IN THE LAND CLAIMS COURT OF SOUTH AFRICA

(HELD AT RANDBURG)

Case No: 144/2014

In the matter between:

MIRADEL STREET INVESTMENTS CC	Applicant
and	
MAGORETIE MNISI	First Respondent
THE OCCUPIERS OF PORTION 305 MIRABEL STREET, POMONA ESTATES AGRICULTURAL HOLDINGS, KEMPTON PARK	Second Respondent
EKURHULENI METROPOLITAN MUNICIPALITY	Third Respondent
HEAD OF GAUTENG PROVINCIAL OFFICE OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	Fourth Respondent

Date of Hearing: 27 September 2016

Date of Judgment: 20 January 2017

JUDGMENT

BARNES AJ

Introduction

1. This is an application in terms of the Extension of Security of Tenure Act 62 of 1997 ("ESTA") for the eviction of 375 poor households ("the respondents") from portion 305, Mirabel Street, Pomona Estates Agricultural Holdings, Kempton Park ("portion 305" or "the property").

2. The applicant, Miradel Street Investments CC, of which Mr Neville John Bester ("Bester"), is the sole member, is the owner of the property.

3. The applicant acquired ownership of the property in 2001.

4. The applicant's founding affidavit creates the impression that the respondents unlawfully invaded the property "*particularly from 2008*" and have never had the applicant's consent to reside on the property.

5. However, it is apparent from the averments made in the respondents' answering affidavit, which are either admitted or not denied by the applicant

in reply, that the true picture is in fact a very different one. This case does not involve a land invasion scenario. On the contrary, many of the respondents were lawfully resident on the property prior to the applicant's acquisition thereof in 2001. Those respondents paid rent to the person in charge of the property at the time.

6. When the applicant acquired ownership of the property in 2001, the respondents sub-let rooms on the property, with the applicant's knowledge and consent. The respondents paid rent to the primary lessee who passed it on to the applicant. This arrangement continued for 5 years until 2006.

7. In 2006, the applicant decided that it wished to develop the property commercially and gave the respondents notice to vacate. The respondents refused on the basis that they had nowhere else to go.

8. The applicant provided the Court with none of these facts in its founding affidavit. They are however either admitted or not denied in reply.

9. When the respondents refused to vacate the property in 2006, the applicant did not take steps to secure their eviction but tolerated their continued occupation of the property for a further 7 years.

10. The applicant accepts that the respondents are ESTA occupiers.

11. On 5 March 2014, the applicant gave the respondents notice of the

termination of their rights of residence in terms of section 8(1) of ESTA.

12. In October 2014, the applicant instituted this application for the respondents' eviction.

13. The respondents contend that while their rights of residence may have been terminated by the applicant, such termination was not just and equitable in terms of section 8(1) of ESTA. The applicant disputes this. This judgment turns on that question.

The Facts

14. The applicant is the owner of the property as well as its neighbour, portion 304, Mirabel Street, Pomona Estate Agricultural Holdings, Kempton Park ("portion 304").

15. The applicant purchased both portions 305 and 304 in 2001.

16. In its founding affidavit, the applicant pleads that in 2001, after purchasing portions 304 and 305, it leased the buildings on portion 304 to Mr Petrus Mahlangu who, in turn, sublet the rooms to various tenants. This subletting took place with the applicant's knowledge and consent.

17. This arrangement continued until 2006 when the applicant, through Bester, cancelled the lease agreement with Mahlangu and gave the tenants notice to

vacate. When they refused to do so, Bester says that he approached the Department of Rural Development and Land Reform for assistance.

18. The applicant pleads that after *"a proper mediation process, prolonged discussions and negotiations,"* the tenants agreed to relocate to a property on EP Malan Road, Pomona Estates Agricultural Holdings, Kempton Park ("the Malan street property") owned by Maple Views Pty (Ltd), of which Bester is the sole shareholder and the director.

19. So much for portion 304.

20. In relation to portion 305, which forms the subject matter of this eviction application, the applicant simply pleads as follows:

> "Throughout the years, and more particularly around 2008 until now, the 1st and 2nd respondents have unlawfully occupied portion 305. Since the former tenants were moved to the EP Malan Road property, no person was granted permission to occupy portion 305. The 1st and 2nd respondents have therefore occupied portion 305 without the applicant's consent and/or permission. They have been erecting shacks and squatting on the property."

21. The respondents, in their answering affidavit, tell a very different story.

22. First, the respondents aver that many of their number have resided on the property for lengthy periods of time, some for over 15 years. The deponent to the respondents' answering affidavit, William Nqaba, has

lived on the property since 1993.[1] These averments are not denied by the applicant in reply.

23. Second, the respondents aver that prior to the applicant's acquisition of the property in 2001, they resided there lawfully, with the knowledge and consent of the owner or person in charge whom they knew only as "Hans" and to whom they paid rent. This is not denied by the applicant in reply.

24. Thirdly, the respondents aver that upon the applicant's acquisition of the property in 2001, Bester concluded a lease agreement with Mr Jacob Slepe in respect of the buildings on portion 305 (just as he concluded a lease agreement with Mahlangu in respect of portion 304). Slepe, like Mahlangu, sub-let rooms on portion 304 to the respondents. He did so with the applicant's knowledge and consent.

25. The respondents pleaded as follows in this regard:

> "Mr Bester concluded a lease agreement with Mr Jacob Slepe as the primary tenant in the cottage situated at portion 305. Slepe collected monies from the occupiers situated in the outbuildings of portion 305 in the amount of R180.00 on a monthly basis. The monies were collected in accordance with instructions from Mr Bester."

> "Consequently all the occupiers who resided at [portion 305] did so with the express alternatively tacit consent of Mr Bester.

[1] Other examples include Julia Mafokoane who has lived on the property since 1993, Merry Kekana who has lived on the property since 1999, David Sibuyi who has lived on the property since 2000 and Surprise Mashala has lived on the property since 1997.

26. These allegations are admitted by the applicant in reply.

27. In October 2006, Bester decided that he wished to develop the properties commercially. For this reason, he terminated the lease agreements with Mahlangu and Slepe and gave the occupiers on both portions 304 and 305 notice to vacate. The occupiers refused to do so stating that there was no alternative accommodation available to them. Again, these facts are not put up in the applicant's founding affidavit in relation to portion 305. They are however admitted in reply.

28. It is therefore evident that the applicant failed to include highly relevant facts in its founding affidavit and created the impression that it seeks the eviction of a group of recent land-invaders: an impression which is gravely misleading. While it does appear from the papers that some of the respondents moved onto the property more recently, the occupation of the majority of the respondents pre-dated the applicant's acquisition of the property, was initially lawful and was, for a time, with the express consent of the applicant itself.

29. Bester says that when the occupiers refused to vacate the property in 2006, he approached the Department of Land Reform and Rural Development for assistance and a process of engagement ensued. While the applicant puts up these facts in relation to portion 304 only, it is clear that the engagement related to both properties. Neither party, however, provides any detail of the engagement process.

30. As stated above, the applicant pleads that after *"a proper mediation process, prolonged discussions and negotiations,"* the occupiers of portion 304 agreed to relocate to the Malan street property. A lease agreement was concluded in terms of which those occupiers would reside at Malan Street property rent free for a period of a year. [2]

31. As stated above, the applicant did not reveal in its founding affidavit that the engagement process covered the occupiers of portion 305 as well. Indeed, on reading the applicant's founding affidavit, one would be forgiven for thinking that portion 305 was unoccupied at this time.

32. The respondents, on the other hand, say the following:

> "In February 2007, Mr Bester abandoned the process of engagement and decided to demolish the main house [on portion 304] and to move Mahlangu. Mr Bester used a bulldozer to break the toilets and disconnected the water and electricity. Furthermore, Mr Bester gave instructions that the sewerage from the toilets should be dumped in the main houses of both portion 304 and 305 Mirabel road property."

33. The respondents plead that as a result of the above, the occupiers of portion 304 moved to the Malan street property, while they remained on portion 305.

34. Bester denies dumping sewerage on the properties. He admits

[2] There is a dispute on the papers as to whether or not the year long lease agreement concluded between the parties was renewable and if so on what terms. However, nothing turns on this for purposes of this judgment. It appears that, at least at the time that this eviction application was brought, the occupiers had not vacated the Malan Street property.

demolishing the main house on portion 304 but states that he did so only after the occupiers had relocated to the Malan street property. Bester admits disconnecting the water and electricity on portion 305. He does so in the following terms:

> "I admit having disconnected the water and electricity; simply because the respondents unrestrainedly used these services at my expense. It seems that the deponent is taking the stance that I simply had to pay for the water and electricity usage without any of the occupiers having paid one cent therefore."

35. Bester does not deny the allegation that he abandoned the process of engagement in February 2007, at least insofar as the occupiers of portion 305 (the respondents) are concerned.

36. The respondents plead that *"the occupiers of both the Malan Road Property and [the property] did not hear anything from Mr Bester nor his employees after 2007."* This is not disputed and it is common cause on the papers that the next communication from the applicant to the respondents took place 7 years later when on, 5 March 2014, the applicant gave the respondents notice of the termination of their rights of residence in terms of section 8(1) of ESTA.

37. In its founding affidavit, the applicant accepts that the respondents are ESTA occupiers.

38. Finally, to complete the factual picture, it is undisputed that the respondent households are extremely poor. Those individuals who work do so in the informal sector where they earn a meagre living, typically through hawking and piece work. In respect of some households on the property, there is no member who is employed. Where respondents do have a means of earning an income, they invariably do so in close proximity to the property. As the respondents state in their answering affidavit:

> "Some [respondents] work in the informal sector, and earn a living through selling on the streets nearby. There are some families where there is no member of the household who is employed. I such circumstances such families are wholly dependent upon social grants received from government and sometimes donations received from Non-Governmental Organisations (NGOs).
>
> To those occupiers who are employed, their places of employment are located in close proximity to their places of residents (sic). Some of the occupiers stays within walking distance to their places of employment whilst other occupiers would travel one return trip when travelling to their places of employment. In short, our residential area is located very closely to our respective places of employment ..."

39. It was presumably in recognition of the extremely low income levels of the respondents and the concomitant difficulty they would experience in finding alternative accommodation that the applicant permitted the occupiers of portion 304 to live in the Malan street property rent free for a period of a year.

40. As regards the present situation pertaining to alternative accommodation, the Probation Officer's Report, furnished on 30 June 2016, finds that there is no alternative accommodation available for the respondents.

The Law

41. Section 8(1) of ESTA provides as follows:

> **"8 Termination of right of residence**
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> (1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable having regard to all relevant factors and in particular to –
>
> (a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
>
> (b) the conduct of the parties giving rise to the termination;
>
> (c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned and any other occupier of the right of residence is or is not terminated;
>
> (d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and
>
> (e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the

decision was made to terminate the right of residence."

42. The question which arises in this case is whether the applicant's termination of the respondents' right of residence was just and equitable in terms of this section.

43. The statutory factors relevant to this enquiry must be interpreted and applied in the light of the constitutional rights which ESTA was enacted to protect and promote, namely:

43.1 the promotion of long-term security of tenure, particularly for vulnerable occupiers (section 25(5) and (6) of the Constitution); and

43.2 the regulation of eviction of vulnerable occupiers from land in a fair manner (section 26(3) of the Constitution).[3]

44. Both this Court[4] and the Constitutional Court[5] have held that, when dealing with eviction applications under ESTA, regard should be had to the jurisprudence under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"), enacted, like ESTA, to give effect to section 26(3) of the Constitution. In terms of that jurisprudence, the opposing interests of landowners and vulnerable occupiers are required to

[3] See the Preamble of ESTA and *Molusi and Others v Voges NO and Others ("Molusi")* 2016 (3) SA 370 (CC) at para 1.
[4] *Diedericks v Univeg Operations South Africa (Pty) Ltd t/a Heldervue Estates ("Diedericks")* (LCC 18/2011) [2011] ZALCC 11 at para 7; *Ncholo Trust v Mphofu and Another* (LCC 6R/2014) [2014] ZALCC 8 at para 9.
[5] *Molusi* at para 31.

be balanced in a constitutionally just manner.

45. As the Constitutional Court held in *Port Elizabeth Municipality v Various Occupiers ("PE Municipality")*:[6]

> "The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather, it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case."[7]

46. Balancing these opposing interests in a just manner requires the courts to pay due regard to the constitutional imperatives in section 26(3) of the Constitution and to the fact that the sub-section demonstrates special constitutional regard for a person's place of abode.[8]

47. As the Constitutional Court held in *P E Municipality:*[9]

> "Section 26(3) acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often, it will be the only relatively secure space of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become

[6] 2005 (1) SA 217 (CC).
[7] At para 23.
[8] *Molusi,* at para 46.
[9] 2005 (1) SA 217 (CC).

its familiar habitat."[10]

48. Neither the right of ownership nor the right not to be dispossessed of a home is absolute and the Constitutional Court has held that *"eviction of people in informal settlements may take place, even if it results in loss of a home."*[11] However, the Constitutional Court has also held that:

> *"*a court should be reluctant to grant an eviction order against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme."[12]

49. A fundamental component of PIE jurisprudence is the requirement of meaningful engagement.

50. Early in its jurisprudence on PIE, the Constitutional Court held that a key factor in determining the fairness of an eviction is whether *"proper discussions, and where appropriate, mediation have been attempted."*[13] The Constitutional Court held that in seeking to resolve the conflict between property and housing rights in eviction cases "*the procedural and substantive aspects of justice and equity cannot always be separated."*[14]

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[10] At para 19.
[11] *P E Municipality* at para 21.
[12] *P E Municipality* at para 28.
[13] *P E Municipality* at para 43.
[14] *P E Municipality* at para 39.

51. As Professor Liebenberg notes:

> "This signalled an affirmation by the Court that the housing rights protected in section 26 of the Constitution, in addition to conferring substantive benefits, entitle unlawful occupiers to participate in the process of finding a just solution to what often appears as the intractable conflict between their housing rights and the property rights of landowners."[15]

52. The participatory dimension of section 26(3) was substantially expanded in *Occupiers of 51 Olivia Road and 197 Main Street, Johannesburg v City of Johannesburg ("Olivia Road")*[16] in which the Constitutional Court developed the concept of meaningful engagement. In *Olivia Road*, the Constitutional Court issued an interim order requiring the City of Johannesburg and the occupiers to:

> "engage with each other meaningfully … in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned."[17]

53. The Court derived the legal basis for the requirement of meaningful engagement from a range of constitutional provisions, including the right to dignity, the right to life and the right to housing in terms of section 26 of the Constitution. The Court held that whether there has been meaningful engagement is one of the "*relevant circumstances*" to be taken into

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[15] Sandra Liebenberg *"Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: the Possibilities and Pitfalls of 'Meaningful Engagement"* 2012 AHRLJ 1 at p 14.
[16] 2008 (3) 208 (CC)
[17] At para 5 (interim order, para 1)

account in terms of section 26(3) of the Constitution and established the principle that the absence of meaningful engagement should ordinarily be a weighty consideration against the grant of an eviction order.

54. The importance of participatory engagement in the resolution of land and housing disputes is made expressly foundational to ESTA. Thus, its Preamble provides:

> "that the law should promote the achievement of long-term security of tenure for the occupiers of land, where possible through the joint efforts of occupiers, land owners and government bodies …" (emphasis added)

55. In the interpretation and application of ESTA, this Court has drawn on the jurisprudence under PIE and has issued engagement orders in appropriate cases.[18] In *Diederick*s, this Court affirmed that the requirement of meaningful engagement applies to all eviction applications, whether they be in terms of PIE or ESTA and whether they be in respect of state owned or privately owned land:

> "All decisions in these matters dealing with evictions – whether they be evictions carried out in terms of PIE (*PE Municipality, Joe Slovo*) or whether they be in terms of the National Building Regulations and Building Standards Act (*Olivia Road*) or ESTA (*Lebombo*) or whether they be on private property (*Olivia Road*, *PE Municipality, Lebombo*) or on state land (*Joe Slovo*), point to a requirement that there must be engagement by the parties. The engagement is clearly directed at informing the

[18] *Lebombo Cape Properties (Pty) Ltd v Awie Abdol and Others* (LCC 129/10) at para 39(d); *Diedricks* at para 20

> parties concerned and the local authority (even if not a party) in a manner so as to limit homelessness – accordingly in most cases an eviction order would not be competent in the absence of some form of engagement."[19]

56. The value of meaningful engagement is two-fold. It facilitates participatory democracy in resolving housing rights disputes, allowing occupiers a stake in decision-making which fundamentally affects their lives[20] and it carries the potential to achieve the resolution of housing disputes in a pragmatic, humane and sustainable manner.[21]

57. One of the factors to be considered in determining whether a termination under section 8(1) of ESTA is just and equitable is *"the fairness of the procedure followed by the owner or person in charge and whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence."*

58. The importance of this factor was highlighted by the Constitutional Court in *Molusi* where the Court lamented the failure to grant the occupiers in that case an opportunity to make representations:

> "What's more, had [the occupiers] been given the opportunity to make representations in terms of section 8, the applicants may have explained the unjustness of the cancellation of the

[19] At para 10.
[20] Sandra Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta, 2010) at p 314.
[21] *Olivia Road*, at para 15.

> lease and termination of the right of residence. This did not happen."[22]

59. While the termination of an ESTA occupier's right of residence in terms of section 8(1) will not necessarily result in an eviction, the reality is that it is very often the precursor thereto. Moreover, and even if it does not ultimately result in an eviction application being brought or granted, it has the effect of terminating the occupier's consent to reside on land, thereby rendering their continued occupation precarious. For these reasons, section 8(1)(d) of ESTA must be interpreted in harmony with the constitutional requirement of meaningful engagement. This means that, in appropriate cases, the termination of the right of residence of an ESTA occupier will not be just and equitable if the occupier has not been given an effective opportunity to make representations prior to that decision being taken.

60. Furthermore, the determination of whether the termination of an occupier's right of residence was just and equitable in terms of section 8(1) as a whole must be undertaken in manner which, in accordance with the jurisprudence set out above, balances the opposing interests of owners and vulnerable occupiers in a constitutionally just manner.[23]

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[22] At para 36.
[23] *Molusi* at paras 39 and 45.

Analysis

61. It was submitted on behalf of the respondents that the applicant's conduct in disconnecting the water and electricity on the property in an attempt to effect the eviction of the respondents was unfair and is a factor to be taken into account in determining whether the applicant's later termination of the respondents' right of residence was just and equitable. The applicant's conduct in this regard was indeed unlawful and unfair and the Court takes a dim view of it. The Court also takes a dim view of the applicant's failure to include highly relevant facts in its founding affidavit, which created the false impression that the respondents are recent land-invaders.

62. By contrast, there are no allegations on the papers of any sort of misconduct on the part of the respondents. They have by all accounts occupied the property peacefully for many years.

63. Quite apart from these considerations however, I am of the view that this is a case in which the respondents ought to have been given an opportunity to make representations before the applicant took the decision to terminate their rights of residence in terms of section 8(1) of ESTA. In my view, the following factors support this conclusion:

63.1 The respondents have resided on the property for lengthy periods of time and have become well settled in the area with regard to access

to employment opportunities, schools and the like.

63.2 At least in respect of the majority of the respondents, their initial occupation of the property was lawful.

63.3 The respondents paid rent to the previous owner or person in charge of the property as well as to the applicant (when required to).

63.4 Although the respondents were given notice to vacate the property in 2006, their continued occupation was tolerated by the applicant for an extended period of time thereafter.

63.5 It is undisputed that there is no alternative accommodation available for the respondents.

64. As for the applicant, it is, in my view, relevant that for a period of five years, the applicant was effectively in the low income rental market and expressly consented to the respondents occupying the property on that basis. Although the applicant later decided that it wished to develop the property commercially, as it was perfectly entitled to do, it did not pursue this with any urgency and continued to tolerate the respondents' occupation of the property for a further 7 years.

65. The applicant complains that the respondents have not paid rent for many years and contends that this is neither just nor equitable. In their answering

affidavit, the respondents state that they have not been paying rent because they have not been required to. The applicant, in reply, labels this allegation "absurd" but does not deny it. Importantly, in their answering affidavit, the respondents tender *"for the period until they are relocated to alternative accommodation, to pay to the applicant the rental payments that were previously payable."* There is no response to this tender by the applicant in reply.

66. In my view, the rental payable by the respondents to the applicant while they continue to reside on the property is precisely the sort of issue suited for discussion in an engagement process which ought ideally to precede a decision to terminate ESTA rights. Such an engagement process, if approached constructively by both sides, has the potential to achieve a pragmatic and humane solution to the dilemma at hand. However, in this case, what was required, at the very least, was that the respondents be afforded an opportunity to make representations before the decision to terminate their rights of residence was taken. That would have allowed the respondents a say in relation to a decision with potentially drastic implications for their lives and their basic constitutional rights.

67. This judgment should not be understood to imply that a landowner such as the applicant can never terminate the rights of residence of ESTA occupiers or secure their eviction. What it does imply is that a landowner cannot act in an unrestrained way in relation to property which has been occupied by vulnerable occupiers for extended periods of time and that where occupiers

have acquired rights as a result, such rights must be terminated fairly. In this case, that was not done.

68. I am making no order as to costs in keeping with the practice of this Court not to award costs in matters such as this which fall within the genre of social litigation.

69. I accordingly make the following order:

1. The eviction application is dismissed.

2. There is no order as to costs.

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BARNES AJ

Appearances:

For the Applicant: Adv Oschman instructed by Pearson Attorneys

For the 1st and 2nd Respondents: Adv Magardie with Adv Khoza instructed by the Legal Resources Centre