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.

3/3/2022

CASE NO.: LCC: 142/2019

In the matter between:

JACOB JOHANNES MAHLANGU	FIRST APPLICANT
MARIA MANZINI	SECOND APPLICANT

and

GAWIE VAN DER MERWE	FIRST RESPONDENT
ALBERTUS PETRUS VAN DER MERWE	SECOND RESPONDENT
MINISTER OF RURAL DEVELOPMENT	THIRD RESPONDENT
PROVINCIAL HEAD OF THE DEPARTMENT AND LAND REFORM	FIFTH RESPONDENT

TOYS BOERDERY (PTY) LIMITED SIXTH RESPONDENT

EMAKHAZENI LOCAL MUNICIPALITY SEVENTH RESPONDENT

JUDGMENT

COWEN J

1. The applicants assert various rights under the Extension of Security of Tenure Act 62 of 1997 (ESTA).

2. The applicants reside at Portion 10 of the farm Boschpoort 388 Registration Division JS, Mpumalanga near Belfast (the farm or the property). The first applicant, Mr Jacob Mahlangu is a pensioner. He alleges that his family has resided on the farm since 1980 when his father moved there. His father used to work for a previous owner but he left the farm following a dispute with his employer. The second applicant, Mrs Maria Manzini, does not provide much information about herself in the founding affidavits but explains that she is residing on the farm.

3. The first respondent is Mr Gawie van der Merwe and the second respondent, Mr Albertus van der Merwe. The fifth respondent is Toys Boerdery (Pty) Ltd, the owner of the property.[1] These respondents are opposing the application and I refer to them as the participating respondents. Both the first and second respondents are

[1] The fifth respondent was not initially cited in the proceedings but was subsequently joined.

directors of the fifth respondent but the first respondent is in control of the property. The second respondent apparently has no active role on the farm in his individual capacity.

4. The third respondent is the Minister of Agriculture and Rural Development and the fourth respondent is the head of the relevant provincial department. The Emakhazeni Local Municipality is the sixth respondent (the Municipality).[2] None of the state respondents are participating in the proceedings and relief is sought only against the Municipality.

5. The relief sought is wide-ranging and, in an amended notice of motion, includes the following orders against the first and second respondents:

   5.1. An order compelling restoration of the applicants' allocated grazing camp on the farm in terms of section 14 of ESTA.

   5.2. An order compelling them to allow the applicants to exercise their tenure rights as contained in section 6 of ESTA.

   5.3. An order interdicting them from violating the applicants' right to improve their households and preventing the applicants from renovating their homestead.

   5.4. An order interdicting them from continuing or commencing any constructive eviction without following the requirements of ESTA.

---

[2] The sixth respondent was also not initially cited but was subsequently joined.

5.5. An order directing them to permit electricity to be connected to the applicants' homestead and to permit the sixth respondent to enter the premises to assess whether it can be installed.

5.6. An order interdicting them from harassing or threatening to evict the applicants and visitors / entering their homestead and yard / conducting a constructive eviction without court order.

6. The applicants also seek an order against the sixth respondent to inspect the area in the vicinity around the applicants' homestead and to advise the parties whether electricity can be installed in the homestead of the applicants.

7. The application was instituted in February 2020. The first and second respondents deposed to an answering affidavit in July 2020 in which they raised certain non-joinder points. The applicants then obtained an order joining the fifth and sixth respondents. Save to clarify the position of the fifth respondent, which made common cause with the first and second respondents, the participating respondents did not file further affidavits. The applicants did not file any replying affidavit and the evidence in the answering affidavits is thus uncontested. Notwithstanding enquiry, the applicants do not apply to refer any issue to oral evidence. The matter came before me on 19 November 2021 on the opposed roll. Ms Mashaba appeared for the applicants and Mr Hamman appeared for the participating respondents. On that date I postponed the matter until 26 November 2021 in circumstances where the papers were not in order. I reserved the costs of that postponement and continue to do so in this judgment. This is because the

participating respondents gave notice that they are seeking costs *de bonis propriis* against the applicants' attorney for the costs occasioned by the postponement. Moreover, I have raised concerns of my own in this regard, which are still being considered. To avoid delay in the delivery of the main judgment, those reserved costs will be dealt with separately.

8. ESTA is legislation that affords secure tenure to persons who reside on land that they do not own, as envisaged in section 25(6) of the Constitution.[3] It affords occupiers '*the dignity that eluded most of them throughout the colonial and apartheid regimes.*[4] These important objectives will invariably come to the fore in cases concerning ESTA such as this one where occupiers assert rights against unlawful eviction, seek restoration of the use of land under section 14 of ESTA and seek to enforce the protections of section 6 of ESTA. These cases are stark reminders of the ongoing disparities in wealth which prevail in the rural context where ESTA (generally speaking) applies[5] and which are a legacy of our unjust past.

9. Mr Mahlangu alleges that he obtained consent to reside on the farm with his family from a prior owner.[6] While the information before me about the applicants is scant there is no dispute on the papers that the applicants are ESTA occupiers and entitled to its protections. Rather, what the participating respondents contend is

---

[3] Daniels v Scribante 2017(4) SA 341 (CC) (Daniels) at para 13.
[4] Id at para 23.
[5] Specifically, ESTA applies to land referred to in section 2(1) of ESTA.
[6] In terms of section 24 of ESTA, the rights of occupiers are binding on successors in title. Section 24, titled Subsequent Owners provides as follows: '(1) The rights of an occupier shall, subject to the provisions of this Act, be binding on a successor in title of an owner or person in charge of the land concerned; (2) Consent contemplated in this Act given by the owner or person in charge of the land concerned shall be binding on his or her successor in title as if he or she or it had given it.

that their rights were lawfully terminated in terms of section 8 of ESTA and there are eviction proceedings pending under the Act. However, Mr Hamman responsibly accepted that even if the termination was lawful (which is not before me), the applicants are entitled to the protection of their rights in terms of ESTA in the absence of any eviction ordered in terms of section 9 of the Act, or a voluntary relocation.

10. The main issue in these proceedings, rather, is whether the applicants have made out a case for the diverse relief that they seek asserting their ESTA rights. In my view, and for the most part, they have failed to do so in the founding affidavits, and the answers provided by the respondents do not assist them.[7] I do grant certain relief in respect of the prayers mentioned in paragraphs 5.2 and 5.5 above. Moreover, where no case has been made out in respect of other prayers, I make no order thereon and my order makes it clear that the applicants may return to court for further relief in due course should they be advised to do so.[8]

11. In order to succeed in the first prayer sought, which entails restoration of a grazing camp, the applicants would need at least to bring themselves within the terms of the agreement which regulates the use of the camp in question for grazing.[9] In the founding affidavit, Mr Mahlangu alleges that he was granted consent to reside with his family on the farm by the previous owner and he says that: 'as part of our

---

[7] Administrator of Transvaal and others v Theletsane and another [1990] ZASCA 156; 199192) SA 192 (A); [1991] 4 All SA 132 (A).
[8] Rule 33(9) provides: "The Court, after hearing an application, whether brought *ex parte* or otherwise, may decide to make no order thereon (save as to costs if any) but to grant leave for the applicant to renew the application on the same papers supplemented by such further affidavits and documents as the case may require." Rule 33(9) has its counterpart in Rule 6(6) of the Uniform Rules of Court.
[9] See Adendorffs Boerderye v Shabalala and Others [2017] ZASCA 37 at para 28.

agreement, I was given a small portion to grow crops, grazing camp and building material to erect structures which I currently occupy with my family'. He further alleges that before the first respondent arrived on the farm (in about 2008): 'the Mahlangu family had large grazing fields and unrestricted water access. Our cattle were able to graze freely without any restriction on the grazing fields around our homestead.' The allegation is then made that at that time the participating respondents 'reduced our grazing camp by erecting crops intentionally in a camp allocated to us.' This has allegedly resulted in the applicants having to move four cows to the neighbouring farm and they are left with two. These allegations are insufficient to ascertain the terms and conditions of the alleged agreement, or sensibly to consider where the alleged grazing camp is, its size (even if approximate) and what was taken away. The allegations, such as they are made, are, furthermore, disputed and the participating respondents allege, amongst other things, that the applicants have no right to keep cattle at all. But what is material for present purposes is that the applicants have not made out any case for the relief sought.

12. I reach this conclusion with caution. Disputes involving the keeping of cattle by ESTA occupiers are not infrequently litigated in this Court. This Court has recognised the interconnectedness of the history of land and cattle dispossession in South Africa.[10] In *Sibanyoni v Holtzhausen*, this Court held that ESTA must be interpreted and applied to redress this history, not to entrench it.[11] In my view, this Court should be slow to refuse relief on technical grounds where important

---

[10] *Sibanyoni v Holtzhausen and others* [2019] ZALCC 11; *Ramohloki and others v Raiden (Pty) Ltd and others* (LCC282/2017B) [2020] ZALCC 31 (12 November 2020). In context of impoundment see *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005(3) SA 589 (CC); 2005(4) BLCR 347 (CC) at para 38 to 42.

[11] At paras 50 and 51.

constitutional rights are in issue. But this does not relieve a party from the duty to plead a case with sufficient particularity and adduce the necessary evidence: this is material to achieving fairness between the parties and allowing a rational resolution of disputes. Importantly, the applicants in these proceedings have at all material times been legally represented.

13. In the second prayer, the applicants seek an order allowing them to exercise their tenure rights as contained in section 6 of ESTA. Section 6 of ESTA protects a range of rights of an occupier and confers correlative obligations on an owner and person in charge, and I do not recite the section in full here. No specific right or obligation is referred to in paragraph 2 of the notice of motion. When regard is had to the content of the founding affidavit, the allegations that are made potentially germane to this relief as a distinct prayer are in the nature of broad conclusions rather than statements of fact or evidence. It is thus alleged that whereas in the past, the applicants had unrestricted water access, after 2008, the participating respondents 'made it difficult for us to gain access to social services' (which, it is contended in argument includes at least water and electricity) and 'also denies us the right to renovate our already deteriorated structures which are hazardous to our wellbeing.' It is later alleged that '[t]he situation on the farm is at this point unbearable as we have no access to water and other human dignified services.' The allegation that there is no access to water is pertinently disputed and a photograph of a hand water pump which enables water access is supplied. During the course of argument, Ms Mashaba confirmed that in fact there is access to water albeit unsatisfactory. Whatever the true factual position, the applicants' difficulty is that, again, they have failed to place sufficient evidence before the Court in the founding affidavits to permit a factual assessment of the vital issue of whether the

applicants are being denied or deprived of access to water in all of the circumstances. I return to the issue of access to electricity below.

14. In *Daniels*,[12] the Constitutional Court pronounced on occupiers' rights to make such improvements as are reasonably necessary to make them habitable consistently with human dignity. This is the subject of the relief sought referred to in paragraph 5.3 above. There can be no question that the applicants enjoy these rights, which – importantly – are not dependent on the consent of the participating respondents for their assertion or realisation.[13] The Constitutional Court held in this regard: '... in the final analysis an owner's consent cannot be a prerequisite when the occupier wants to bring the dwelling to a standard that conforms to conditions of human dignity.' The applicants difficulty, rather, is that there are only very general allegations regarding a denial of consent to renovate the dwellings, which, as with other matters, are similarly unexplained. And notably this too is disputed, the participating landowners saying that they have no objection to the existing structures being renovated: the objection is to the extension of the structures. As Ms Mashaba conceded, any entitlement to *extend* the existing structures is not pleaded in the founding affidavit albeit something she contends the applicants should be entitled to do in order to live a dignified life. That may be so, but that case is not made out in the founding affidavit and the court is not apprised of evidence upon which it can arrive at that conclusion. In this regard, Daniels provides the applicants with their remedy, at least at this stage: meaningful

---

[12] Supra.

[13] *Daniels*, supra n3, para 59: 'In the end the occupier must reside under conditions that afford her or him as wholesomely as possible all the rights contained in ESTA. A simple stratagem like the refusal of consent by the owner cannot be allowed to render nugatory an occupier's right that is primarily sourced from the Constitution itself.'

engagement with the participating respondents. The Constitutional Court held that such meaningful engagement before effecting improvements is necessary, but that if it results in a stale-mate, it should be resolved by a court.[14]

> "[64] It is necessary that an occupier should approach the owner or person in charge to raise the question of the proposed improvements. They may – not will – make it possible for the occupier and owner or person in charge to engage each other meaningfully. This may yield any number of results. The owner or person in charge may actually grant consent. The owner or person in charge may convince the occupier that the dwelling is, in fact, in an acceptable standard and that the proposed improvements are not reasonably necessary. The owner or person in charge may demonstrate that the improvements do not have to be to the extent the occupier had in mind. The owner or person in charge may show that the proposed improvements will probably compromise the physical integrity of the structure to the detriment of the owner. In that event there might be further engagement on how best to bring the dwelling to an acceptable standard. The occupier may agree in writing that, upon eviction, she or he will not be entitled to compensation for the improvements. That said, the need for meaningful engagement does not detract from the conclusion that the existence of the occupier's right is not dependent on the owner's consent."
>
> [65] If engagement between an occupier and owner or person in charge gives rise to a stalemate, that must be resolved by a court. The occupier cannot resort to self-help."

15. If the true position is that the occupiers have already sought to engage with the participating respondents and a stalemate has arisen the issue can be determined by a court. But the case must be pleaded and substantiated with evidence.

---

[14] At para 64.

16. The applicants also seek relief to facilitate their access to electricity.[15] It is common cause that the applicants have no access to electricity. Ms Mashaba emphasised that the relief sought against the owners is aimed solely at ensuring that the participating respondents do not preclude them from pursuing a process of obtaining access to electricity through the Municipality should this be viable. On this issue, the respondents state on affidavit that they refuse to consent to this and in my view this intransigent stance entitles the applicants to relief, albeit in a more limited and alternative form to what is sought. In this regard and during the course of the hearing, I requested Mr Hamman to obtain an instruction whether the respondents would engage with the applicants in this regard, and I was informed that while they are of the view that there is no practical way for the Municipality to provide access to electricity without disrupting farming operations, they would be willing to engage.

17. ESTA does not expressly confer on occupiers any right of access to electricity. However, occupiers have a protected right to dignity both in terms of section 10 of the Constitution and section 5(a) of ESTA. In *T.M Sibanyoni and others v Van der Merwe and others*[16] this Court held that on the facts of that case, the applicant's right to bring his dwelling to a standard that conforms with conditions of human dignity entailed installing electricity.[17] This Court did so after analysing various case law, academic treatise and international law principles and concluding as follows:

---

[15] The relief referred to in both paragraphs 5.5 and 5.2 above are relevant hereto.
[16] (LCC 119/2020) [2021] ZALCC 33 (TM Sibanyoni).
[17] At para 24.

"The above analyses make clear that electricity has come to be variously accepted as a basic necessity to enjoy adequate living conditions, a practical necessity to use a property as a dwelling, virtually indispensable, and that there is a right to receive electricity as a basic municipal service. It also reveals that there is a strongly implied right to electricity in international and domestic law. A more positive assertion that the installation of electricity would be an improvement that is reasonably necessary to make the Applicant's dwelling habitable, to enable him to exercise his right *inter alia* to human dignity in section 5(a) of ESTA, would be difficult to find."

18. In the wake of Daniels and TM Sibonyani, it is not open to the respondents merely to refuse consent to the respondents to access electricity for their dwellings as they do. As Meer AJP held in TM Sibonyani:

"[I]t remains to be said how disquieting in the extreme it is that some twenty years into a constitutional democracy based on freedom, equality and dignity, a farm owner can, in antithesis to these very values, refuse an occupier access to electricity, thereby perpetuating the injustices of the past and the stark division and disparity between the "haves" and the "have-nots" in our society."[18]

19. At this juncture the applicant is entitled to relief that will secure a meaningful engagement to assess whether and how electricity can be provided to the applicants' homestead. All parties must approach meaningful engagement with an open mind and it is not open to the participating respondents merely to refuse or withhold consent, based on their currently held views[19] or otherwise. Should a

---

[18] At para 26.
[19] Articulated in part in the last sentence of paragraph 16 above.

stale-mate arise, the Court may be approached to resolve the matter. To the extent that a meaningful engagement may require the involvement of the Municipality, or indeed any other stakeholder such as Eskom, the respondents must take such steps as may be necessary and co-operate to enable this to ensue.

20. The remaining relief sought against the participating respondents is that foreshadowed in paragraphs 5.4 (relating to a constructive eviction) and 5.6 (relating to harassment in various forms). While the averments that are made in the founding affidavit are cause for concern, the applicants have, again, not made out a case for the relief sought. The applicants provide particularity about one instance of conduct that, if it occurred, might ground appropriate relief.[20] But the applicant cannot succeed on this issue either. One of the applicants' difficulties is that on the evidence before me, I must conclude that incident occurred not long after fifth respondent purchased the farm in 2008 and there is no evidence of any threat of ongoing harm that can ground interdictory relief. Moreover, the factual allegations are squarely disputed and the participating respondents have advanced a different version of events.[21] The relief would thus in any event be precluded by the rules articulated in *Plascon Evans* and *Wightman*.[22]

---

[20] Specifically, "the farm owner's son" is alleged to have pointed a fire-am when the first applicant tried to stop him from beating his children. This led to a criminal complaint but, allegedly the case was not pursued for racial reasons. It is then alleged that the first respondent came to the first applicant's homestead to "egoistically brag" and contended that he is financially underprivileged and powerless: "you just need to pack your veilgoed and leave my farm in peace and no legal system in Belfast can take poor people like (you) seriously."

[21] Their version is a story of self-defence in the face of an attack from by one of the homestead occupiers on the second respondent. They contend that the incident was investigated and ultimately removed from the court roll.

[22] *Plascon-Evans Paints v Van Riebeeck Paints* 1984(3) 623 (A at 634H-635C and *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008(3) SA 371 (SCA) at para 13.

21. The applicants also seek an order against the sixth respondent to inspect the area in the vicinity around the applicants' homestead and to advise the parties whether electricity can be installed in the homestead of the applicants. The Municipality is not participating in these proceedings. A difficulty that the applicants face in respect of this relief is that there is no suggestion in the affidavits before me that the applicants, or anyone else on their behalf, have approached the Municipality to request assistance or that the Municipality has refused to assist in a way it is obliged to. Accordingly, there can be no finding on these papers that the Municipality has acted in breach of any legal duty: no case has been made out in that regard.

22. As appears below the order I make makes provision for the applicants to approach the Court for further relief on the same papers duly supplemented if so advised in due course. I have included this order to cater for the possibility that the engagement that must ensue between the applicants and the participating respondents regarding access to electricity (or indeed engagements on any other improvements where not yet pursued) may result in a stale-mate. But I have also done so, because, where I have declined to grant relief, the reason is that a case has not been made out in the founding papers: the disputes raised are thus not finally decided between these parties. Moreover, the issues raised are matters of constitutional importance and concern fundamental human rights that go to the heart of a dignified existence for vulnerable rural occupiers of privately owned land. I do not have sufficient information before me to draw any conclusions as to why the founding affidavits were drafted in such scant terms in circumstances where the applicants were legally represented and such important constitutional issues

are at stake. But whatever the reason, the interests of justice demands that if the disputes are ongoing, they can be properly ventilated: and this Court has a duty to ensure that disputes that come before it are resolved expeditiously, economically and effectively.

23. This Court only orders costs in special circumstances. I can see no reason to grant costs in favour of either party as regards the main action. Different considerations apply to the costs wasted or occasioned by the postponement of the application from 19 to 26 November 2021, which I continue to reserve.

24. The following order is made:

24.1. It is declared that the applicants are entitled to exercise their right, in terms of sections 5 and 6 of ESTA, to access electricity.

24.2. The first, second and fifth respondents are directed meaningfully to engage with the applicants regarding the connection of electricity to the applicants' homestead and, in doing so, to facilitate engagement with the Municipality or any other person or entity responsible for enabling access to electricity.

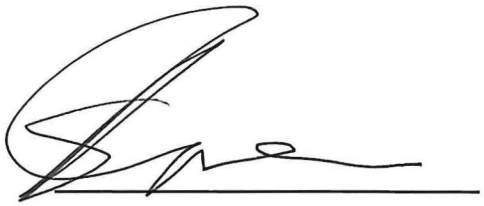
24.3. The applicants may approach this Court for further relief on the same papers duly supplemented.

24.4. No further application shall be set down for hearing unless the papers have been duly compiled in accordance with the Rules of Court and any directives issued.

24.5. Each party is to pay its own costs to date.

24.6. The costs wasted or occasioned by the postponement of the application

from 19 to 26 November 2021 are reserved.



COWEN J

Date of hearing: 26 November 2021

Date of judgment: 3 March 2022

Appearances:

Applicants: Adv Mashaba instructed by Mthimunye Attorneys

1st, 2nd and 5th respondents: Adv Hamman instructed by SD Nel Attorneys