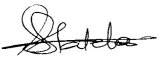




**IN THE LAND OF SOUTH AFRICA  
HELD IN RANDBURG**

**CASE NO: LCC136/2020**

<b>DELETE WHICHEVER IS NOT APPLICABLE</b>	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
25 August 2023	
DATE	SIGNATURE

In the matter between:

**FINBOND MUTUAL BANK LIMITED**

**Applicant / Respondent**

and

**MAGAU ELPHAS**

**First Respondent**

**ZWELI MAGAU**

**Second Respondent**

**BULELWA MAGAU**

**Third Respondent / Applicant**

**FRANS MAHLANGA**

**Fourth Respondent**

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**JUDGMENT**

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**FLATELA J:**

## Introduction

[1] This is a delictual claim instituted by the third respondent against the Applicant for damages allegedly suffered by her as a result of alleged irregular proceedings launched by the Applicant against the respondents in terms whereof the Court granted an interim order on 22 September 2020 and an interim eviction order on 2 October 2020 respectively. In terms of the order of 2 October 2020, the third respondent was ordered to vacate her home within 2 (two) calendar days of the service of the order, failing which the Sheriff of the Court would carry out the eviction.

[2] The third respondent contends that she experienced shock and trauma when she learned that the Applicant obtained a “final” order for her eviction with her children without prior notice to them.

[3] According to the third respondent, the Applicant is liable to compensate her in the amount of R1 000 000 (One million rand) for shock and trauma and legal costs, including the costs of the main application.

[4] This claim is pursued through a counterclaim to the Applicant's main application for eviction of the respondents. The Applicant has since withdrawn the main eviction application; however, the third respondent persists in her counterclaim.

[5] Since this application is a counterclaim, I shall refer to the parties as they were cited in the main application.

## The Parties

[6] The Applicant is **Mutual Bank Limited**, the registered owner of the Farm fully described as Portion 11, the remaining extent of portion 6 (a portion of portion 1) and portion 10 (a portion of portion 6) of the farm Zwartkoppies, 316 Belfast (the property). The property is given to forestry, cattle farming, crop farming, and clearing of a certain area of the property as part of a golf estate.

[7] The first respondent is **Elphas Magawu**, a major male residing on the property. The second respondent is **Zweli Magawu**, a major male residing on the property. The first and second respondents are the adult sons of the third respondent.

[8] The third respondent is **Bulelwa Magawu**, a major female residing on the property. The third respondent has four minor children besides the first and second respondents.

[9] The fourth respondent is **France Mahlangu**, the father of the third respondent's minor children. It is alleged that Mahlangu is no longer staying on the property.

[10] The first to the third respondents are Occupiers in terms of the Extension of Security of Tenure Act, 1997 (**ESTA**).

### **Factual Background**

[11] On 22 September 2020, the Applicant brought an urgent application *ex parte* for an order in the following terms.

1. That the application be dealt with without prior notice to the respondent;
2. That the application be heard as one of urgency in accordance with Rule 6(12) of the Uniform Rules of Court, and that the failure to strictly comply with the rules relating to the forms and service be condoned;
3. That a *rule nisi* be issued calling upon the respondents or any interested party to show cause to the above Honorable Court, on a date to be determined by the Court and or its Registrar, why a final order should not be granted in the following terms:

3.1. That the respondents be hereby interdicted from:

- 3.1.1. Intimidating, threatening and or assaulting Mr. PS Van Rooyen, the farm manager of portion 11, the remaining extent of portion 6 (a portion of portion 1) and portion 10 (a portion of portion 6) of the

Farm Zwartkoppies 316, Belfast (hereafter referred to as the property);

3.1.2. Damaging Mr. P.S Van Rooyen's and the Applicant's property.

3.1.3. Visiting and or accessing the property.

3.2. The fourth respondent be interdicted from erecting any buildings and or structures on the property.

3.3. That the respondents be evicted from the property within such periods as the above Honorable Court deems reasonable.

3.4. In the event of the respondents failing and/or refusing to vacate the property within the period stipulated by the above Honorable Court, the Sheriff of the above Honorable Court be and is hereby authorized to forthwith enter upon the property to evict the respondents.

4. That pending the return date of the above-mentioned *rule nisi*, the provisions of paragraphs 3.1 to 3.3, as stated above, operate as an interim interdict in terms whereof the Applicant may evict the respondents pending the granting of a final order on the return date;
5. The respondents shall be entitled to anticipate the return date of the above *rule nisi* with at least 24 hours written notice to the Applicant.
6. Cost of suit.

[12] In support of the urgent eviction application, the Applicant's farm manager **PETRUS STEFANUS VAN ROOYEN** made the following allegations:

1. Since the purchase of the Farm, he noted various instances of crop theft, trespassing, arson, and illegal hunting by the respondents and other occupiers of the property.
2. On 4 September 2020, he noticed Eucalyptus trees with a market value of about R10 000 cut and stacked, ready to be loaded. The following day he returned to the site where he noticed the load when the first respondent and five others arrived in a truck and loaded the trees.

3. Upon confronting the perpetrators, he was physically and verbally assaulted; he reported the incident to the South African Police Services and opened a criminal case.
4. The SAPS investigating officer assigned visited the property on the morning of 14 September 2020. The first and third respondents visited Van Rooyen and verbally intimidated, threatened and abused him.
5. During the arrest of the first respondent, Van Rooyen's car was surrounded by various community members who threatened and verbally abused him.
6. In the evening, the respondents surrounded Van Rooyen's residence and threatened him.
7. On 18 September 2020, a member of the public who was driving a vehicle of a similar model and make was attacked with rocks thrown at his car by persons he believed to be community members.
8. The Applicant contended that he believed that the attack was aimed at him; the member of the public was a mere casualty.
9. He fears for his life such that he asked a friend to stay with him temporally, and he requested his neighbours to patrol the area surrounding the property at night.
10. The Applicant alleged that he believed that there was a real and imminent threat of substantial injury and damage to his vehicle and the Applicant's property if the respondents were not removed from the property and if an interdict preventing them from intimidating or threatening and/or assaulting him was not granted because:
  - A. His residence is isolated;
  - B. He lives alone on the property;
  - C. No cell phone reception is available in or around his residence on the property;
  - D. The closest SAPS station to his residence is a 20-minute drive from his residence on the property, and the closest neighbor, other than occupiers, is 10 minutes away from his residence on the property;

E. The property is on an isolated stretch of road, and the interim measures he put in place are not sustainable for a prolonged period.

[13] On 22 September 2020, the following order was granted:

1. An order is granted in paragraphs 3.1.1 and 3.1.2 of the Notice of Motion.
2. The order is granted on an interim basis pending the return day;
3. Service of the application, together with this directive, must be affected on or before 23 September 2020;
4. The respondents must file their answering affidavits on or before 28 September 2020;
5. The Applicant must file its replying affidavit, if any, by 30 September 2020.
6. The parties may file Heads of Argument on 1 October 2020;
7. The application will be heard on 2 October 2020 via Zoom.

[14] On 23 September 2020 the respondents were served with the interim order of the 22 September 2020. They were informed by the Sheriff that they must seek legal assistance from the offices of the Legal Aid in Belfast. Due to the public holiday on 24 September 2020, the respondents only managed to travel to seek legal aid on 25 September 2020 and they advised that they could only be assisted on 8 October 2020. The respondents went to seek legal assistance from a private legal practitioner who advised them that he will need an amount of R7000 after they paid an amount of R500 for file opening. The respondents could not raise the amount required. It was only on 2 October 2020 that the first respondent managed to travel to Legal Aid office Middleburg to seek Legal assistance on the day of the hearing Friday 2 October 2020. The matter proceeded in their absence.

[15] On Friday, 2 October 2020, Barnes AJ granted an interim order in the following terms:

- 1) Pending the finalization of proceedings for a final eviction order, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents are evicted from the immovable properties Known as Portion 11, the Remaining Extent of Portion 6(a portion of portion 1) and a portion 10(a portion of portion 6 of the Farm. Zwartkoppies 316, Belfast (the properties) in terms of section 15 of the Extension of Security of Tenure Act. 62 of 1997. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are ordered to vacate the properties within two calendar days from the date of service of this order;
- 2) In the event that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents fail to vacate the properties within 2 calendar days of service of this order, the sheriff is mandated and ordered to evict them;
- 3) It is ordered that this order may be executed whilst the national state of disaster in terms of the Disaster Management Act, 57 of 2002, in relation to the COVID-19 pandemic, remains in force;
- 4) The Applicant is ordered not to demolish the structures from which the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are addicted, pending the adjudication of proceedings for a final eviction order to allow for a possible restoration to them;
- 5) The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents are interdicted not to threaten, intimidate, or assault Mr. Van Rooyen (the farm manager on the properties) and from damaging his or the Applicant's property;
- 6) Pending the finalization of the final eviction proceedings the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are interdicted from visiting the properties after they have vacated or have been evicted in terms of this order;
- 7) The Applicant is ordered to serve notice of intention to terminate residence simultaneously with the service of this order to all four respondents, whereafter the Applicant is ordered to pursue all further steps required for the finalization of final eviction proceedings without unreasonable delay. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are ordered to provide the sheriff with an address where they elect to receive all further notices and court processes;
- 8) There is no order as to costs.

[16] On the same day, 2 October 2020, the Applicant's attorneys also addressed a letter to all the respondents advising them that the relationship between the Applicant and the respondents has irretrievably broken down and there is no possibility of a normal relationship being established, and the reason for the breakdown is one or more of the following:

1. The respondents committed or attempted theft.
2. They engaged in illegal hunting.
3. They were violent towards the farm manager.
4. They threatened the farm manager.
5. They damaged the Applicant's property, including fencing and vehicles.
6. They littered on the Farm.
7. They displayed an aggressive attitude towards the Applicant and its functionaries.
8. They built structures without seeking permission or meaningful engagement from the Applicant.
9. They have guests on the Farm without seeking permission or meaningful engagement from the Applicant.
10. They do not adhere to the reasonable rules of existence on the Farm.

[17] The Applicant further advised the respondents that the letter served as notice informing them that the Applicant was considering terminating their right of residence on the Farm. The respondents were invited to submit written representations of why they believe terminating their right of residence would not be just and equitable.

#### **Urgent application to stay eviction proceedings.**

[18] On Monday, 5 October 2020, an urgent application to stay the execution of the eviction order was instituted by the third respondent's attorney of record on behalf of the third respondent. It served before Cowen J. After consideration of the pleadings, Cowen J issued the following directives:

[19] Pending the determination of the application, paragraphs 1,2,3 and 6 of the



order granted by Barnes AJ on 2 October 2020 are suspended.

[20] The applicants are interdicted from intimidating, threatening and/or assaulting. Mr. PS Van Rooyen, the farm manager of portion 11, the remaining extent of portion 6(a portion of portion 1) and portion 10(a portion of portion 6 of the Farm Zwartkoppies 360 Belfast (the property)

[21] The applicants are interdicted from damaging the property of Mr. PS Van Rooyen and the respondent.

[22] The application was set down for hearing on 27 October 2020.

[23] The Applicant opposed the application for rescission of the orders of Barnes AJ; however, on 28 October 2020, by agreement between the parties, an order to rescind the orders of 22 September 2020 and 2 October 2020 was granted. The respondents were granted leave to file a notice to participate, and the application costs were in the cause.

### **Notice of irregular Step**

[24] On 3 November 2020, the third respondent filed a notice of irregular step in terms of Rule 32(5) of the Land Claims Court Rules. The Applicant was notified that its notice of motion in the main eviction application is an irregular step in terms of Rule 32 (3)(c) of the Land Claims Court Rules in that.

1. The notice of motion was drafted per the Uniform Rules of Court, which apply to the procedure in the High Courts and not the procedure in the Land Claims Court. The issue of urgency was dealt with in terms of Rule 6 and brackets 12 of the Uniform Rules instead of Rule 34 of the Land Claims Court Rules.
2. The notice of motion did not comply with Rule 33 of the Land Claims Court Rules.

3. Prayer 1 of the notice of motion that the application be dealt with without prior notice to the respondents, is irregular and in conflict with rule 33(1) of the Land Claims Court rules;
  - a. No factual allegations were presented about pending proceedings for a final order completed in section 15 of ESTA, and
  - b. Removing the respondents from the land in question was not sought pending the outcome of such proceedings of the final order.

[25] The applicants were given 5 days to rectify or withdraw the irregular step or comply with the applicable provisions of the Land Claims Court rules.

[26] On 21 January 2021, the Applicant's current attorneys, AGM Attorneys Incorporated, filed a notice of substitution as attorneys of record and substituting VDT Attorneys. On the same day, the Applicant filed a notice of amendment in terms of Rule 22 of the Land Claims Court Rules by deleting the notice of motion in its entirety.

[27] There was no objection to the amendment of the Notice of Motion because, on 10 February 2021, the Applicant filed an amended notice of Motion and Form 09.

[28] In terms of the amended notice of motion, the Applicant sought an order in the following terms.

1. A declaratory order that the first to fourth respondents have breached the provisions of sections 6(3)(a) to (d) of ESTA.
2. That the first to the fourth respondents be evicted from the property described as portion 11, the remaining extent of portion 6(a portion of portion 1) and portion 10 (a portion of portion 6 of the Farm Zwartkoppies 360 Belfast.
3. In the event of the first to fourth respondents failing and or refusing to vacate the property within the period determined by the above Honorable Court, the Sheriff of the Court be and is hereby authorized to forthwith enter upon the property and evict the first two fourth respondents.

4. Costs of the application.
5. Further, and or alternative relief

[29] On 8 September 2021, the third respondent filed a counter application to the main eviction application incorporating the first, second and third respondents answering affidavit in the main application and the third respondent's founding affidavit in the counter application.

### **The third respondent's counterclaim**

[30] On 25 August 2021, the third respondent instituted these proceedings through a counterclaim. The third respondent contends that the counter application is based on how the Applicant litigated against her and on false allegations levelled against her in a letter dated 2 October 2020.

[31] In her notice of motion, the third respondent sought an order in the following terms:

1. That the Applicant and anyone acting on behalf of the Applicant interdicted and restrained from preventing the completion and or interfering with the completion of the structure that is half built next to the dwelling where the third respondent and her family members are residing on the Applicant's land referred to below.
2. The third respondent shall be entitled to complete and /or cause to be completed the building of the structure.
3. That, after completion of the structure, the third respondent and her family members shall be entitled to occupy the same and make use thereof as part of the third respondent's homestead.
4. That the Applicant is liable to pay the third respondent compensation in respect of impairment of her dignity.
5. That the Applicant is liable to pay the third respondent compensation in respect of emotional shock and trauma, and mental suffering.
6. That the Applicant shall pay the following amounts to the third respondent.

- 6.1. In respect of impairment of her dignity: R800,000; and
  - 6.2. In respect of emotional shock and trauma and mental suffering: R200,000;
  - 6.3. In the alternative sub paragraphs 1 and 2, oral evidence be heard on the issue of the amounts of compensation in terms of Rule 33(8) (a);
7. That the Applicant shall pay the third respondent's legal costs in respect of the counterclaim.

[32] The Applicant has since abandoned the main eviction application and has allowed the third respondent to complete the building of the structure. A notice of withdrawal of eviction application was filed on 3 April 2023.

### **Issue**

[33] The delictual claim pursued by the third respondent through a counterclaim is the first in this Court. This invokes the question of whether this Court has jurisdiction to adjudicate a delictual claim for damages thereof, which is ordinarily in the domain of the High Court. This is the first issue to be decided. The second issue is whether the Applicant should be held liable for litigation conduct of which the respondent avers was pursued irregularly and caused her emotional and psychological toil, for which she is entitled to compensation.

[34] The other issue to be determined is the "costs of the application to stay eviction proceedings and the rescission application."

### **Jurisdiction**

[35] The matter served before me on 18 April 2023 after an argument. I advised the parties to file further submissions on why this Court has jurisdiction to adjudicate prayers 5 and 6 of the third respondent's counter-application. The Applicant filed further submissions on 22 April 2023, while the third respondent filed them on 2 May 2023. I will start with the submissions by the third respondent.

## The Third Respondent's submission on jurisdiction

[36] The third respondent contends that this Court has the jurisdiction to adjudicate this matter under section 22 (2)(c)<sup>1</sup> of the Restitution of Land Act 22 of 1994. The third respondent further contends that in terms of Section 20<sup>2</sup> of Extension of Security of Tenure Act 62 of 1997 ('ESTA'), this Court has jurisdiction to decide on any constitutional matter in relation to ESTA on the following grounds:

- A. all the facts emanate from the eviction application.
- B. The counter application rests squarely on the facts emanating from the eviction application, and the former is thus incidental to the latter: OR the counter application rests squarely on the manner of litigation, and a purported termination of residence in the eviction application and the former is thus incidental to the latter.

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<sup>1</sup> **Section 22 (2) of the Restitution of Land Act provides:**

(2) Subject to Chapter 8 of the Constitution, the Court shall have jurisdiction throughout the Republic and shall have –

- (c) the power to decide any issue either in terms of this Act or in terms of any other law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the Court considers it to be in the interests of justice to do so

<sup>2</sup> **Section 20 of the Extension of Security of Tenure provides:**

20 (1) The Land Claims Court shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power—

- (a) to decide any constitutional matter in relation to this Act;
- (b) to grant interlocutory orders, declaratory orders and interdicts;
- (c) to review an act, omission or decision of any functionary acting or purporting to act in terms of this Act; and
- (d) to review an arbitration award in terms of the Arbitration Act, 1965 (Act No. 42 of 1965), in so far as it deals with any matter that may be heard by a court in terms of this Act.

(2) Subject to the provisions of section 17(2), the Land Claims Court shall have the powers set out in subsection (1) to the exclusion of any court contemplated in section 166(c), (d) or (e) of the Constitution.

(3) If in any proceedings in a High Court at the date of commencement of this Act that Court is required to interpret this Act, that Court shall stop the proceedings if no oral evidence has been led and refer the matter to the Land Claims Court.

(4) The President of the Land Claims Court may make rules to govern the procedure in the Land Claims Court in terms of this Act.

### **The grounds upon which the delictual claim is based**

[37] The third respondent contends that the “final order” of her eviction was preceded by an interim order where a reference was made to a Zoom meeting. She states that the respondents does not know what Zoom is as they do not have access to a computer and are computer illiterate.

[38] The third respondent contends that by asking for the interim order in the terms the Applicant did, the Applicant followed a deliberate stratagem to confuse the occupiers and make it impossible for them to attend Court

[39] The third respondent further contends that the whole urgent application was made irregularly as no legal practitioner acting diligently could have committed such gross non-compliance with the rules, forms, and procedures of the Land Claims Court.

[40] The third respondent contends further that reasonable inference is that this urgent application was made in a grossly irregular manner as a stratagem to obtain an eviction order easily without opposition.

[41] The third respondent further avers that the Applicant dominated and bullied her with irregular proceedings to deprive her and her children of their home.

[42] The third respondent avers that the eviction order was granted on a Friday to be executed the following Monday. The Sheriff arrived at her home on Friday morning, handed a document to her saying that it was an eviction order and told her that she (and her children) had to vacate their home by the coming Sunday, failing which they would be forced off the land and their belongings would be dumped next to the nearest public road. She immediately went into extreme shock and fear as the eviction would render her and her children homeless and forced to sleep in the open like animals.

[43] The third respondent avers that the irregular proceedings severely traumatized and belittled her. When the Sheriff brought the eviction order the Friday morning, the third respondent states that sShe felt inadequate as a mother because she

could not even guarantee her children's shelter. The stress that she experienced with the service of court papers surrendered her into naked fear, shock, and anxiety. Apart from the emotional effects, she suffered physical symptoms the whole weekend like nausea, trembling, irregular heartbeat, and shortage of breath.

[44] She contends that it will be extremely costly to institute the claim in another court instead of proceeding by way of counter-application in the already pending application.

[45] The third respondent has no funds to spend on litigation as the Land Reform Management Facility assists her under the auspices of the Department of Agriculture, Rural Development and Land Reform.\

### **The Applicant's submissions**

[46] In its answering affidavit to the third respondent's counterclaim, the Applicant raised an issue with the jurisdiction of this Court and specifically the fact that the third respondent elected to proceed with the counterclaim by way of application contrary to Rule 23(2)<sup>3</sup> of the Land Claims Court, which provides that no claim for the determination of compensation may be brought by way of notice of motion.

[47] The Applicant further contended that the terms of rule 42(2)(c) of the Rules of the Land Claims Court clearly provide that in every statement of claim, where compensation is claimed, such claim must be brought in terms of notice of action. Where the amount must be determined, the plaintiff must set forth sufficient particulars to show how the amount arrived at.

[48] The Applicant submitted that the third respondent's entire counterclaim for compensation does not comply with the rule for 42(2)(c) and is, therefore, bad in law; as such, prayers 5 and 6 fail to be dismissed.

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<sup>3</sup> **Land Claims Court Rule 23(2):**

(2) No claim for the determination of compensation may be brought by way of notice of motion.

[49] Furthermore, in any event, the third respondent has not set out a cause of action satisfying the requirements for such a claim, namely commission or omission, fault, causation, wrongfulness, and damages.

### **Further Submissions**

[50] The applicant filed further submissions per directives. The applicant submitted that that this court does not have jurisdiction to adjudicate a delictual claim based on *action iniuriarum*. It states that none of the legislation in respect of which this Court has exclusive jurisdiction provides for include an impairment claim. I disagree. In terms of section 14 of ESTA this Court has jurisdiction to grant orders for payment of damages, including but not limited to damages for suffering or inconvenience caused by the eviction and for costs in circumstances where an occupier was evicted contrary to the Act.

### **Discussion**

#### *Jurisdiction*

[51] The jurisdiction of the Land Claims Court ('the LCC') is provided for in Section 22 (1) and (2) of the Restitution of Land Rights Act 22 of 1994 ('the Act').

#### **"22 Land Claims Court**

(1) There shall be a court of law to be known as the Land Claims Court, which shall have the power, to the exclusion of any court contemplated in section 166 (c), (d) or (e) of the Constitution-

(a) to determine a right to restitution of any right in land in accordance with this Act.

(b) to determine or approve compensation payable in respect of land owned by or in the possession of a private person upon expropriation or acquisition of such land in terms of this Act.



(c) to determine the person entitled to title to land contemplated in section 3;

(cA) at the instance of any interested person and in its discretion, to grant a declaratory order on a question of law relating to section 25 (7) of the Constitution or to this Act or to any other law or matter in respect of which the Court has jurisdiction, notwithstanding that such person might not be able to claim any relief consequential upon the granting of such order.

(cB) to determine whether compensation or any other consideration received by any person at the time of any dispossession of a right in land was just and equitable.

(cC) to determine any matter involving the interpretation or application of this Act or the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996), with the exception of matters relating to the definition of 'occupier' in section 1 (1) of the Extension of Security of Tenure Act, 1997 (Act 62 of 1997);

(cD) to decide any constitutional matter in relation to this Act or the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996);

(cE) to determine any matter involving the validity, enforceability, interpretation or implementation of an agreement contemplated in section 14 (3), unless the agreement provides otherwise.

(d) to determine all other matters which require to be determined in terms of this Act.

(2) Subject to Chapter 8 of the Constitution, the Court shall have jurisdiction throughout the Republic and shall have-

(a) all such powers in relation to matters falling within its jurisdiction as are possessed by a High Court having jurisdiction in civil proceedings at the place where the land in question is situated, including the powers of a High Court in relation to any contempt of the Court.

(b) all the ancillary powers necessary or reasonably incidental to the performance of its functions, including the power to grant interlocutory orders and interdicts.

(c) the power to decide any issue either in terms of this Act or in terms of any other law, which is not ordinarily within its jurisdiction if the Court considers it to be in the interests of justice to do so

[52] Although the issue raised by the third respondent may be the first of its kind in this Court, the third respondent submits that this Court has jurisdiction as the delict is incidental to her eviction, which was irregularly pursued and granted by order of this Court.

[53] The High Court is precluded by section 169 (1)(a)(ii) of the Constitution from deciding on a matter that is assigned to another Court of similar status to the High Court by an Act of Parliament. This Court is a Court of similar status to the High Court. Furthermore, section 22(a) grants this Court all such powers within its jurisdiction as possessed by the High Court.

[54] Section 22(c), on the other hand, empowers this Court to decide on any issue in the Restitution Act or any other law which is not ordinarily within its jurisdiction if this Court considers it to be in the interests of justice to do so. As the third respondent is an occupier in terms of ESTA and her eviction was pursued in this Court, it logically follows that it is within this Court's exclusive jurisdiction to decide on the relief claimed by the third respondent.

### **Liability**

[55] This Application

[56] The Applicant takes issue with the procedure followed by the third respondent to bring this counterclaim. The Applicant contends that the third's respondent suit is an action and should have been brought in terms of section 44 of the Rules of this Court. I agree; although Rule G33(7) allows for a respondent to an application

to bring a counter-application with the delivery of her answering affidavit, this provision does not substitute an action proceeding by a counterclaim to an application. The third respondent should have brought her claim by Notice of Action based on Form 8 of Schedule 1.<sup>4</sup>

### **Were the eviction proceedings irregular?**

[57] The third respondent contends that the Applicant sought her eviction using the irregular procedure in that in its *ex parte* urgent eviction, the Applicant referred to Rule 6(12) of the Uniform Rules instead of referring to Rule 34 of the Land Claims Court Rules read with section 15 of the ESTA.

[58] It is correct that the Applicant, in its notice of motion, referred to Rule (6) (12) of the Uniform Rules. However, in its heads of arguments, the Applicant stated that the urgent application was in terms of section 15 of ESTA.

[59] On 2 October 2020, Barnes AJ granted an interim order in terms of section 15 of ESTA after considering the allegations that the Applicant placed before her. This appears in paragraph 1 of the order.

[60] Section 15 of ESTA provides for immediate removal of an occupied using urgent proceedings. It provides as follows:

#### **15. Urgent proceedings for eviction**

- (1) Notwithstanding any other provision of this Act, the owner or person in charge may make urgent application for the removal of any occupier from land pending the outcome of proceedings for a final order, and the Court may grant an order for the removal of that occupier if it is satisfied that—

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<sup>4</sup> I ACTIONS:

#### **44 ACTIONS IN GENERAL**

(1) Every action must be initiated by way of notice of action, based on form 8 in Schedule 1. A notice of action must have attached to it a statement of claim and copies of all supporting documents

- (a) there is a real and imminent danger of substantial injury or damage to any person or property if the occupier is not forthwith removed from the land
  - (b) there is no other effective remedy available;
  - (c) the likely hardship to the owner or any other affected person if an order for removal is not granted, exceeds the likely hardship to the occupier against whom the order is sought, if an order for removal is granted; and
  - (d) adequate arrangements have been made for the reinstatement of any person evicted if the final order is not granted.
- (2) The owner or person in charge shall beforehand give reasonable notice of any application in terms of this section to the municipality in whose area of jurisdiction the land in question is situated and to the head of the relevant provincial office of the Department of Rural Development and Land Reform for his or her information.

[61] Explaining its default in not opposing the urgent eviction application, the third respondents outlined the difficulties the respondents encountered in receiving legal assistance from the Legal Aid Offices.

[62] It seems that the Applicant complied with the requirements of section 15 (2) of ESTA in that the third Applicant's attorney contacted the Court telephonically on the day of the hearing to inform the court that he was appointed by the Department of Rural Development and Land Reform to represent the respondents and that he needed time to consult with them first. Unfortunately, the order was already granted when the attorney contacted the Court. This appears in a letter dated 2 October 2020 written by the third respondent's attorney addressed to the Court.

[63] The third respondent contends that when the Sheriff came to serve the order on her on Friday, 2 October 2020, he advised she and her children should vacate the property by Sunday, failing which they would be forced off the land and their belongings would be dumped next to the public road. She immediately went into a

state of extreme shock and fear as she feared that they would be rendered homeless and forced to sleep in the open like animals. The third respondent contends that she was severely traumatized and belittled by the irregular proceedings, she felt inadequate as a mother because she could not even guarantee her children shelter.

[64] However, in her papers, the third respondent states that while the Sheriff was still in her home serving the order, the officials of the Department of Agriculture, Rural Development and Land Reform arrived with her attorney of record, who consulted with her immediately and who worked tirelessly during the weekend and launched an urgent application to stay the eviction. The order to stay the eviction was granted 5 October 2020.

### **Were the proceedings contrary to the ESTA?**

[65] As stated elsewhere in this judgement ESTA does provide for “the payment of damages, including but not limited to damages for suffering or inconvenience caused by the eviction. Section 14 of ESTA provides as follows:

#### **‘14. Restoration of residence and use of land and payment of damages**

(1) A person who has been evicted contrary to the provisions of this Act may institute proceedings in a court for an order in terms of subsection (3).

(2) A person who—

(a) would have had a right to reside on land in terms of section 6 if the provisions of this Act had been in force on 4 February 1997; and

(b) was evicted for any reason or by any process between 4 February 1997 and the commencement of this Act,

may institute proceedings in a court for an order in terms of subsection (3).

(3) In proceedings in terms of subsection (1) or (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 or her 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.
- (4) Where the person contemplated in subsection (2) was evicted in terms of an order of a court—
- (a) the proceedings contemplated in subsection (1) shall be instituted within one year of the commencement of this Act; and
  - (b) the Court shall in addition to any other factor which it deems just and equitable, take into account—
    - (i) whether the order of eviction would have been granted if the proceedings had been instituted after the commencement of this Act; and
    - (ii) whether the person ordered to be evicted was effectively represented in those proceedings, either by himself or herself or by another person.’

[66] If regard is had to section 14 (3)(e) of the Act this Court has jurisdiction to grant orders for payment of damages, including but not limited to damages for suffering or inconvenience caused by the eviction and for costs in circumstances where an occupier was evicted contrary to the Act, however, the third respondent is not relying on section 14 of ESTA.

[67] Section 14(1) is clear that the provisions are available to a person who was evicted contrary to the Act.

[68] For the Applicant to be successful in her claim the first issue that she must address is whether the eviction proceedings were contrary to the Act before any

inquiry as to whether the Applicant can be held delictual liable for an eviction which was in the end, not only never executed, but abandoned by the Applicant.

[69] In these proceedings, there is no allegation that the Court granted an order contrary to the ESTA; nor is there an allegation that the Applicant executed or even attempted to evict the respondents in a way that was contrary to the Act. This disposes of the third respondent's counterclaim.

[70] The Court considered the Applicant's application and granted an order regarding section 15 of ESTA. Section 15 allows for the court to grant a removal of an occupier urgently in circumstances listed in section 15(1) (a)-(d). The third respondent has failed to demonstrate how the orders by Barnes AJ were contrary to the Act.

[71] Having found that the order of 2 October 2020 was not contrary to ESTA, an inquiry as to whether the third respondent has met the five elements of delict, viz. commission or omission, fault, harm, causation, wrongfulness for the damages claimed is unnecessary as these were in any event, not pleaded in any clarity – especially the wrongfulness element which is necessary before a respondent may be found delictual liable for an act or omission.

[72] **Costs**

[73] A final issue to dispose of is the issue of costs. As stated earlier in this Judgment, the costs of the urgent application for the rescission application of the orders granted on 22 September 2020 and 2 October 2020 were the costs in the cause of the main application.

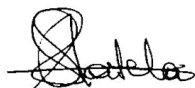
[74] The Applicant has since withdrawn the main application. Ms. I Ochman on behalf of the Applicant submitted due to a lapse of time and the fact that the matter laid dormant; the Applicant and its legal team consulted on the status of the respondent's residency on the Farm, which was peaceful since 2020, the Applicant withdrew the main eviction application due to peaceful interaction amongst the parties

[75] On the other hand, Mr. Botha, on behalf of the third respondent, submitted that this matter justified a deviation from the normal rule of not awarding costs due to the conduct of the Applicant in these proceedings. It was submitted on behalf of the third respondent that the Applicant only withdrew its application at an eleventh hour and consented to the completion of an additional dwelling at an eleventh hour.

[76] I have considered whether the fact in this matter justifies the departure from the ordinary approach of not awarding cost orders except in special circumstances. There are no exceptional circumstances that warrants the departure from the ordinary approach in this court on costs.

[77] In that result, I make the following order:

1. The third respondent's counterclaim is dismissed.
2. There is no order as to costs.



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**L FLATELA**

JUDGE

LAND CLAIMS COURT

This Judgment was handed down electronically by circulation to the parties and/or their representatives by email. The date and time for the hand down is deemed to be 10H00 on this 25 August 2023.

Date of Hearing: 18 April 2023

Date of written Submissions on Jurisdiction: 26 April 2023; 2 May 2023

Counsel for Applicant: I, Oschman,  
Instructed by AGM Inc

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Instructed by: Kgaukgelo Baloyi Inc