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.

12-06-2018

CASE NO: **LCC 202/2017**

In the matter between:-

ANNA JOHANNA ERASMUS	APPLICANT
and	
GODFREY MTENJE	1ST RESPONDENT
UNKNOWN INDIVIDUALS OCCUPYING SMALLHOLDING 54, ANDEON AGRICULTURAL HOLDINGS PRETORIA	2ND RESPONDENT
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	3RD RESPONDENT
MINISTER OF TRADE AND INDUSTRY	4TH RESPONDENT
DEPARTMENT OF HUMAN SETTLEMENTS	5TH RESPONDENT

DEPARTMENT OF HUMAN SETTLEMENTS:

GAUTENG PROVINCE 6TH RESPONDENT

and

AFRISAKE NPC *AMICUS CURIAE*

Handed down on: 12 June 2018.

JUDGMENT

CANCA AJ

Introduction

[1] This is the return day of an application for final interdictory relief and a demolition order. The applicant ("Erasmus") seeks an interdict preventing (1) the first and second respondents from continuing the construction of a structure, which is being erected on her immovable property, without her permission, and, allegedly, in contravention of the third respondent's town planning scheme and building legislation and (2) the occupation of the structure, as well as an order that same be vacated, in the event that it has been occupied. Finally, Erusmas seeks an order authorizing the demolition of the structure.

[2] When this matter first came before me on 31 July 2017, I granted Erasmus an *interim* order, *inter alia*, halting further construction of the structure and directed that the first and second respondents vacate the structure, in the event that they had already moved into it. I also ordered an inspection *in loco* of the property in order to have sight of the living conditions of the first and second respondents. And, to view the impugned structure. The inspection *in loco* took place on 13 November 2017 and the matter was eventually argued on 19 and 20 March 2018.

[3] The first respondent ("Mtenje") and the second respondents, one of whom, it appears from the papers is his wife, Sheila Baloyi, reside on a portion of Erasmus' immoveable property, oppose the applicant's relief. They have launched a counter-application for relief pursuant to section 14(1), read with section 14(3)(b) of the Extension of Security of Tenure Act, 62 of 1997 ("ESTA").[1]

[4] In their counter-application, the first and second respondents seek an order that: (1) the building the first respondent, his wife and son occupied immediately prior to its demolition in March 2006, be replaced by the impugned structure and (2), that they be allowed to occupy that structure until they have either been evicted in accordance with the provisions of ESTA or have voluntarily vacated the property. The counter application also contains a constitutional challenge in which it is contended that the National Building Regulations and Building

[1] Section 14(1) & (3) deals with the restoration of a residence, use of land and the payment of damages in instances where an occupier has been evicted contrary to the provisions of ESTA.

Standards Act, 103 of 1977 ("NBRBSA")[2] is inconsistent with the Constitution of the Republic of South Africa, 1996 ("the Constitution") as it does not exempt poor people and those in informal settlements.

[5] Erasmus opposes the counter application and, apart from raising several points in *limine,* including *lis alibi pendens* and prescription, contends that neither the notice of motion in the counter application nor the founding affidavit thereto contains allegations to justify a constitutional attack.

[6] Afrisake NPC, a non-profit company that promotes and protects, *inter alia*, the rule of law, fundamental rights and democracy applied to be admitted as *amicus curiae* based on the contention that its members object to the construction of illegal buildings or structures as same would, among other things, lead to the devaluation of their property and so infringe on their rights. The third respondent ("the Municipality") is the local authority with jurisdiction over the property. Although the papers were served on a responsible official in the employ of the Municipality, it has not indicated its stance to the litigation and was not represented at the hearing of the matter.

[7] The fourth respondent is the Minister responsible for the administration of the NBRBSA. The fifth respondent is the department ultimately responsible for the formulation and implementation of South Africa's housing policies. The sixth

[2] The NBRBSA provides, inter alia, that no person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act. According to this Act, a building includes any structure

respondent is responsible for promoting and facilitating the provision of adequate housing in this Province. The fourth to sixth respondents were joined to these proceedings as a result of the constitutional attack raised in the counter-application. Individually and collectively, they have duties to regulate the laws relating to the erection of buildings in the areas of jurisdiction of local authorities and for the prescribing of building standards. These respondents have elected to abide the court's decision.

Background

[8] Erasmus is the registered owner, and the person in charge, of the immovable property known as, Smallholding 54, Andeon Agricultural Holdings, Pretoria, measuring 2, 0752 hectares, held under Deed of Title No. T34565/1973 ("the property"). She avers in her founding affidavit that Mtenje came to reside on the property in 1996, where he rented a room for a monthly rent of R50.00. It was, allegedly, a condition of the rental agreement that, due to its size, Mtjenje would reside in the room alone, without family members. According to Erasmus, the relationship between her and her late husband, on the one hand, and Mtenje and his family, on the other hand, soured over time, allegedly, due to several breaches of the lease agreement by Mtenje and unacceptable behavior by him and/or his guests.

[9] During March 2006, following a dispute regarding Mtenje operating an illegal (spaza) shop on the property, the building occupied by Mtenje and his immediate

family, was demolished, allegedly on the instructions of Erasmus' husband. The demolition appears to have taken place after an unsuccessful eviction proceeding in the High Court, brought in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("PIE") by Erasmus' husband. The upshot of this was, Mtenje and his family living, since that period, in 3 army style tents in the immediate vicinity of where the demolished building previously stood.

[10] These tents were alleged supplied to Mtenje by the third respondent, following the institution of an application for a mandament *van spolie* in the Magistrate's Court for the District of Pretoria by Mtenje and a fellow lessee, one Abraham Moriba, on or about 29 March 2006 against Erasmus. The applicants in that case were granted an *interim* relief in terms of which Erasmus was, *inter alia,* ordered to restore their possession and control of the building they occupied immediately prior to its demolition. Erasmus was also prohibited from *"unlawfully interfering with the Applicants' occupation and control."* It is not clear from the papers whether Mtenje sought to have that *interim* relief made final once he was allowed back on the property. The papers also reveal that Mtenje levelled a complaint of malicious damage to property against Erasmus as a result of the demolition.

[11] Erasmus left the main dwelling on the property to live with her son, at some point after the death of her husband in 2015 and let it to a tenant. She avers that she was alerted to the construction of the impugned structure, during the latter

part of July 2017, by that tenant. On inspection, she found a structure which was in the process of construction *"in a very informal and unprofessional fashion"*. In her opinion, the structure is not only illegal but is also an eyesore which has the potential to devalue her property, so the averment continues.

[12] In his answering affidavit, Mtenje denies that he was not allowed to live with his family on the property and avers, among other things, that his wife and two daughters moved in with him approximately two months after he had concluded the lease agreement. He further states that his wife was, for a while, employed as a domestic helper by Erasmus and her husband. And, until he was ordered to close down the spaza shop, allegedly because Erasmus and her husband objected to the number of people who visited the property, also sold cakes baked by Erasmus and that they shared the profits of those sales. Mtenje also avers that he stopped paying rental only when his building was demolished. According to him, the tents are no longer fit for human occupation as same are falling apart and are unable to keep the elements out due to wear and tear. He and his wife then decided to build the structure, which they intend to occupy only until an eviction order against them is granted or until they can find alternative accommodation by themselves, so the averment continues.

[13] Mtenje admits that he has not sought or obtained permission to erect the structure. He, however, contends that the structure will provide better protection against the elements and avert the indignity that he and his family have had to endure by being forced to live in tents for over a decade.

[14] It is worth noting that the inspection *in loco* revealed that the previous structure had double brick outside walls, a concrete floor and was approximately 2,5 metres by 10 metres in size. The area presently occupied by Mtenje and his family does not have ablution facilities. They use the veld as their toilet area. It was also ascertained during the inspection *in loco* that they have been denied access to tap water and that their access to fresh water is via a municipal water tanker or from the overflow of a water tank situated on the fenced-off side of the property on which the main dwelling is situated. The inspection also revealed that the impugned structure is incomplete and not yet in a habitable state. Mtenje and his family are still living in tents.

[15] It is convenient to give a brief description of the impugned structure and its surrounds before discussing the merits of the application. The inspection *in loco* confirmed that the structure is appears to be of a temporary nature as it is made out corrugated iron sheets and poles. It is approximately 8 metres by 13 metres. The inside of the structure, on the day of the inspection, was unfinished. The floor consists of some sand and concrete aggregate and there is no other partitioning. There were seven windows, a double door at the front and a single door at the back. Not all windows are glazed. The land next to the area occupied by the Mtenje family is firstly just open lawn for about 50 metres, with a single storey building in the background. The land to the west of the area occupied by the Mtenje family is completely undeveloped and open veld for a considerable area.

The applicant's claim

[16] The majority of the relief sought is interdictory in nature. It is therefore convenient to first ascertain whether Erasmus has met the threshold requirements for a final interdict. The requirements for a final interdict are trite. They are (i) a clear right, (ii) injury actually committed or reasonably apprehended and (iii) the absence of similar protection by any other ordinary remedy. See *Setlogelo v Setlogelo* SA 1914 AD 221 at 227. All three requisites have to be proven for the application to succeed.

Did the applicant establish a clear right?

[17] It is not in dispute that Erasmus is the owner of the property. In the founding affidavit, she invokes, as her clear right, her title of ownership as well as her constitutional right to property under section 25 of the Constitution. Mr. Thompson, for the first and second respondents, however, contends that Erasmus has, notwithstanding the above, failed to establish a clear right entitling her to final interdictory relief.

[18] In support of that contention, Mr. Thompson submitted that Mtenje and his family's current living conditions (in the tents) are not conducive to human dignity and that the order I am required to grant would result in the Mtenje family to continue to live in conditions that are bereft of any human dignity in clear contradiction to *Daniels v Scribante and Other* 2017 (4) SA 341. In order to test

the soundness of these submissions, it is convenient to first examine the relevant provisions of ESTA and then to ascertain whether reliance on *Scribante* is justified.

[19] Section 5 of ESTA affords an occupier a number of fundamental human rights, the first of which is human dignity. *Scribante,* at paras [31]-[34], deals extensively with the dignity that ought to be afforded to an ESTA occupier and same need not be repeated here. It is clear from the provisions of ESTA and from *Scribante*, that a landowner's right is limited by ESTA. The mere fact that Erasmus owns the land might have given her a clear right to launch the application under Roman Dutch law. However, this is no longer the position in our new constitutional dispensation. Mtenje also has rights in respect of the land, namely, to live on the land with dignity, and that right has to be balanced with Erasmus' rights as owner. Mtenje's rights as occupier intrudes upon and reduces the extent of Erasmus' rights as owner. See the judgment by Madlanga J in *Scribante* at paras [29], [31] and [32] and paras [133] to [138] of the judgment of Froneman J also in *Scribante*. The submission that Erasmus does not have a clear right has merit. If Erasmus had a "clear right" (namely, absolute ownership, untrammeled by Mtenje's rights,) the mere presence of Mtenje and his family on the property would be a trespass by them. I am satisfied that Erasmus has failed to fulfil the first requirement for an interdict. It is therefore not necessary to deal with the rest of the requirements as all three have to be fulfilled in order to succeed in an application for a final interdict. This has not happened in this case. The application for interdictory relief must therefore fail.

[20] Has a case been made for the grant of the demolition order? The prayer for the demolition of the structure is refused for the reasons set out later in this judgment.

The first respondent's (and second) counter application

[21] The Mtenje family seek, among other things, that the impugned structure serves as the replacement to the building which they occupied in 2006 prior to its demolition. Mtenje avers that their occupation of the structure would be temporary as they will vacate same should an eviction order against them be granted. Alternatively, they will vacate the property should they find suitable accommodation in the interim.

Defence of *lis pendens*

[22] The first point raised *in limine* is that of *lis alibi pendens*. It is not disputed that Mtenje brought an application premised primarily on *mandament van spolie* in the Magistrate's Court of Pretoria during 2006. Mr Hamman argued that the relief sought in the 2006 application is strikingly similar to one of the orders this court may grant under the provisions of section 14(3)(a) of ESTA, namely, restoration. In the 2006 application, Mtenje sought an order *"That the Respondent (Erasmus) herself or through anyone else, is prohibited from unlawfully interfering with the Applicants' occupation and control"*. In support of this argument, Mr Hamman referred me to *Williams v Shub* 1976 (4) SA 567 (C), where the court held that the test for *lis alibi pendens* is not whether the relief

sought was the same but rather whether it is substantially similar or based on the same dispute, in support of his argument. I am not persuaded by this argument.

[23] In order to succeed with a plea of *lis alibi pendens* a person must prove that there is pending litigation between the same parties based on the same cause of action in respect of the same subject-matter. See Amlers Precedent of Pleadings, 7th ed.

[24] The essential allegations in respect of the relief sought in terms of section 14 (1) read with section 14(3) of ESTA are the following:

24.1 eviction of an occupier contrary to the provisions of ESTA;

24.2 peaceful occupation or use of a building, structure or thing prior to the unlawful eviction; and

24.3 damage, demolition or destruction of that building, structure or thing referred to in 24.2 above.

In contrast to the cause of action for section 14(1) read with section 14(3) ESTA relief, the material allegations for spoliation are only peaceful and undisturbed possession as well as unlawful deprivation of that possession.

[25] Mr. Thompson submitted that Erasmus has failed to satisfy two essential requisites for a plea of *lis alibi pendens*, namely that the litigation was based on the same cause of action and was in respect of the same subject-matter. I agree. The cause of action in the two matters is not the same and does not relate to the

same subject-matter. In the spoliation application, Mtenje sought to interdict Erasmus from, *inter alia*, interfering with his occupation and control whereas the subject-matter of the counter application is the demolished building. Mr. Thompson correctly submitted that Mtenje's application in the Magistrate's Court was launched on the basis of the common law. I accordingly find no merit in the *lis alibi pendens* preliminary point.

Defence of Prescription

[26] The second preliminary point raised on behalf of Erasmus is that of prescription. Citing *Road Accident Fund & Another v Mdeyide* 2011 (2) SA 26 (CC) at para 8 and *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 11 where the Constitutional Court emphasized the need for legal disputes to be brought to the court "as soon as possible after the events giving rise to the disputes" and that "*Inordinate delays in litigating damage the interest of justice",* Mr. Hamman contended that in terms of section 10 of the Prescription Act, 68 of 1969 ("the Prescription Act"), debts prescribed within three years and that in this matter, the delay in seeking the relief in the counter application was more than a decade.

[27] Although "debt" is not defined in the Prescription Act, the Constitutional Court in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC), at para 85, held that "debt" should be given the meaning ascribed to it in the Shorter Oxford English Dictionary, namely,

"Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another. A liability or obligation to pay or render something; the condition of being so obliged."

[28] Mr. Hamman submitted that because the court, which can order monetary payment of compensation and monetary payment of damages in terms of section 14(3)(d) and (e), the other remedies such as restoration, repair and replacement also imposed positive obligations, and therefore, the relief sought was a debt which fell within the ambit of the Prescription Act. I find no merit in this submission.

[29] The definition of debt referred to above, in my view, restricts the thing owed or due, to "*money, goods or services*" which one person is under an obligation to render to another. It is the court that makes the determination of the type of redress due to the wronged occupier. I agree with Mr. Thompson that Mtenje's counter application is not a claim for payment or delivery and that the definition of debt does not include every obligation to do something or to refrain from doing something apart from payment or delivery. Consequently, the prescription point *in limine* also falls to be dismissed.

The Merits

[30] It is common cause that the building in which Mtenje and his immediate family lived was demolished during 2006. He alleges that the demolition was at

the instance of Erasmus, who denies the allegation and avers that same was on the instructions of her husband, who passed on during 2015. However, it is not disputed that Mtenje levelled a complaint for the demolition of the building with the South African Police Service only against Erasmus and that she was tried on a charge of malicious damage to property during her husband's lifetime. Mr. Thompson submitted that it was inherently improbable that, if it were Erasmus' husband who ordered the demolition, Mtenje would level the complaint against her. I agree. However, even if it was her husband who ordered the demolition of the building, Erasmus was a co-owner of the property at the time, due to her having been married in community of property to her late husband. Therefore, as co-owner, she bears joint responsibility for the obligations imposed on landowners by section 14 of ESTA.

[31] I find that Mtenje has made out a proper case for the replacement of the demolished building. What remains to be determined is whether the impugned structure should serve as its replacement.

[32] It is not disputed that the impugned structure does not comply with the property's title deed. However, it does not appear from the papers that non-compliance therewith is a criminal offense. At most, non-compliance will afford civil remedies to the person(s) or institution in whose favour it was registered. The argument advanced on behalf of Mtenje is that the spirit, purport and the object of the Bill of Rights, as well as the provisions of section 5 of ESTA, imposes a duty on landowners to accommodate ESTA occupiers in premises that are

consonant with the right to human dignity. I find merit in this argument. To expect an ESTA occupier to carry the financial burden of constructing a building that complies with the conditions of a property's title deed because a landowner has failed to comply with the obligations imposed on him or her by section 5 of ESTA, would be unconscionable and fly in the face of the purpose of ESTA.

[33] It is clear from the papers that the relationship between Erasmus and the Mtenje family has broken down. This is confirmed by Erasmus in her replying affidavit. However, notwithstanding the fractured relationship between the protagonists, I am of the view that, given the emphasis placed on meaningful engagement between an occupier and a landowner (or the person in charge of the land) by the Constitutional Court in *Scribante,* the parties have an obligation to engage meaningfully with each other. See the dictum of Madlanga J at para [62] of Scribante where the learned Judge states that: *"Although consent is not a requirement, meaningful engagement by an owner or person in charge by an occupier is necessary.* Mtenje's failure to engage with Erasmus regarding the need to upgrade his living conditions is, rightly, open to criticism but to non-suit him for having failed to do so, would, in the circumstances of this case, as was found by Madlanga J in *Scribante* at para [67], be *"too formalistic and unjust"* in the light of the history of acrimony between them.

[34] Whilst *Scribante* dealt with improvements to an existing building, there is, in principle, no difference between improving an existing building (including the addition of outside paving) on the one hand and replacing tents with an informal

structure on the other, particularly since the informal structure will provide better protection from the elements and give its occupants some measure of dignity.

[35] If an occupier is entitled to improve an existing structure to achieve dignified living conditions, then, surely, he can erect a new structure for the same purpose, particularly, since living in leaking tents can hardly be dignified living. There must however, be prior meaningful engagement, and if the engagement gives rise to a stalemate, that must be resolved by a Court.

[36] Although having found that landowners are obliged to house ESTA occupiers in accommodation that accords with their right to dignity, I cannot ignore (1) the uncontroverted allegation that Erasmus is not in a financial position to construct a replacement building which will comply with the conditions of her title deed and (2) the averment by Mtenje that he and his family would vacate the property if they are evicted in accordance with the provisions of any applicable law or when they find alternative accommodation elsewhere. It would, in these circumstances, not be practical to insist that Erasmus erect a building which complies with the conditions of her title deed.

[37] There is a constitutional duty on Erasmus to tolerate the Mtenje family's presence on the property and allow him, in the absence of other suitable shelter, to complete the construction of his informal structure. The parties must however engage meaningfully with each other on all relevant aspects relating to the

structure and the work required for its completion before any further work on it may be undertaken.

[38] In the light of all of the above, I find that Mtenje's right to dignity entitles him to replace the tents with the impugned structure.

The constitutional challenge to the NBRBSA

[39] I do not consider it necessary to deal with the constitutional challenge as I am not convinced that the NBRBSA applies to the property. Section 2(1) of the NBRBSA reads as follows:

> *"Subject to provisions of any notice published in terms of subsection (2)*[3]*, the provisions of this Act shall apply in the area of jurisdiction of any local authority."*

In terms of section 151 of the Constitution, we now have "wall to wall" municipalities. There is no land that does not fall within the area of jurisdiction of a municipality.

[40] A similar dilemma presented itself with the interpretation of "agricultural land" which is subject to the Subdivision of Agricultural Land Act, Act 70 of 1970 ("the Subdivision Act") "Agricultural land", according to the definition in section 1, means

[3] Subsection (2) is not applicable in this case.

"...any land except land situated in the area of jurisdiction of a municipal council, ..."

This definition was interpreted in *Kotze v Minister van Landbou en Andere* 2003 (1) SA 445 (T) at 454J – 455B to retain the meaning which it had when the Subdivision Act was promulgated. In other words, "agricultural land" means land which fell outside the boundaries of a municipality before it was replaced by a "wall to wall" municipality.[4]

[41] The same approach should, in my view, be followed in interpreting section 2(1) of the NBRBSA. It has not been established that the property fell within the boundaries of the Pretoria Municipality before it was replaced by a new structure (the City of Tshwane Metropolitan Municipality) with "wall to wall" jurisdiction. In any event, it is doubtful whether NBRBSA, even if applicable, would Mtenje's rights in terms of ESTA.

Costs

[42] This court, as a general rule, only makes costs orders where there are special circumstances. However, in the *Hlatshwayo & Others v Hein* 1999 (2) SA 834 (LCC) at paras [21] and [25]. The court makes it clear that, notwithstanding that general rule, the risk of an adverse costs order remains intact where there at special

[4] The decision in Kotze was overturned by the Supreme Court of Appeal in Stalwo (Pty) Ltd v Wary (Pty) Ltd & Another 2008 (1) SA 654 (SCA); on appeal, the SCA judgment was overruled by the Constitutional Court in Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another 2009 (1) SA 337 (CC).

circumstances. Nothing in this matter persuades me that circumstances exist which warrant a departure from the general rule.

[43] In light of all of the above, I order as follows:

1. The rule nisi granted on 31 July 2017 is discharged.

2. The main application is dismissed.

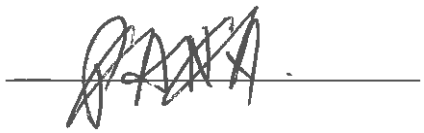
3. It is declared that the first respondent is entitled to complete the impugned structure and to occupy it upon completion.

4. The applicant and the first respondent are ordered to engage meaningfully with each other on all relevant aspects relating to the structure and the work required for its completion, before any further work may be undertaken.

5. If the parties fail to reach agreement within 30 days of the date of this order, each party may approach a Court having the necessary jurisdiction for appropriate relief.

6. It is declared that, after completion of the structure, the first respondent and his wife, together with his family, be allowed to occupy the structure until they have either been evicted in accordance with the provisions of any applicable law or have voluntarily vacated the property.

7. No order as to costs.



MP Canca

Acting Judge, Land Claims Court.

Appearances:

For the Applicant:	Advocate JGC Hamman
Instructed by:	Hurter Spies INC, Centurion.
For the First and Second Respondents:	Advocate A. Thompson
Instructed by:	Lawyers for Human Rights, Pretoria.
Amicus Curiae:	Advocate CFJ Brand S.C.
Instructed by:	Hurter Spies INC, Centurion.