they again approached the Department for the appointment of a legal representative to assist them in contesting their eviction from the farm. Their appeal was successful this time and Ms. Macnab was appointed to represent them. However, the

occupiers deny that Ms. Macnab had a mandate to enter into the settlement discussions which led to the grant of the second order.

[13] The second order, in relevant parts, reads as follows:

> ***"BY AGREEMENT BETWEEN THE FIRST TO FIFTH, SEVENTH, TENTH AND ELEVENTH RESPONDENTS, AND THE APPLICANT***
>
> ***IT IS ORDERED THAT:***
>
> 1. *The Order of the above Honourable Court under the above Case Number dated 30 April 2018 is varied as set out here below.*
> 2. *The first to Fifth, Seventh and Tenth Respondents are ordered and directed to vacate Farm 1652 Paarl Division ("the property") by no later than 15 January 2019, failing which the sheriff of the High Court is ordered to evict them.*
> 3. *It is recorded that the Sixth, Eighth and Ninth Respondents have vacated the property. In the event of the Sixth, Eighth and Ninth Respondents re-occupy the property, the sheriff of the High Court is ordered to evict them.*
> 4. *In the event that any of the First to Fifth, Seventh and Tenth Respondents are convicted of any offence relating to the illegal possession and/or sale of alcohol and or [sic] narcotics from the date of this Order to date of*
>
>   *vacation of the property, the sheriff of the High Court is authorized and directed to evict them from the property forthwith, provided that:*
>   *4.1 An affidavit deposed to by the Applicant's attorney of record filed with the above Honourable Court to the effect that such Respondent has been convicted of said offence shall be sufficient for the Registrar to issue the relevant warrant of execution.*
> 5. *Each party to pay their own costs."*

[14] May avers in the founding affidavit that the occupiers had repeatedly informed Ms. Macnab that they would be homeless should they be evicted from the farm. He further avers that they provided Ms. Macnab with a defense which,

if properly presented, this Court, having considered the facts and the law, would have rescinded the first order and would, thereafter, have granted them the opportunity to oppose the application for their eviction.

[15] According to May, Ms. Macnab sent an email to the sixth applicant, Ms. Elna Brown ("Ms. Brown"), a member of his household, on 8 August 2018. The second order, still in draft form at that stage, was attached to that email. In the email, Ms. Macnab advises that the draft order would be made an Order of Court, in the event that the occupiers agreed to its contents. The following day, Ms. Macnab telephonically contacted Ms. Brown and advised her, *inter alia*, that there were no reasonable prospects of succeeding in their case and that they should consent to the terms of the aforementioned draft order, so the averment continued. May further states that when Ms. Brown informed the rest of the occupiers of her conversation with Ms. Macnab, they unanimously decided to reject the terms of the draft order. This is denied by Ms. Macnab. Her denial is dealt with later in the judgment. It is not evident from the papers that the applicants enquired as to the outcome of the hearing of the first application after they rejected the settlement agreement.

[16] May also avers that they were not aware of the second order until 26 March 2019 when the Sheriff arrived with members of the South African Police Service, members of a security company, a tow truck and approximately 20 people in a truck, who removed their goods and belongings from the farm and deposited same on the side of the road bordering the farm, where the occupiers currently still find themselves.

[17] Insofar as the issue of alternative accommodation is concerned, it is not denied by the occupiers that the Municipality, on the day of their eviction, dispatched two of its officials to the site where the occupiers currently are, outside the boundaries of the farm. These officials offered them temporary accommodation in tents in a township called New Orleans Park, whilst other alternatives were investigated by the Municipality. In addition, the occupiers were

also offered food parcels, blankets and water containers to assist them in their move as well as the provision of warm food for a few days. An offer of a truck to move their belongings to New Orleans Park was refused.

[18] It is common cause that the said officials returned to the site two days later and reiterated the offer of alternative accommodation to the occupiers. The offer was, once more, turned down. An offer of accommodation in two wendy houses in New Orleans was also rejected by the applicants.

The occupiers' stance with regard to their application for rescission

[19] The occupiers contend that the second order was erroneously sought and granted and that the protections afforded to them in the Constitution and in ESTA were not fairly and properly "*conferred"* on them. They further contend that the Court erred in failing to request certain reports from the second respondent and to make enquires relating, *inter alia*, to the alleged illegal activities and/or their alleged involvement in such activities, which alleged activities led to their eviction; their circumstances; the issue of meaningful engagement between all the parties and the availability of suitable alternative accommodation and/or emergency housing in the event of their eviction as well as the undue hardship an eviction would cause them.

[20] May proffers the following as the basis for the rescission of the two eviction orders. He avers that:

> 20.1 the occupiers were unrepresented when the first order was granted on 30 April 2018;
>
> 20.2 the occupiers were not present in Court when the second order was granted on 10 August 2018;

20.3 Ms. Macnab did not have a mandate to settle their matter and that they did not consent to the second order; and

20.4 this Court did not apply the principles set out by the Constitutional Court in *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* 2017 (5) SA 346 CC when it granted the second order.[1]

The landowner's stance in respect of the rescission application

[21] Mr. Wilkin, for the landowner, contends that, insofar as the occupiers also seek the rescission of the first order, they may not do so on these papers by virtue of the doctrine of *lis pendens*. This is because there are already papers filed in the first rescission application, including heads of argument, and that success by the occupiers in persuading me to rescind the second order would merely revive the first application which would then have to be argued. And, until such time as that application is argued and the first order set aside, it cannot be said that the occupiers were evicted contrary to the provisions of ESTA, so the contention continued. Mr. Wilken argued strongly that, until that has taken place, the first order stands.

[22] As regards the rescission of the second order, Mr. Wilken contends, *inter alia,* that the occupiers' reliance on Rule 42 of the Uniform Rules of Court was misplaced and that the allegation that Ms. Macnab acted without a proper mandate and contrary to a direct injunction, was patently false. These contentions are dealt with later in this judgment.

Discussion

Rescission of the first order

[1] It must be noted that Occupiers, Berea is a PIE matter, and the same principles will not necessarily apply to ESTA matters. In ESTA, the Court has the benefit of a Probation Officer's Report.

[23] The main reason offered by the occupiers for not opposing the main application appears to be their alleged lack of funds to instruct a legal representative to represent them in that matter when the Department failed to appoint one for them. It is not apparent from the occupiers' papers what steps they took to seek legal representation from the various institutions in the Western Cape, such as the Stellenbosch University Law Clinic, the Legal Resources Centre, the UCT Law Clinic and Legal Aid which provide free legal services to persons who cannot afford legal representation. Nor do they explain why they did not advise the Registrar of this Court that they required to be provided with legal representation. Notwithstanding the aforesaid, I do not agree with Mr. Wilken's contention, set out in paragraph [21] above, that the doctrine of *lis pendens* trumps the application for the rescission of the first order. The second order, as I read it, varies and subsumes the first order. The first eviction order no longer has any independent existence as it is replaced by the second eviction order.

Rescission of the second order

[24] The circumstances in which rescission may be granted by this Court are set out in the Rule 64 of the Rules of this Court and in section 35 (11) of the Restitution of Land Rights Act, 22 of 1994 ("the Restitution Act").

[25] Rule 64, in relevant parts, reads as follows:

> *"(1) Subject to section 35(11) of the Restitution of Land Rights Act, the Court may suspend, rescind or vary, of its own accord or upon the application of any party, any order, ruling or minutes of a conference which contains an ambiguity or a patent error or omission, in order to clarify the ambiguity or to rectify the patent error or omission."*

[26] Section 35(11) of the Restitution Act reads:

> *"(11) The Court may, upon application by any person affected thereby and subject to the rules made under section 32, rescind or vary any order or judgment granted by it-*
>
> *(a) in the absence of the person against whom that order or judgment was granted;*
> *(b) which was void from its inception or was obtained by fraud or mistake common to the parties;*
> *(c) in respect of which no appeal lies; or*
> *(d) in the circumstances contemplated in section 11(5).*

[27] The occupiers attack the second order on the basis that same was *"erroneously sought and granted"* because they had not instructed Ms. Macnab to consent to the draft which led to the second order. Reliance for this attack is placed on Rule 42 of the Uniform Rules which state that "*An order or judgment erroneously sought or granted in the absence of any party affected thereby".*

[28] Mr. Wilken argued that the Rules of this Court, insofar as they relate to rescissions of judgments or orders, do not authorize the rescission of an order or judgment on the basis contended for by Mr. Mahomed in the preceding paragraph. Rule 64 states that rescission is only granted *"in order to clarify [an] ambiguity or to rectify [a] patent error or omission."*, so the argument continued. There is merit in the argument advanced by Mr. Wilken.

[29] A plain reading of Rule 64 makes it clear that a rescission of an order is only granted for the purposes of clarification or rectification. This Rule does not provide for the rescission of an impugned order *in toto.* It is also worth noting that, although not relied upon by the occupiers, section 35(11) of the Restitution Act does not make provision for rescission where an order was erroneously sought or granted. The aforesaid section also does not incorporate the provisions of Uniform Rule 42. However, section 35(11)(b) allows the Court to set aside an Order which was void from its inception or was obtained by fraud or mistake common to the parties. If the occupiers did not, either personally or through their

attorney or other representative, consent to the second order, it will be void under common law and this Court will therefore have the necessary jurisdiction to set it aside. See *Occupiers, Berea, supra*, at paras [73] – [78].

[30] This Court is a creature of statute and only has the powers conferred upon it by the Restitution Act. It cannot extend its jurisdiction. See *Macassar Land Claims Committee v Maccsand CC and Another* 2017 (4) SA 1 (SCA) at paragraph [8].

Did Ms. Macnab have the requisite mandate to agree to the second order?

[31] I am not persuaded that there is merit in the occupiers' contention that Ms. Macnab acted without a proper mandate when she consented to the grant of the second order.

[32] It is convenient, before giving reasons for not finding merit in the contention that Ms. Macnab acted without a mandate, that I set out, in some detail, the events, according to her, which led to her consenting to the second order. These events are set out in Ms. Macnab's "explanatory" or answering affidavit filed of record on 18 April 2019. It is important to note that the occupiers refused to waive their legal privilege, save insofar as it relates to their disputed mandate to agree to the second order.

[33] The facts put forth by Ms. Macnab are, in brief summary, the following. She avers that, on receipt of her instructions in this matter, she consulted with the occupiers on the farm. May was not present at that consultation due to him having been in the Eastern Cape at the time. After that initial consultation, Macnab communicated with the occupiers via Ms. Brown, who had provided her with an email address and access to her cell phone. Ms. Brown was the conduit through whom the occupiers' instructions were conveyed to her and through whom Macnab interacted with them. Macnab states that she received

correspondence containing a possible settlement of the matter on 8 August 2018. She then telephonically conveyed the contents of the proposed settlement to Ms. Brown that same day. An email, to which the draft order was attached, was sent to Ms. Brown at approximately 19:20 that same evening.

[34] The aforesaid email, which is attached to May's founding affidavit, in relevant parts, reads as follows:

> *"Dear all,*
>
> *Attached is a draft Order with the proposed settlement agreement which will be made an Order of Court by the Judge on Friday, if you agree.*
>
> *It is my counsel's advice that you agree. You do not have a right to stay on the farm indefinitely and it is difficult to argue against the allegations in the eviction because you have to prove that no illegal activities took place. Furthermore, Windmeul will most [sic] ask for the matter to be heard very soon (expedited) and you may end up with an eviction date which is sooner than the one in this agreement.*
>
> *It is also possible that you do not qualify for emergency shelter because the family has some income. Lastly, the municipality would expect that efforts are made to find alternative accommodation with family or friends, either here or in the Eastern Cape.*
>
> *……"*

[35] The following morning, 9 August 2018, Ms. Brown telephonically advised Ms. Macnab that the terms of the agreement, whilst not ideal, were acceptable to all the occupiers. Ms. Macnab then requested Ms. Brown to get each of the occupiers to sign the draft order and confirmed their telephonic conversation with a WhatApp message which reads:

"I confirm our telephone conversation wherein you confirmed that all of you, including Mr. May have discussed the matter and that you have now agreed that [sic] to the proposed date of 15 January 2019 and the conditions in the

agreement. I confirm that the agreement will be made an order of court tomorrow."

[36] Ms. Macnab states that the draft order was not signed as requested due to logistical problems. And, when there was no response to her aforementioned WhatApp message, Macnab avers that she assumed that the description of her instructions was accurate.

[37] Ms. Macnab further avers that when the second order was granted, she sent a text to Ms. Brown which read "*All done*", by which she says that the said text meant to indicate that the draft order had been made an order of Court. Ms. Brown, according to Ms. Macnab, responded nearly immediately to that text with one reading "*So we are staying till 15 January?"*. She replied to this query with another text message which read: "*Yes I will let you have a copy of the order when I am back in the office on Monday."*

Discussion

[38] It is common cause that the occupiers gave Ms. Macnab a general mandate to act as their attorneys. It is also not disputed that it was Ms. Brown who communicated with and conveyed the applicants' instructions to Ms. Macnab. She was also the one with whom Ms. Macnab liaised regarding any legal advice and the prospects of success in their matter. Communication between Ms. Macnab and the occupiers was conducted via electronic mail, WhatsApp messages and telephonically, via cell phone.

[39] There is obviously a dispute as to whether the occupiers had accepted the terms of the second Order. Whilst Ms. Macnab gives pointed averments regarding the issues discussed during her telephonic conversation with Ms. Brown, the

occupiers, on the other hand, merely deny, giving no specificity, that they accepted the terms of the second Order.

[40] It is instructive that the occupiers have not given an alternative version of the aforesaid telephonic conversation. See *Syntheta (Pty) Ltd (formally Delta G Scientific (Pty) Ltd v Janssen Pharmaceutica NV and Another* 1999 (1) SA 85 which sets out the probative value of a bare denial. The Supreme Court of Appeal, in *Syntheta,* held at 91C that *"A bald assertion does not establish facts necessary for a legal conclusion."* See also *Wrightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 at para (13). It is worth noting though that the test set out in Wrightman attaches to respondents in motion proceedings.

[41] The telephonic instructions which Ms. Macnab confirmed by WhatApp, quoted in paragraph [35] above, was a contemporaneous record of that conversation. The occupiers have not provided any explanation as to why, if the contents of the WhatApp message were incorrect, they did not correct her, given that, on their version, the contents of that message clearly misrepresented their instructions. I agree with Mr. Wilken and Ms. Macnab that the only inference that can be drawn from the correspondence between Ms. Macnab and Ms. Brown is that the occupiers were aware of and agreed to the terms of the second order, then in draft form, and that the contents of the aforementioned WhatsApp message accurately captured their instructions.

[42] The version put up by the occupiers is so untenable that it can be rejected on the papers.

[43] I agree with Mr. Wilken that the occupiers have offered no explanation as to why Macnab, who instructed counsel, settled the application for a rescission and condonation, ensured that the Court file in that application was indexed and paginated, attended upon the drafting and filing of heads of argument, attended

Court here in Randburg with her counsel on the day set down for hearing, would of her own volition suddenly decide to act contrary to her clients' instructions in taking an order by agreement, thereby exposing herself to a damages claim by the occupiers and the landowner as well as professional sanction, amongst other things.

[44] I accept the version presented by Macnab particularly in view of the fact that the applicants did not apply to have the dispute regarding the issue of the mandate or lack thereof referred to oral evidence.

[45] Mr. Wilkens, correctly in my view, submitted that the occupiers have not presented any evidence that Ms. Macnab acted contrary to their instructions or without a mandate. The evidence, when viewed objectively, reveals that Ms. Macnab acted professionally as well as in the occupiers' best interests. In the result, I find that the second order was properly entered into and granted.

Restoration of Right of Occupation and Related Services and Compensation.

[46] The second relief sought by the occupiers is based on section 14 of ESTA which, *inter alia,* provides that "*A person who has been evicted contrary to the provisions of this Act may institute proceedings in a court in terms of subsection (3).*"

Subsection (3) reads as follows:

> *"(3) In proceedings in terms of subsection (1) and (2) the court may, subject to the conditions that it may impose, make an order –*
>
> *(a) for the restoration of residence on and use of land by the person concerned, on such terms as it deems just;*
> *(b) for the repair, reconstruction or replacement of any building, structure, installation or thing that was peacefully occupied or used by the person*

immediately prior to his eviction, in so far as it was damaged, demolished or destroyed during or after such eviction;

(c) for the restoration of any services to which the person had a right in terms of section 6;

(d) for the payment of compensation contemplated in section 13;

(e) for the payment of damages, including but not limited to damages for suffering or inconvenience caused by the eviction, and

(f) for costs."

[47] It is common cause that that the occupiers were evicted by the Sheriff pursuant to the second order and a warrant issued by this Court. Section 14 of ESTA is applicable only in instances where an occupier or occupiers have been evicted contrary to the provisions of ESTA. Essentially, an aggrieved party may seek the protections offered by this section where a landowner or the person in charge has resorted to self-help and forcibly removed an occupier from property without following due process.[2]

[48] The occupiers have not alleged how exactly landowner acted contrary to the provisions of ESTA. What they allege, *inter alia*, is that both landowner and the Municipality failed to engage with them. They have simply not laid out the basis for alleging that the eviction was contrary to ESTA nor is there any reference to a specific provision of ESTA that was contravened by landowner.

[49] In the light of the above, I find that the occupiers are not entitled to the relief they seek based on the provisions of section 14 of ESTA.

Alternative Accommodation

[2] See subsection 14(4) of ESTA which applies to evictions pursuant to an order of court which provides for the restoration of a right of occupation of a person who was evicted prior to the commencement of the Act.
Also see Karabo v Kok 1998 (4) 10114 (LCC) where the Court sat as a court of review over a decision of the Magistrates' Court. The Magistrate, in Karabo, granted an interim eviction order *ex parte* in 1998 based on common law principles when it was common cause that the evictees were occupiers as defined in ESTA and the original *ex parte* interlocutory order had been set aside.

[50] The occupiers' case for relief under this heading, as I understand it, is that the second order should not have been granted in light of the fact that they were not provided with suitable alternative accommodation and that an eviction would render them homeless. Although the issue of alternative accommodation is moot, due to the occupiers' rejection of the accommodation offered by the Municipality, it is, notwithstanding its mootness, still appropriate to deal with this aspect of the matter.

[51] It is convenient to first set out the jurisprudence, legislation, policies and procedures dealing with this aspect of the matter.

[52] It is now trite that local authorities are required to assist persons who, for reasons beyond their control, find themselves in an emergency housing situation, including eviction or the threat of imminent eviction. See *Nokotyana and Others v Ekhuruleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC) where the applicants sought an order against the municipality to provide them with basic services, pending a decision on whether a settlement would be upgraded to a formal township. See also *Baron and Others v Claytile (Pty) Ltd and Another* 2017 (5) SA 329 (CC) at para [8] where the owner sought the eviction of the occupiers from brick and mortar structures due to the fact that the employment agreement between the landowner and the head of each household had been terminated.

[53] The assistance referred to above is, however, only rendered in emergency situations of exceptional need. See the preface to Chapter 12 of the National Housing Code, referred to in *Nokotyana* above.

[54] The Municipality has in place an Emergency Housing Policy, promulgated in terms of the Housing Act 107 of 1997, which closely follows the requirements and policy guidelines found in Chapters 12 and 13 of the National Housing Code. This policy provides that the emergency assistance is only available upon application to former occupiers who can show that they are without means and who make application providing full details, with supporting documentation as to, *inter alia,* their earnings, employment, dependents and disabilities. The policy also stipulates, given the acute housing backlogs in the urban areas, that the emergency housing programme cannot be used as a method of jumping the queue for housing.

[55] The occupiers, notwithstanding that they are legally represented, have, according to the Municipality, not applied for emergency housing. In any event, as alluded to in paragraphs [17] and [18] above, the occupiers have turned down the Municipality's offer for temporary emergency housing. The rejection is based on the occupiers' contention that the offered accommodation was unsuitable.

[56] It is important to note that the provision of "*suitable alternative accommodation"* is only called for in the event of an eviction in terms of section 10(2) of ESTA. The occupiers' eviction was in terms of section 10 (1)(c) and was based on an irretrievable breakdown of the relationship between them and the landowner, not section 10(2). The issue of suitable alternative accommodation, in section 10(1)(c) evictions, only arises where the Court, in considering all the relevant circumstances of the matter before it, takes into account the question of the occupiers' homelessness in the event of eviction. However, as Mr. Wilkins submitted, "homelessness" is not a deciding factor but one of a number of considerations a Court has to take into account.

[57] Whilst it is unfortunate, based on a consideration of a totality of the papers, that the adult members of the occupiers have, notwithstanding that there are minor children in their midst, chosen to remain at the roadside, this is their

choice. And, therefore, they are, in the circumstances, the authors of their own fate. They cannot now be heard to complain about the circumstances they currently find themselves in.

[58] I agree with Mr. Greig, for the Municipality, that, even if the proffered accommodation was unacceptable, the applicants' refusal to accept that accommodation in preference to their present accommodation on the roadside justifies an inference that they are being disingenuous and wish to stay where they are for reasons other than the unacceptability of the accommodation offered.

[59] Personally, I find it unconscionable that the adult members of the occupiers have, at the start of what is normally a harsh winter in the Western Cape, apparently elected to make some sort of a standpoint or to coerce the Municipality into granting them benefits to which they are not entitled. This might very well be a matter that requires investigation by the Child Protection Unit of the South African Police Service.

Compensation and Damages

[60] The occupiers' claim for an award against the landowner under this heading is also without merit. They were evicted pursuant to an order of this Court and was given effect to by the Sheriff in terms of a writ which was also issued by this Court.

[61] In seeking the relief set out above, the occupiers do not allege that the Sheriff or the landowner acted unlawfully. Furthermore, they do not give any

basis for the computation of the compensation or damages sought against the landowner which they might have suffered as a result of the Sheriff's conduct.

Costs

[62] The landowner seeks a cost order in this matter. The Municipality has not addressed the issue of costs. I shall therefore assume that it has elected not to ask for costs. This Court has a wide discretion in dealing with costs. *Hlatshayo and Others v Hein* [1997] 4 B All SA 630 (LCC) at 640B. The usual practice of this Court is not to make costs orders. I am not persuaded that the facts in this matter warrants a departure from that practice.

[63] In support of its prayer for costs, it was contended on behalf of the landowner that this is the third meritless rescission application instituted by the occupiers. Mr. Wilken contended that the occupiers settled the first rescission application and obtained a further 5 months gratuitous occupation without the burden of paying costs. They then brought the second rescission application which was procedurally and substantively defective and was, properly struck from the Roll, so the contention continued.

[64] Insofar as this, the third rescission application is concerned, which I have already found to lack merit, Mr. Wilken argued that this application was an abuse of process of Court in order to obtain for the occupiers further benefits to which they are not entitled.

[65] In view of the fact that May and his family are indigent and that there would no point in making a costs order against them, Mr. Wilken argued that I should order the Department to pay the landowner's costs. This argument is misplaced. There is no legal basis on which I can order the Department to the costs. The

Department is not a party to the litigation and, apart from providing funding, it was not involved in the litigation at all.

[66] In the light of all of the above, I find as follows:

1. The application for the rescission of the orders granted on 30 April 2018 and 10 August 2018 is dismissed.

2. The application for an order directing the first respondent to compensate or pay damages to the applicants is dismissed.

3. The application for reinstatement is dismissed.

4. The application for leave to oppose the main eviction application under Case No. LCC 275/2017 is dismissed.

5. The application for an order directing the second respondent to provide the applicants with the specific accommodation sought in the Notice of Motion is dismissed.

6. There is no order as to costs.

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M P Canca

Acting Judge, Land Claims Court

Appearances

For the Applicants: Mr. A Mahomed

Attorney, Claremont.

For the first respondent: Adv. LF Wilken

Instructed by: Oosthuizen & Co. Paarl.

For the second respondent: Adv. MA Greig

Instructed by: Van der Spuy & Partners, Paarl.