THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 611/2010

In the matter between:

NTOMBIZODWA YVONNE MAPHANGO (NOW MGIDLANA) AND 17 OTHERS **APPELLANTS**

v

AENGUS LIFESTYLE PROPERTIES (PTY) LTD **RESPONDENT**

Neutral citation: *Maphango v Aengus Lifestyle Properties* (611/2010) [2011] ZASCA 100 (1 June 2011)

Coram: Brand, Lewis, Cachalia, Shongwe JJA and Plasket AJA

Heard: 17 May 2011

Delivered: 01 JUNE 2011

Summary: Termination of lease agreements ─ tacit term contended for that landlord will not employ termination clause in order to renegotiate new leases at higher rental ─ found not to have been established ─ reliance on s 26(1) of the Constitution and other considerations of public policy ─ unsuccessful

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ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Van der Riet AJ sitting as court of first instance).

The appeal is dismissed.

JUDGMENT

BRAND JA (LEWIS, CACHALIA, SHONGWE JJA and PLASKET AJA):

[1] The 18 appellants are lessees of flats in a ten storey building known as Lowliebenhof, in Braamfontein, Johannesburg. The respondent is the owner of the building. Proceedings started when the respondent brought an application in the South Gauteng High Court, Johannesburg, for the eviction of the appellants and their families from the flats on the basis that their leases had been duly terminated by notice on its behalf. The appellants opposed the application, essentially on two grounds. First, that the respondent's purported termination of the leases was invalid. Second, that, even if the leases were validly terminated, it would not be just and equitable to evict them from the flats. For the second ground they relied on the provisions of s 4(6) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, that generally became known as PIE.

[2] When the application came before Van der Riet AJ in the court a quo, the respondent conceded that the leases of two of the appellants, Ms Siguca and Ms Masemola had not been validly terminated. With regard to the sixteen other leases involved, Van der Riet AJ upheld the respondent's contention that the

termination was valid. He further held, in respect of nine of the appellants, that there were no grounds of justice and equity, as contemplated in s 4(6) of PIE, that would justify the refusal of their eviction. These nine appellants were therefore evicted. As to the other seven appellants, he concluded that an eviction order would render them homeless and would thus not be just and equitable as contemplated by s 4(6) of PIE. At the behest of these appellants, he therefore postponed the application for their eviction for three months so as to afford them the opportunity to join the City of Johannesburg as a party to the proceedings and to obtain a report from the latter, setting out what steps it could take to provide them with alternative accommodation. As to the costs of the application, Van der Riet AJ decided that since the matter involved constitutional issues, the parties should pay their own costs.

[3] The appeal against the judgment of Van der Riet AJ is with his leave. In essence it is aimed at two findings in the judgment. First, that the leases were validly terminated. Second, that Ms Siguca and Ms Masemola should pay their own costs.

Termination of the lease agreement

[4] I start with the issues surrounding the termination of the leases. The respondent purchased the property in 2007, but only became the owner in May 2009, shortly before the eviction applications were launched. It was not a party to any of the leases. They were concluded over the years between the different appellants, as lessees, and whoever happened to be the respondent's predecessor as owner of the building at the time, as lessor. However, by operation of the common law principle of *huur gaat voor koop*, the respondent became the successor to all rights and obligations deriving from these lease agreements, when it became the owner of the building.

[5] The appellants entered into four different pro forma lease agreements that were identified with reference to the name of the lessor at the time, as the

Ithemba agreement, the Union agreement, the Artisan agreement and the Eagle Creek agreement. For reasons that will soon become apparent, the appellants emphasised those terms of the four agreements that deal with increases in the stipulated rental while the respondent's focus was directed at the period of the lease for which the different agreements provide.

[6] As to increases in the stipulated rental, three of the agreements expressly limit the increment at which the stipulated rent can be increased annually. The Ithemba agreement permits an increase of 10 per cent, together with an amount equal to any increase in rates, taxes and other stipulated expenses payable by the lessor in respect of the building, distributed pro rata between the tenants occupying the property. In the Union agreement, the annual escalation is 15 per cent, while the Artisan agreement limits the increment to the lessee's pro rata share of any increase in rates and taxes payable by the lessor. The Eagle Creek agreement is the exception. It does not specifically impose a limitation on the increase of rental, but it is common cause that in this case any increase must be reasonable (see s 5(6)(c) of the Rental Housing Act 50 of 1999). Finally, the Ithemba agreements provide that in the event of some legislative provisions affecting the rental, the respondent cannot increase the rent without first approaching the competent authority for leave to do so.

[7] As to termination of the leases, each of the agreements provides for an initial fixed period. In the Ithemba agreement, for example, it is 12 months. After the initial period, each agreement is automatically renewed indefinitely. Three of the agreements contain an express provision entitling both parties to terminate the agreement on written notice to the other, though the periods of notice required are of different duration. The Artisan agreement does not have an express term providing for termination by notice. But it is not in issue that in terms of the residual rules of the common law, this agreement is also terminable by either party after the initial period, on reasonable notice to the other (see eg A J Kerr *The Law of Sale and Lease* 3 ed (2004) at 488; Francois du Bois (ed)

Wille's Principles of South African Law 9 ed (2007) at 918 para 9(1) and the authorities there cited.) With regard to termination, the Ithemba agreement again contains a provision which is not to be found in the other agreements. It is to the effect that, if the lease is supported by a Department of Housing subsidy, termination shall be at the discretion of the lessee. As it turned out, the only two leases that were supported by a Departmental subsidy were those of Ms Siguca and Ms Masemola. That is why the respondent conceded that their leases could not be terminated on notice by the respondent.

[8] It is common cause that in respect of all the leases the initial fixed period had lapsed prior to the notices of termination, to which I now turn. From about September 2008, the respondent gave written notice of termination of the leases to each of the appellants. The notices called upon them to vacate their flats on different dates during the period from November 2008 to March 2009. The notices also informed the appellants that if they wished to stay on in their flats beyond the stipulated dates, they would have to enter into new lease agreements at rentals which were between 100 per cent and 150 per cent more than what they were paying at the time. The appellants refused to accept the termination of their agreements. They also said that they could not afford to pay the increased rent. They accordingly remained in occupation and continued to pay the rental amounts that they were paying at the time.

[9] The respondent's explanation as to why it gave these notices remained mainly undisputed. According to this explanation, the respondent's business model is to acquire buildings in the Johannesburg CBD that are often derelict, which it then renovates and rents out to tenants. This business model requires it to be able to generate sufficient income from rental in order to service the acquisition and renovation costs of the building. It acquired Lowliebenhof for R11 628 000, which it obtained through bond finance.

[10] After acquisition of the building, the respondent spent an amount of over R1 million on renovation and maintenance. It also employed fulltime guards and cleaners. These expenses appear to have been advantageous to the tenants of the building. In motivating why the appellants would not be able to afford comparable accommodation in the same area, their attorney, inter alia, said about other flats in the area that:

'The buildings are not well maintained and major renovations would have to be done for them to be a viable alternative to Lowliebenhof.'

[11] But the result of these expenses was that the rent paid by the appellants (and presumably the occupants of other flats in the building) was insufficient to cover the costs of bond finance, renovation and maintenance. As a result, the respondent found that the project was running at a loss. At the same time, so the respondent said, there were a number of potential tenants who were willing and able to pay the increased rental it was constrained to impose in order to render the project financially viable.

[12] The arguments advanced by the appellants against this background as to why the leases were not validly terminated, were twofold:

(a) First, they contended that each of the lease agreements contained a tacit term which forbids the use of the termination clause to effect an increase in rental beyond the increment provided for in the respective agreements;

(b) Second, that to allow the respondent to terminate the agreements for the sole purpose of allowing it to implement a rent increase would be contrary to public policy. For their argument based on public policy, the appellants relied on three grounds: (a) that the termination would be unreasonable and unfair; (b) that it would constitute an infringement of their constitutional right to have access to adequate housing in terms of s 26(1) of the Constitution; (c) that it constituted an 'unfair practice' as contemplated in the Rental Housing Act 50 of 1999 read with the Gauteng Unfair Practice Regulations 2001, promulgated under that Act.

Tacit term

[13] I propose to deal first with the argument based on a tacit term. As explained by Corbett AJA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531-532, a tacit term is an unexpressed provision of a contract, inferred by the court from the express terms of the contract and the surrounding circumstances. Because a tacit term is derived from an inference as to what both parties must have intended, if they had applied their minds, the inference will be drawn only if the court is satisfied that it is a necessary one. Once there is difficulty and doubt as to how the term should be formulated or how far it should go, it can hardly be said that the parties clearly intended the proposed term to be part of their agreement (see eg *South African Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 606B; *Desai v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) at 522H-523A).

[14] Over the years our courts have formulated the test to be applied in order to decide whether the importation of a tacit term would be appropriate in various ways. Another variation would hardly contribute to clarity. Suffice it therefore to refer to the following summary by Nienaber JA in *Wilkens NO v Voges* 1994 (3) SA 130 (A) at 137A-C:

‘The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional.’

[15] Relying on the test thus formulated, the appellants contended that a tacit term, which prohibits the exercise of the right to terminate for the sole purpose of effecting a rental increase which exceeds the increment agreed upon, is necessary to ensure the efficacy of the agreements. Without this term, so the

argument went, the landlord could demand an increase in excess of that agreed upon by simply threatening to terminate the contract. Moreover, so the argument continued, absent the proposed tacit term, there would be no consensus on an essential term of the contract. A definite or ascertainable rental is one of the *essentialia* of a lease. Were the landlord permitted to use the termination clause to effect a rental increase, the rent would not be definite or ascertainable.

[16] I find these arguments logically unsound. None of them pertain to the position while the lease agreements are in place. During the currency of the lease, the lessees are not at the landlord's mercy insofar as rental increases are concerned. Nor can there be any uncertainty about the permitted increases. Both parties are bound by the terms controlling rental increases. However, once the agreements are validly terminated, the landlord is no longer bound by the express or implied provisions of the erstwhile lease. Whether or not a lease agreement was validly terminated depends on the termination provisions. Thus, for example, any purported termination during the initial fixed period would not be valid. During that period the lessee therefore enjoys the benefits of the rental increase provisions. The same goes for the required period of notice. In short, during the currency of the lease, business efficacy does not require an incorporation of the proposed tacit term. After termination of the lease, the proposed tacit term would be of no consequence.

[17] For their further arguments in support of the tacit term they propose, the appellants relied on what Nienaber JA referred to in the quotation from *Wilkens NO* as the celebrated bystander test. It will be remembered that according to this test the enquiry is what the response of both parties would have been if, at the time the contract was being negotiated, the officious bystander were to ask them 'what would happen in such and such a case?'. Incorporation of the proposed term requires the unanimous confirmation of the proposed term with the comment 'we did not trouble to say that; it is too clear'. (Per *Scrutton LJ in*

Reigate v Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592 (CA) at 605).

[18] With reference to this test, the appellants argued that if the officious bystander were to ask the parties whether they intended the owner to be able to circumvent the rental increase provisions by making use of the termination clause, the answer would have been no. They found support for their argument in the provisions of the Ithemba agreement to the effect that if the lease is supported by Departmental subsidy, termination would be at the discretion of the lessee. This shows, so the argument went, that these leases were entered into with security of tenure in mind.

[19] As I see it, the last-mentioned part of the argument goes against the appellants. What it indicates is that, where the parties intended to qualify the termination provisions so as to provide the lessees with additional security of tenure ─ beyond the initial fixed period and the notice period ─ they knew exactly how to do so. Of greater significance, however, is that in my view the question put forward by the appellants as the one that the officious bystander would ask, is wrongly formulated. In consequence, the answer to the officious bystander is likely to be wrong. The question is not whether the landlord may circumvent the rental escalation provisions by means of the termination clause. What the officious bystander would ask is whether either party would be entitled to terminate the agreement, after the initial fixed period and in accordance with the termination clause, in order to negotiate a new lease with different contractual terms. As I see it the answer would then be ─ why not?

[20] As formulated by the appellants, the question posed by the officious bystander would introduce the consideration of motive in the exercise of a contractual right, while that consideration is generally irrelevant (see eg *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 7). Introduction of motive through incorporation of a tacit term would in my view

elicit the question ─ what motive for termination by notice would be acceptable? Would the landlord have to justify its motive for termination in every case? Is the lessee also required to have a valid motive for terminating the agreement on notice? If so, would the fact that the lessee can no longer afford the rental constitute a valid reason? As I see it, all these difficulties stand in the way of the incorporation of the tacit term for which the appellants contend.

[21] In addition, acceptance of the appellants' argument would mean that the landlord had entered into a lease of infinite duration without being entitled to terminate the agreement, even when the enterprise seeks to be commercially viable. Why this notion is inherently untenable is illustrated by the situation that arose in this case. In my view, it stands to reason that this unlikely intention on the part of the landlord can hardly be incorporated into the lease agreements on the basis that it is self-evident.

Reasonableness and fairness

[22] I now turn to the appellants' case based on public policy. Their first contention in this regard was that termination of the leases was, in the circumstances, unreasonable and unfair and should therefore not be enforced on grounds of public policy. In support of this contention the appellants argued that it had been decided by the Constitutional Court in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) that, as a matter of public policy, our courts will not give effect to the implementation of a contractual provision which is unreasonable and unfair.

[23] I believe that the argument is fundamentally flawed because the proposition on which it relies is not supported by the decision of the Constitutional Court in *Barkhuizen,* nor does it reflect the principles of our law of contract as they stand. Reasonableness and fairness are not freestanding requirements for the exercise of a contractual right. That much was pertinently decided in *Bredenkamp* (para 53). As to the role of these abstract values in the

law of contract, this court expressed itself as follows in *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 27:

'. . . . [A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relations. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty.'

(See also eg *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 21-25 and 93-95)

[24] In *Barkhuizen*, Ngcobo J, writing for the majority, first explained (para 80) what he meant by the notion of 'good faith', namely that it encompasses the concepts of justice, reasonableness and fairness. He then proceeded to express the principles of our law, as formulated by this court, inter alia in *Brisley*, in the following terms (para 82):

'As the law currently stands good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law. In this instance good faith is given effect to by the existing common-law rule that contractual clauses that are impossible to comply with should not be enforced . . . . Whether, under the Constitution, this limited role of good faith is appropriate and whether the maxim *lex non cogit ad impossibilia* alone is sufficient to give effect to the value of good faith are, fortunately, not questions that need be answered on the facts of this case and I refrain from doing so.'

[25] Unless and until the Constitutional Court holds otherwise, the law is therefore as stated by this court, for example, in *South African Forestry Co, Brisley* and *Bredenkamp*. Accordingly, a court cannot refuse to give effect to the implementation of a contract simply because that implementation is regarded by the individual judge to be unreasonable and unfair. Strictly speaking the enquiry into the reasonableness and fairness of the respondent's termination of the contract of the leases is therefore unnecessary. But in any event, I am not

persuaded that in the circumstance the termination of the leases can be denounced as unreasonable and unfair. The respondent's business venture, to acquire and upgrade residential buildings in the inner city of Johannesburg, is commendable. Amongst other things, it appears to be in line with the initiatives of the Johannesburg City Council. However, since the respondent is not a charitable organisation, it cannot be blamed for its unwillingness to pursue this commendable business venture at a loss as would be the result if the current leases were to be maintained at the agreed rentals. The respondent therefore decided to terminate the leases, as it was contractually entitled to do, to save its business from commercial demise. In doing so, it behaved transparently by disclosing its motive, which it was not obliged to do. Had it not done so, the present litigation would probably not have ensued. Objectively, I can find nothing in the respondent's conduct that can justifiably be described as unreasonable and unfair.

The impact of s 26(1) of the Constitution

[26] The appellants' further argument relied on the proposition that the termination of the leases was contrary to public policy, because it constituted an infringement of their right of access to adequate housing in terms of s 26(1) of the Constitution. The logical progression of their argument proceeded as follows:

(a) According to well-settled principles of our common law, a term of a contract will not be enforced if either the term itself or its enforcement will be contrary to public policy (see eg *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 7I-J).

(b) Public policy represents the legal convictions of the community. Since the advent of our constitutional democracy, public policy is informed by our Constitution and the values which underlie it (see eg *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 18; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 28).

(c) Consequently, a term in a contract that is inimical to the values enshrined in the Constitution is contrary to public policy and therefore, unenforceable (see

eg *Barkhuizen* para 29; *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 43).

(d) Even if a contractual provision is not in itself in conflict with any constitutional value, its enforcement may be. In that event, the first question is whether the rights so infringed ─ such as the right to practise a trade, occupation or profession, or the right to freedom of expression ─ can in principle be limited in terms of s 36 of the Constitution. If so, the second question is whether the limitation brought about by the enforcement of the contractual provision is fair and reasonable in the circumstances (see eg *Bredenkamp* paras 47-48).

(e) Security of tenure is a constitutional element of the right of access to housing in terms of s 26(1) of the Constitution (see *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 29; *Gundwana v Steko Development CC* (CCT 44/10) [2011] ZACC 14 (11 April 2011) para 40).

(f) The rights enshrined by s 26(1), including the right to security of tenure to one's home, embodies both a positive and a negative element. Positively, it does not bind private persons, but its provisions oblige the state to take reasonable measures to achieve the realisation of the right. In its negative aspect it also binds private persons. Apart from the obligations of the state, it thus forbids private persons from interfering with the rights of any other person in terms of the section (see eg *Standard Bank of South Africa Ltd v Saunderson* 2006 (2) SA 264 (SCA) para 12).

[27] In furtherance of their case, the appellants then sought to apply these principles in the following way. The termination provisions, so they conceded, are not in themselves inimical to the rights enshrined in s 26(1), since there is nothing wrong with providing for the termination of a lease on notice. Yet the implementation of these provision resulted in an infringement of their right to security of tenure to the flats that are their homes. In consequence, the respondent was bound to exercise its right under the termination provisions in a

manner that was reasonable and fair. Since the termination of their leases was in the circumstance unreasonable and unfair, it was contrary to public policy.

[28] Though I agree with the general principles relied on by the appellants, my difficulty lies with the way in which they sought to apply these principles in furtherance of their case. What their argument appears to lose sight of is that a lessee of property has no security of tenure in perpetuity. The duration of the lessee's tenure is governed by the terms of the lease.Generally speaking a lease can be for a fixed period, say 10 years or six months or for an uncertain period, eg until X dies. If the period of the lease is left undetermined, it can be terminated on notice. If the period of notice is not specifically agreed upon, the residual rules require that the notice must be reasonable. One thing a lease cannot be is 'for ever'. A purported lease in perpetuity is not a lease: it constitutes another contract, namely emphyteusis or '*erfpag*' (see eg A J Kerr *The Law of Sale and Lease* 3 ed (2004) p 273-274; 14 *Lawsa* 2 ed para 4 sv 'Lease'; De Wet & Van Wyk *SA Kontrakte en Handelsreg* 5 ed (1992) p 356).

[29] Beyond the period of the lease, the lessee has no security of tenure. If the lease is for say 10 years, it goes without saying that the lessee's security of tenure is for 10 years only. If after 10 years the lessor insists that the lease has been terminated through effluxtion of time, no one will suggest that such insistence amounts to an infringement of the lessee's security of tenure under s 26(1) of the Constitution. Perhaps less obvious is the situation where the lease is terminated on notice. But the principle remains the same. The parties agreed at the outset that the lessee's tenure can be terminated on notice. What this amounts to, is an agreement that the lessee's security of tenure will never endure beyond the end of the notice period.

[30] The position of owners, on the other hand, is quite different. The right of an owner to possession is of indefinite duration. That, I believe, is the main distinction between cases like *Jafta*, *Saunderson* and *Gundwana*, on the one

hand and the present case on the other. Those cases dealt with interference with the right of security of tenure of an owner to his or her home. The combined effect of those cases is that a termination of that right may only follow upon judgment in a court of law. In this case, as I have said, the appellants had no security of tenure beyond the duration of the leases. Put in another way, this security of tenure was circumscribed by the leases themselves. It therefore cannot be said that termination in accordance with the leases, constituted an infringement of their right to security of tenure.

Provisions of the Housing Act 50 of 1999 and the Gauteng Unfair Practice Regulations, GN 4004 of 2001

[31] Finally, the appellants contended that the termination of the leases was contrary to public policy because it constituted an unfair practice in contravention of the Rental Housing Act 50 of 1999 and the relevant regulations promulgated under that Act. From the appellants' argument it never became clear why they chose this circuitous route instead of simply relying on a contravention of the Act. But be that as it may.

[32] With regard to the provisions of the Act, the appellants' particular focus was on s 4(5)(c). In terms of this section the landlord may 'terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease'. 'Unfair practice' is defined in s 1 of the Act to mean '(a) any act or omission by a landlord or tenant in contravention of this Act; or (b) a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord'.

[33] Since the appellants do not contend for any contravention of the Act by the respondent, we are not concerned with part (a) of the definition. As to part (b), 'prescribed', is defined in s 1 to mean 'prescribed by regulation by the Member of the Executive Council of a province responsible for housing matters, by notice in the Gazette'. With reference to the regulations thus prescribed by the MEC for

Housing in the Province of Gauteng (GN 4004 of 2 July 2001), the appellants relied on two provisions, namely: (a) Regulation 41(d) which prohibits a landlord from engaging in 'oppressive or unreasonable conduct', and (b) Regulation 14(1)(f) which provides that 'a landlord must not conduct any activity which unreasonably interferes with or limits the rights of the tenant . . .'.

[34] I do not agree with the appellants' contention that the termination of their leases constituted a contravention of these statutory provisions. First, the provisions of the Act and the regulations relied upon are directed against a 'practice'. That does not contemplate, as I see it, unacceptable conduct by the landlord on an isolated occasion (see eg *The Concise Oxford English Dictionary* which defines 'practice' (in this context) as 'the customary or expected procedure or way of doing something'). It envisages incessant and systemic conduct by the landlord which is oppressive or unfair. Termination of a lease would therefore not qualify as a practice. Secondly, for reasons I have already stated, I do not believe that the respondent's terminations of the leases could in the circumstances be denounced as unreasonable or unfair, let alone oppressive.

Costs of two appellants in the court a quo

[35] This brings me to the second part of the appeal which is directed at the court a quo's order to the effect that Ms Siguca and Ms Masemola, who were successful on the merits, should pay their own costs. It will be remembered that the respondent conceded in the court a quo that its eviction application against these two appellants could not succeed. The reason for the concession was that these two appellants had entered into the Ithemba agreement and that, because their leases were supported by a Department of Housing subsidy, these leases could, in terms of the specific provisions of the agreement, only be terminated at the discretion of the lessee.

[36] Since the impugned costs orders were made in the exercise of its discretion by the court a quo, this court can only interfere on the basis that the

discretion had not been properly exercised. I do not believe that the appellants have made out that case. On the contrary, I think these costs orders were justly made. All the appellants, including those who were successful and those who were not, were represented by the same counsel. They all filed affidavits which were identical in all material respects. Where the appellants were unsuccessful, no costs orders were made in favour of the respondent and I can see no reason why the position of the successful appellants should be any different. Moreover, the defence on which the two appellants ultimately succeeded was only raised at a late stage of the proceedings, when virtually all the papers had been filed.

Costs on appeal

[37] Following the guidance of the Constitutional Court in *Barkhuizen* (para 90) and in *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC), the court a quo held that, since the appellants raised important constitutional issues, they should not be burdened with costs. It therefore made no order as to costs. I believe this court should adopt the same approach with regard to the costs of appeal.

Order

[38] In the result the appeal is dismissed.

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F D J Brand

Judge of Appeal

APPEARANCES:

APPELLANTS:	D I Berger SC (with him S Wilson & I de Vos)
	Instructed by Mdladlamba Attorneys, Johannesburg
	Lovius Block Attorneys, Bloemfontein
RESPONDENTS:	G C Wright (with him N Mbelle)
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