IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC 13R/2021

MAG CASE NO:80/2019

DELETE WHICHEVER IS NOT APPLICABLE

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

4/04/2022
DATE

SIGNATURE

In the matter between:

VAN NIEKERK, OOSTEWALD	**1ST APPLICANT**
VAN NIEKERK CORNELIA MAGRIETA	**2ND APPLICANT**
and	
RADEBE TSHEPO RETIGNLED	**1ST RESPONDENT**
CEO CHIEF ALBERT LUTHULI LOCAL MUNICIPALITY	**2ND RESPONDENT**
DEPARTMENT OF LAND AFFAIRS	**3RD RESPONDENT**

JUDGMENT

FLATELA; AJ:

Introduction

[1] This is an automatic review emanating from the Magistrate Court , Chief Albert Luthuli District in terms of sec 19(3) of the Extension of Security of Tenure Act 62 of 1997 (ESTA). The Magistrate granted an eviction order against the 1st Respondent from Remaining Extent of Portion 2 of the Farm Wegelegen 400, Registration Division JT in the Province of Mpumalanga (the property).

[2] The first applicant is Oostwald van Niekerk a major male residing in the property. The second applicant is Cornelia Magrieta van Niekerk, the first applicant's wife also residing in the property. The applicants are the registered owners of the property. They became owners in 2008.

[3] The 1st Respondent is Tshepo Radebe, a major male who lives in the property. The applicants issued an eviction application in the Magistrate Court Carolina on the ground that the first respondent's right of occupation in the farm has been cancelled and he was living in the property illegally. The application was opposed by the 1st Respondent.

[4] The second respondent is Chief Albert Luthuli Municipality cited as an interested party pursuant to the provisions of section 9 (2)(d)(ii) of ESTA and the third respondent is the Department of Rural Development and Land Reform as prescribed by section 9(2)(d)(iii) of ESTA.

Factual Background

[5] The 1st respondent is the grandson of the late Tawamari Scotch Tshabangu and Ntombi Maria Mnguni (the Tshabangus). The first respondent's grandfather was born on the property, lived and worked for the different owners of the property until they could not work any longer due to their advanced age. The Tshabangus were allocated land in the property to build their home and for ploughing and grazing. They were allowed to keep the livestock on the farm so they had grazing rights. They lived

in the property until their death. Mr Tshabangu died in 2018. They were buried in their family graveyard on the property. There are graves of 13 other family members of the Tshabangus. At the time of their death, they had about 20 heads of cattle, 21 sheep and 4 horses.

[6] The 1st respondent is the son of their daughter Joysie Ntombikayise Shabangu who currently lives in Katlehong Township in Gauteng Province.

[7] The applicant's case is that when they purchased the farm in 2008, they were made aware of the presence of Tshabangus in the property. They had a right to occupy the property until their death in terms of the right to occupy agreement which they entered into with the previous owner, Mr Gehardus Lengton. The applicants aver that in addition to their right of occupation they were also given permission to keep 10 head of cattle, 20 sheep and 2 horses. They also had a right to cultivate about 1.5 hectares of land as they deem fit. All these conditions of occupation are recorded in the right of occupation agreement. The Right of occupation agreement was attached to the application.

[8] The applicants aver that at the time when they took ownership of the farm, the 1st respondents' grandparents had no dependants who were staying with them. From time to time, they requested permission from them as owners of the property for their grandchildren to stay with them and in all those occasions permission was granted. In 2017 the Tshabangus requested permission for the 1st respondent to be allocated land in their allocated site to occupy in order take care of them as they were now old. The applicant the permission was granted for the 1st respondent to stay with his grandparents until their death after that the 1st respondent's right of occupation would terminate.

[9] The 1st respondent's grandfather died in November 2018 terminating the 1st respondent's permission to stay. On 7 February 2019 the applicant was served with a notice terminating the consent to occupy giving him 72 hours to vacate the property. The applicants aver that the 1st respondent is in unlawful occupation of the property. The 1st Respondent failed to vacate and an application for eviction in terms of ESTA was launched.

[10] In his founding affidavit the applicant avers that he has complied with section 11 (3) of ESTA in that:

10.1 In terms of sec 11 (3) (a)-The first respondent stayed in the property for about 18 months,

10.2 In terms of sec 11 (3)(b) – the agreement between the parties i.e., the previous owner and the 1st respondent grandparents was fair and just agreement and;

10.3 In terms of 11(3) (c) - the first respondent has alternative accommodation available in Johannesburg with his mother and

10.4 Section 11(3) (d) – The right of occupation agreement was terminated by death. The property is in the middle of a commercial cattle farm, and that it is hindering the optimum operation of commercial cattle farm

10.5 In terms of Sec 11(3) (e)- the balance of the interest of the owner and the occupier as set out above is favouring him, the 1st respondent has no right in law to occupy the land.

[11] The 1st respondent opposed the application and filed a counter application. The 1st respondent disputed that he only occupied the farm for 18 months from 2017. He avers that he was born in the farm and was raised by his grandparents until he left at the age of 8 years to stay with his mother in Orange Farm in order to study because there were no schools around the farm. He contends that he regarded the allocated land in the property as his ancestral home as his great grandparents were born, lived, worked, died and were buried in the farm. The first respondent contends that even his grandfather whilst he was still alive did not know where the family originated from because even his grandfather's father was born in the property. He contends that although he lived in the Gauteng to study, he always came back home to his grandparents during school holidays. He filed a supporting affidavit from his aunt Girly Nomvula Tshabangu to support the averment that he returned home after school to his grandparents.

[12] The first respondent also filed a counter application seeking an order to be declared a labour tenant. He argued that he was a labour tenant because his grandparents resided on the farm and were allocated land for use and they used it for grazing and for cultivating crops. He contends that the applicants relied on the incorrect section of ESTA. He states that if the court rejects his contention that he is a

labour tenant, his eviction should have been dealt with in term of section 8 of ESTA not section 11. The counter application was dismissed.

[13] The 1st respondent disputes the fairness of the right to occupy agreement that his grandparents were given to sign. He contends that his grandparents' rights to occupy the property is derived from the legislation and not on Right to Occupy agreement. He contends that his grandparents had long qualified as the labour tenants by the time the contract was entered into. In support of his contention, he filed a supporting affidavit of Mr Jacoob Nkosi who was a witness to the right to occupy contract. Mr Nkosi states in his affidavit that the person who brought the contract to the 1st respondent's grandparents said it was a contract that was meant to protect them and their grandchildren from being chased away from the farm.

[14] Regarding his rights in the farm, the 1st respondent states his grandparents were allocated land in the farm to build their home. He has been staying in this land for more than 10 years. He alleges that his grandparents were allowed to keep an unlimited number livestock had more than 70 cows, 40 sheep that they used to sell for their sustenance. He contends that all their problems started when the applicants took over the ownership of the farm. They reduced the number of livestock and the land they were allocated for grazing and cultivation. He contends that in 2015 he came back home after completing his studies and witnessed the unfair manner in which his grandparents were subjected to by the applicant. As a result, in 2016 he reported the unfair treatment and abuse that his family received from the applicant to offices of the Department of Rural Development and Land Reform.

[15] The first respondent filed a confirmatory affidavit from his mother Joysie Ntombikayise Shabangu who confirmed that although she left the farm in 1986 for Gauteng, she frequently visited her parents and in 1989 she gave birth to the 1st Respondent and left him in the farm to be raised by her parents. She confirmed that he left the farm to come to school in Gauteng but he always returned home to his grandparents who raised him. Mr Robert Vusumuzi Tshabangu, the 1st respondent's uncle also filed a confirmatory affidavit. Mr Vusumuzi is permanently residing in Gauteng. He confirms the allegations by the 1st respondent that he always went back

to the farm after school holidays. He states that he used to transport the 1st respondent back to the farm on request from her sister.

[16] The 1st respondent contends that except the allegation that his stay has been terminated by his grandparent's death, the applicant has not demonstrated in court that his eviction is just and equitable

[17] The first respondent contends that he does not have an alternative land to keep his livestock.

[18] The applicants opposed the counter application on the basis that the 1st respondent's grandparents were not labour tenants. Their right to occupy the farm was based on the right to occupy agreement. The applicants denied that the 1st respondent was born in the farm, they contend that that he only came in 2017 to look after his old grandparents. They filed an affidavit of Gerhardus Lengton who confirmed that the Tshabangus were not labour tenants and he also disputed that the 1st respondent lived in the farm. Lengton stated except for the 1st respondent's grandparents, the only other person who resided in the property was one Petrus Josef Sindane. Josef Petrus Sindane filed a supporting affidavit disputing that the 1st respondent was born in the property. Sindane states that the 1st respondent only came to the farm in 2017 to take care of his grandparents.

Dispute of facts

[19] It is evident from the pleadings that the 1st respondent has raised various disputes of fact regarding the following issues:

19.1 whether the respondent had been resident on the farm continuously and openly before 4 February 1997 or after 4 February 1997?

19.2 Whether the section applicable to him is sec 8 or 11 of ESTA?

19.3 whether there was suitable alternative accommodation?

19.4 and whether it is just and equitable to evict having regard to the factors set out in s 11 where he had commenced occupation only after that date, then having regard to the criteria set out in ss 11(2) and (3).

[20] In his heads of argument, the 1st respondent submitted that he will argue during the hearing that the matter be referred to oral evidence as there were disputes of fact that required the court to conduct a factual enquiry. The matters were not referred to oral evidence though but was decided on affidavits.

[21] In his judgement, the magistrate stated that the Applicants submitted sufficient evidence on a balance of probabilities that the eviction of the 1st respondent would be just and equitable. He further stated that he disregarded the evidence of the 1st respondent entirely as it was full of contradictions, misdirected and misled him.

[22] In motion proceedings the test for the evaluation of evidence is that of Plascon-*Evans*[1] which has been restated recently[2] in NDPP v Zuma. The court held that:

> "Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well-established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

[23] The court in this matter totally disregarded the evidence of the 1st respondent on the basis that it was contradictory and misleading without demonstrating that the Plascon Evans principles were applied in the evaluation of evidence.

[24] The eviction brought by the applicants was not as simple and straightforward, there were competing constitutional rights of parties which required the Magistrate to

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[1] Plascon – Evans Paints Ltd v Van Riebeck Paints (Pty) LTD.[1984] (3)SA 632 (A) at 634
[2] National Director of Public Prosecution v Zuma 2009 (2) SA 277 (SCA) par [26].

make certain enquiries in order to decide whether the eviction of 1st would be just and equitable.

[25] The Magistrate concluded that the 1st respondent was not an occupier but a caregiver of his late grandparents who came to live with his grandparents in 2017, the applicable provisions to be considered is that of sec 11of ESTA. I must now consider whether there was compliance with the provisions of sec 11 of ESTA.

[26] In Mkangeli and Others v Joubert and others[34] the court held that

> "In case such as the present, where the appellants took occupation of Itsoseng after 4 February 1997, s 11 also finds application. This section provides that a court may only grant an eviction order if it is of the opinion that it is just and equitable to do so. In deciding whether it is just and equitable to grant an eviction order the court must have regard to the considerations listed in s 11(3), but it is not limited to them. Included amongst these is the consideration 'whether suitable alternative accommodation is available to the occupier' (s 11(3)(c)) and 'the balance of the interests of the ... interests of the owner, ... the occupier and the remaining occupiers on the land' (s 11(3)(e))."

[27] Section 11 regulates the eviction of occupiers who became occupiers after 4 February 1997 provides:

> "(1) If it was an express, material and fair term of the consent granted to an occupier to reside on the land in question, that the consent would terminate upon a fixed or determinable date, a court may on termination of such consent by effluxion of time grant an order for eviction of any person who became an occupier of the land in question after 4 February 1997, if it is just and equitable to do so.
>
> (2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.
>
> (3) In deciding whether it is just and equitable to grant an order for eviction in terms of this section, the court shall have regard to—

[3] 2002 (4) SA 36 (SCA)
[4] [2002] 2 All SA 473 (A)

(a) the period that the occupier has resided on the land in question;
(b) the fairness of the terms of any agreement between the parties;
(c) whether suitable alternative accommodation is available to the occupier;
(d) the reason for the proposed eviction; and
(e) the balance of the interests of the owner . . . the occupier . . . on the land."

[28] In his founding affidavit the applicant contends that the provisions of section 11 of ESTA have been complied with. A notice in terms of section 11(1) was dispatched to the 1st respondent on 7 February 2019. It is stated in the notice that the right to occupy the property was granted as long as the 1st respondent's grandfather was alive. Now that he died, the permission has expired. He was given 30 days to vacate the property.

[29] Applicants relied on two agreements for the termination of consent given to the 1st respondent to occupy the property. The oral agreement that he alleges was entered into between the him and the 1st respondent's grandfather wherein he granted permission to them for the 1st respondent to stay in the property to take care of his grandparents until they die. After their death the consent will be withdrawn. This oral agreement was disputed by the 1st respondent. The second agreement is the right to occupy agreement that was entered into between the previous owner and the 1st respondent's grandparents. He alleged that the agreement was fair and just. The terms of this agreement were disputed by the 1st Respondent and Jacoob Nkosi who was a witness to the agreement. Mr Nkosi stated in his affidavit that a person who brought the agreement to the 1st respondent's grandparents said that the purpose of signing the agreement was for their protection against unlawful eviction against them and their family.

[30] The 1st respondent's version is that his grandparents lived in this farm all their lives. When Lengton purchased the farm in 1999, they were already enjoying the rights in the land. He avers they qualified to be labour tenants but for illiteracy, old age and lack of knowledge regarding their rights they did not apply to the department or to the Land Claims Court to be declared labour tenants but their rights on land was long

granted by previous owners. The applicant's version is that the Tshabangus right to occupy the property was derived from the right to occupy they signed in 2001 with the previous owner. He claims that this agreement between the parties was fair and just agreement. In his affidavit in the counter application the 1st respondent alleges that his grandparents were during their lifetime, labour tenants on the farm because:

30.1 My grandfather was born on the farm and so was his father.[5]

30.1.1 My grandparents have always stayed on the farm and worked for different farm owners and in compensation for their residence on the farm they were allocated arable land to plough crops, allowed to have livestock on the farm and some grazing fields for their livestock.

30.1.2 My grandparents lived like that until they died and for the record, they are both buried on the farm at the family graveyard located on the farm. The family graveyard has approximately 13 graves.

30.1.3 I submit that my grandparents were for all intents and purposes Labour Tenants as intended by Sec 1(xi) (a) and (b) of the Land Reform Act No.3 of 1996.

30.1.4 Owing to the lack of knowledge and being uneducated, my grandparents never registered with the department of Rural Development and Land Reform and in addition they never made any such application to the Courts to be declared as such.

[31] In his answering affidavit the applicants admit that the applicant's grandparents were buried in the property but noted all other allegations stating that he does not have knowledge of them.

The Right of occupation Agreement -Annexure ON1

[32] The said agreement is a formal agreement written in Afrikaans. I requested my colleague to translate it for me. I am grateful to her for assisting in this regard. A proper

[5] Paragraph 8 .1 of the affidavit at page 88

look at the terms of contract is key to determine whether the contract is fair and just agreement.

[33] I will refer to the relevant clauses of the contract

AGREEMENT – RIGHT OF OCCUPANCY
Entered into by and between
GERHARDUS LENGTON
("THE OWNER")
And
TS TSHABANGU
Id ....
And NM NMGUNI
Id .....
Marital Status

(hereinafter called the Holders of a Right of occupancy)

[34] The preamble of the contract reads as follows

WHEREAS

A. The holder of the right of occupancy is a member of the public;
B. The Owner is willing to give certain occupational rights on the property to the Holders of the right of Occupancy, who want to live on the property of the Owner;
C. The Parties hereto are desirous to put the conditions of the Occupancy Agreement in writing.

NOW THEREFOR THE OWNER AND THE HOLDER OF THE RIGHT OF OCCUPANCY AGREE AS FOLLOW:

1 RIGHT OF OCCUPANCY

1.1 The Owner herewith grants the Holder of the Right of Occupancy right of occupation on a certain part of the immovable property (hereinafter called "the premises"), together with ancillary assets and accessories, situated at

_____

_____

_____

2 PERIOD OF RIGHT OF OCCUPANCY

2.1 This Agreement comes into force on 01 April 2000, on which date possession and occupation of the Premises shall be given to the Holder of the right of Occupancy and shall stay in force until it terminates as set out hereinunder.

3 TERMINATION OF OCCUPANCY AGREEMENT

This Agreement shall terminate on the death of both occupants.

4 **RENTAL OF THE PREMISES**

4.1 Apart from livestock, as set out hereinafter, no rental shall be payable by the right of occupancy to the Owner;

4.2 Grazing for 10 heads of cattle, 2 horses and 20 sheep shall be provided free of charge. The holders of the right of occupancy shall also be entitled to the free use of approximately 15 hectares of land;

4.3 Any additional grazing can be secured from the Owner at

4.3.1 R75.00 per head of cattle per annum, to a maximum of 22 additional head of cattle.

5 **USE OF THE PREMISES**

5.1 The premises shall be used exclusively for living purposes by the Holders of the right of Occupancy and their family. They will not be allowed to work, engage in business- or trade from the Premises. In particular they will not be allowed to bring- or keep any explosives or highly flammable objects on the premises. No minor children (under the age of 18 years) will be entitled to any right of occupancy.

[35] The applicant relies on this agreement between the previous owner of the property Gerhardus Lengton who acquired the property in 1999 and he found the 1st respondent's grandparents on the property. In his affidavit in support of the eviction of the 1st respondent, Lengton states that he never farmed in the property or actively lived there. He used the property as a weekend gateway. He rented the farm to a local farmer for commercial purposes.

[36] He states that the 1st respondent's grandparents approached him and requested the permission to stay and occupied the property where they resided because of their advanced age they did not want to relocate. The right to occupy agreement came to effect in 2001. He further states that he never saw any of their grandchildren in the property. It is clear from the evidence that the Tshabangu's had rights in land way before Lengton bought the property. Mr Tshabangu was born in the property; his father was also born in the property. Already they had ploughing and grazing rights and the rights to keep cattle in the property. They had a gravesite in the property where they were burying their loved ones. Where were they going to relocate to if their roots are in the property?

[37] The said right to occupy agreement is not a neutral. On proper look at its contents, it limits the rights of the Tshabangus. The Tshabangus belonged to a class of people who bargained from an inferior position. They were an old couple and vulnerable. Its aim was simple to disentitle the Tshabangu's remnant of rights in land

that they had. In its preamble, the Tshabangu's are described as the member of the public who entered into an agreement with the gracious owner who was willing to grant them rights of occupation in his land.

[38] First of all, the right to legally secure tenure of the Tshabangus is derived from the Constitution not from gracious permission to occupy the property from the owner. Section 25(6) provides for either tenure which is legally secure or to comparable redress to a person or a community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices.

[39] In this regard, Parliament passed the Land Reform (Labour Tenants) Act 3 of 1996("Land Reform Act") and the Extension of Security Act 62 of 1997. The Land Reform Act title states that the Act was promulgated to provide for the security of tenure of labour tenants and those occupying and using the land as a result of their association with labour tenants, to provide for the acquisition of land and rights in land by labour tenants and to provide for matters connected thereto.

[40] Had the Tshabangus made application to be declared a labour tenant in terms of the relevant provision of the Land Reform Act 3 of 1996, they would have perhaps enjoyed a better protection and security of tenure like the acquisition of the property where their family members would inherit the land from generation to generation. The owner knew this and he stripped them that right so that they die without leaving any inheritance to their children and their children's children, the land.

[41] Dealing with the agreements that owners and labour tenants enter into which disentitle labour tenant's rights from more secure tenure rights into personal rights In Maluleke Timothy NO v Sibanyoni Hendric[6] Spilg J had this to say:

> "I am concerned that the destruction of such rights, even if only those of a labour tenant wrought by apartheid have been replaced by agreements that bring about the same result; the conversion of more secure rights to occupy land into a purely personal right umbilically

[6] (LCC 59/2018) [2020] ZALCC 15 (05 August 2020) at [77]

linked to the ongoing provision of labour or services. In particular there may be unfortunate parallels to be drawn with the case decided by the Constitutional Court in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 despite the fact that the reduction of rights previously enjoyed is now affected by agreements which may, not must, have been concluded at a time when the occupier was unaware of the true nature of the right he or she enjoyed. If so, this would have precluded the occupier from making an informed decision as to whether rights were in fact being gained or lost when signing agreements of this nature, unless of course there a meaningful consideration received. The agreement that Hendrick signed does not clarify this but opaquely refers to some other agreement of employment.

[42] In *Goedgelegen*[7] Moseneke DCJ dealing with the destruction of rights in land that Black people had in the land. He said the following:

> "Finally, it is appropriate to observe that rights of the individual applicants were not merely economic rights to graze and cultivate in a particular area. They were rights of family connection with certain pieces of land, where the aged were buried and children were born and where modest homesteads passed from generation to generation. And they were not simply there by grace and favour. The paternalistic and feudal-type relationship involved contributions by the family, who worked the lands of the farmer. However unfair the relationship was, as a relic of past conquests of land dispossession, it formalised a minimal degree of respect by the farm owners for the connection of the indigenous families to the land. It had a cultural and spiritual dimension that rendered the destruction of the rights more than just economic loss. These are factors that

[7] Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027

might require appropriate consideration by the Department or the Land Claims Court when an appropriate remedy is fashioned."

[43] I doubt that the learned Magistrate considered the agreement at all to make value judgement as to its fairness. Furthermore the 1st respondent raised an important issue that of an African culture. He alleged that as a child of his grandparent's daughter in African style he has only one home, his grandfather's home. I think that the 1st respondent meant in African culture a child born out of marriage by a daughter, that child's home is not his mother's place but the grandparent's home.

The Probation Report in terms of Sec 9(3) of ESTA

[44] In terms of s 9(3) of ESTA the court ordered that the necessary probation officer's report be submitted. The probation report prepared by Mr Ephraim Tau Mojafela from the office of the 3rd respondent in Ermelo was submitted after a year after several court orders were issued against the probation officer. The learned Magistrate is commended for insisting on the report.

[45] In his report the probation officer state that a land rights enquiry was conducted on 05 June 2020 and the respondent was invited to make oral presentations. The probation officer established the following: -

45.1 That the respondent can be provided with the alternative land where he can be assisted to erect a structure to live, have access to water, arable and grazing land;

45.2 That the respondent has no alternative accommodation and therefore no suitable alternative accommodation for him and his livestock in case of eviction.

45.3 That effect of an eviction order on their Constitutional rights and whether an eviction would cause undue hardship to the respondent, the probation reported that the 1st respondent will suffer without suitable land and funds to build new structures.

[46] The applicants submitted in their heads of arguments that the report compiled by the Probation officer does not assist the Court much and they opined that it was merely completed for formality's sake without the probation applying his mind.

[47] On the availability of suitable alternate accommodation, the 1st respondent submitted that he does not have any alternative accommodation. The respondent stated that he inherited the livestock from his late grandfather and there is no suitable accommodation for him and his livestock.

[48] The applicant suggested that the 1st respondent must relocate to Orange Farm, Gauteng where his mother is, he suggested that there was land that was sold by a neighbouring farm that the 3rd respondent must consider buying for the 1st respondent. The applicants were not willing to allocate or even sell a portion in their property to the respondent. The applicants offered an amount of R10 000 (Ten Thousand Rand) for resettlement and he offered transportation to transport the 1st respondent's personal belongings to Orange Farm. The applicant also offered the 1st respondent assistance to sell his livestock on the market if he so desires.

[49] The applicants aver that the 1st respondent has no entitlement to the farm. He left the farm at a young age and does not meet the requirements as defined for permanent residence in terms of Income Tax Act; He has no right to remain in the property must go back to his maternal home in Johannesburg.

[50] The applicant argued that the 1st respondent lied to the Probation Officer about alternative accommodation.

[51] On the balancing of the constitutional rights of the Applicants and those of the 1st Respondent, the applicants submitted that his constitutional rights in this matter weighs in favour of the applicant. His right to property and the unhindered enjoyment thereof amongst others whilst the 1st respondent is attempting to abuse the Legal Framework to establish unfounded rights.

[52] On undue hardships that might fall unto the occupier, the applicant submitted that the current accommodation that the 1st respondent occupies does not have the

running water and remaining in the property is in fact enduring more hardships than relocating to his maternal home. The applicants failed to show any hardships that they might suffer if the application is refused. On the other hand, the 1st respondent has shown that he has no suitable alternative accommodation for him and his livestock and if evicted he will experience hardships. This is captured in the report of the Probation officer.

[53] In granting eviction order, the Magistrate said: -

53.1 'It is clear from the first respondent's papers that he is not having children or staying with his children .... therefore, 1st respondent's Constitutional rights to be returned to his maternal home shall not be a violation of his human dignity in terms of section 10 of the Constitution.[8] One wonders what Constitutional Right is this?

53. 2 On undue hardships, referring to the applicant's submissions that there is currently no running water and electricity in the property occupied by the 1st respondent, the learned Magistrate states that:

"This suggests that relocation to his maternal home is the best alternative accommodation. Sec 27 (1)(b) of the Constitution provides that" Everyone has the right to have access to sufficient food and water[9].

53.3 "it is very clear on application or papers that the first Respondent was not an occupier but rather the caregiver of his grandparents .....His right of residence was terminated after the death of his grandparents on the farm"[10]

53.4 "The applicant's right to property is infringed by the conduct of the first respondent. Section 25 (1) of the Constitution provides that "No one may be

[8] Para 52 of judgement
[9] Para 53 of the judgement
[10] Para 57 of the judgement

deprived of property except in terms of general application, and no law may permit deprivation of property."[11]

[54] Unlike other cases that were previously decided in this court and in the Supreme Court of Appeal where the presiding officer adjudicated the ESTA eviction in the absence of Probation officer report, in this case the report was present but the court did not consider the recommendations by the Probation Officer. If he did, it is not clear from the judgement. The Magistrate agreed with the submission of the Applicants in response to the probation officers report It is mandatory for the judicial officer to consider the probation report in deciding whether the eviction would be just and equitable.

[55] The magistrate attached the Probation report in his judgement. Not much is said about the Probation officer's recommendations. Dealing with the purpose of the reports Ngcukaitobi AJ said in Drankeinstein Municipality[12]

> "There is a clear reason why the consideration of these reports is entrenched in statute: the reports must (a) indicate availability of alternative land in the event of an eviction; (b) the impact of the eviction on the affected occupiers, including their children; and (c) any undue hardship which will be caused by the eviction. It can be seen from the provisions of section 9(3) that the purpose of the statute is to protect occupiers from unlawful evictions and where evictions are inevitable to ameliorate their adverse impact".

[56] In deciding whether the eviction would be just and equitable, the judicial officer must consider the Probation officer report in ESTA matters, the Supreme Court of Appeal held in *Monde v Viljoen NO & others* [13]

> "The LCC has subsequently in *Cillie*[14] held that a probation officer's report was not a mere formality. It found that the issues in s 9(3) of ESTA that had to be addressed in the report were necessary to assist a court in deciding whether an eviction was just and equitable; that the importance of the report in an eviction could not be overemphasised; and that it ensured that the constitutional rights of those affected by eviction were not overlooked. Likewise, in

[11] Paragraph 58 of the judgement
[12] *Drakenstein Municipality v CJ Cillie en Seun (Pty) Ltd* [2016] ZALCC 9
[13] (1162/17) [2018] ZASCA 138
[14] *Cillie NO & others v Volmoer & others* [2016] ZALCC 5 para 18.

Drakenstein Municipality,[15] the LCC noted that s 9(3) was cast in peremptory terms; that the court's ability to discharge its function was frustrated without a report by a probation officer; and that the absence of the report negatively affected the interests of occupiers, since the purpose of ESTA was to protect occupiers from unlawful eviction and where eviction was inevitable, to ameliorate its adverse impact".

[57] Although the cases quoted above dealt with matters where the probation officer's report was not available at all and thus not considered before granting the eviction, the principle applicable is the same that the report of the Probation Officer must be considered. It is now settled that failure to consider the report is a material misdirection on the part of the judicial officer.

[58] The Magistrate failed to balance the competing rights of the owner and an occupier before he granted an eviction. Nkabinde J in Molusi[16] said the following regarding the balancing of the competing rights: -

"...

ESTA requires that the two opposing interests of the landowner and the occupier need to be taken into account before an order for eviction is granted. On the one hand, there is the traditional real right inherent in ownership reserving exclusive use and protection of property by the landowner. On the other, there is the genuine despair of our people who are in dire need of accommodation. Courts are obliged to balance these interests. A court making an order for eviction must ensure that justice and equity prevail in relation to all concerned. It does so by having regard to the considerations specified in section 8 read with section 9 as well as sections 10 and 11 which make it clear that fairness plays an important role.

[15] *Drakenstein Municipality v CJ Cillie en Seun (Pty) Ltd* [2016] ZALCC 9 para 15.
[16] *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6

In *PE Municipality* this Court remarked that it is necessary "to infuse elements of grace and compassion into the formal structure of the law" and courts need "to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern" because "we are not islands unto ourselves". One immediately agrees that—

> "[t]he Judiciary cannot, of itself, correct all the systemic unfairness to be found in our society. Yet it can, at least, soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails." (Footnote omitted)

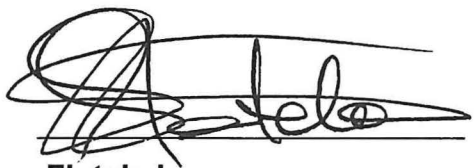
[59] I find that the Magistrate erred in finding that the respondent's eviction would be equitable. The Magistrate failed to balance the competing rights.

[60] Lastly the court ordered the 1st Respondent to pay the costs of the application. The costs order in ESTA proceedings are only ordered in special circumstances. In this matter there are no circumstance that gave rise to special circumstances. The court erred in granting the cost order.

[61] In the result I am unable to confirm the order by the Magistrate. Consequently; the following order is made:

1. The order granted by the Magistrate Carolina is set aside and replaced by the following order:

   "The application is dismissed."



Flatela L

Acting Judge of the Land Claims Court

4 APRIL 2022