THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 429/2015

In the matter between:

THE MINISTER OF HUMAN SETTLEMENTS, WESTERN CAPE PROVINCIAL GOVERNMENT **APPELLANT**

and

THE PENHILL RESIDENTS SMALL FARMERS CO-OPERATIVE LTD **FIRST RESPONDENT**

GRAHAM ADA **SECOND RESPONDENT**

IVAN CLOETE **THIRD RESPONDENT**

Neutral Citation: *Minister of Human Settlements, Western Cape v Penhill Residents Small Farmers Co-operative* (429/2015) [2016] ZASCA 99 (3 June 2016)

Coram: Lewis, Cachalia, Saldulker and Mathopo JJA and Tsoka AJA

Heard: 24 May 2016

Delivered: 3 June 2016

Summary: Land: unlawful occupation of land owned by provincial government: occupiers of farm land interdicted from taking further occupation of additional land and erecting new structures: did not have consent of owner to settle on additional land and were not deprived of any right unlawfully.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Saldanha J, Cloete J and Nyman AJ concurring, sitting as full court of appeal)

1 The appeal is upheld with the costs of two counsel where so employed.

2 The order of the full court is set aside and replaced with the following:

'(a) The first respondent is interdicted and restrained from-

(i) Settling on any of the portions of the properties listed in annexure A to the notice of motion and which are demarcated in red on the plan attached hereto (the unoccupied areas);
(ii) Erecting structures on any portion of the unoccupied areas;
(iii) Claiming rights over any portion of the unoccupied areas by cordoning off such portion;
(iv) Inciting or encouraging other persons to settle on any portion of the unoccupied areas, or to erect structures on such portions.

(b) The first respondent is directed to pay the costs of the application.'

JUDGMENT

Lewis JA (Cachalia, Saldulker and Mathopo JJA and Tsoka AJA concurring)

[1] The Western Cape Provincial Government owns a tract of land close to Stellenbosch known as the Penhill Farms. The land consists of several registered farms and is very close to the N2 highway running between Cape Town and Somerset West. It is thus land of considerable value. I shall refer to it either as Penhill Farms or the property. Until 1994 it was not occupied and not farmed. In that year indigent small scale farmers started to occupy Penhill Farms and to establish farming operations – mostly pig and livestock farming.

[2] The number of people occupying the land and the extent of Penhill Farms used for farming increased significantly over time. The Provincial Government was aware of the occupation, and indeed over many years gave assistance to the farmers and tried to regularize their occupation through proposed leases at a nominal rental. In 2000 the farmers began to organize as a group and eventually formed the Penhill Residents Small Farmers Co-Operative Ltd, which is the first respondent in this appeal. I shall refer to it as the Penhill Farmers.

[3] However, in early 2011 the Provincial Government wished to settle another group of farmers – the Ithemba farmers – for whom it was obliged to find land for occupation in terms of a settlement made an order of court, on the unoccupied portions of Penhill Farms. The Penhill Farmers were advised before then that the unoccupied land was needed for other people. Nonetheless, the Penhill Farmers and others continued to take occupation of portions of the property previously unoccupied and to erect structures without consent. In February 2011 they were given notice by the Department of Human Settlements that they should demolish the structures illegally erected. The notice was ignored and people continued to erect structures and to fence off previously unoccupied portions of Penhill Farms.

[4] The Minister of Human Settlements, Western Cape Provincial Government (actually the Member of the Executive Council (MEC) of the Provincial Council, but referred to in the application as a Minister, and I will refer to him as such accordingly) accordingly brought an urgent application in May 2011, which was heard on 14 June 2011, for an interdict preventing further settlement and the erection of new structures on Penhill Farms. The respondents cited were, in addition to Penhill Farmers, two members, Mr G Ada and Mr I Cloete. Mr Ada has subsequently died and Mr Cloete no longer occupies a portion of Penhill Farms: the only respondent now is Penhill Farmers. The Minister also sought orders prohibiting the incitement of others to occupy and to erect structures on unoccupied portions of Penhill Farms. These were identified in an annexure to the notice of motion.

[5] The Provincial Government did not attempt to interfere with the occupation of the property by existing occupiers: it did not seek to evict any of the Penhill Farmers or other occupiers. It sought to prevent future unlawful occupation. Its ownership of the property was not disputed by the respondents. The court of first instance (Allie J in the Western Cape High Court) dismissed the application some six months after it was heard, despite the urgency. It refused an application for leave to appeal in February 2012. This court gave leave to appeal against Allie J's order to the full court of the Western Cape High Court.

[6] The full court (per Saldanha J, Cloete J and Nyman AJ concurring) heard the appeal in July 2013, and refused it in November of the following year. This court gave special leave to appeal against the order of the full court. It directed the Provincial Government to file, together with the record of appeal, a plan depicting precisely the portion of the properties in respect of which it claimed an interdict, together with a description of the area. This court also requested the parties to make good faith efforts to agree on the current number of occupiers, the portions of Penhill Farms occupied, and the extent not occupied.

[7] No agreement was reached. The Provincial Government attempted to get clarity, and on its own inspection concluded that 52.2473 hectares (26.1 per cent) of the property were occupied, whereas Penhill Farms was 200.0844 hectares in extent. Thus 73.9 per cent was not occupied. It also established that there were 269 people occupying Penhill Farms. The areas not occupied were described as empty farm land. The State Attorney advised the court of this on 26 March 2015.

[8] In August 2015 professional land surveyors provided a comprehensive survey at the request of the Provincial Government. The statistics were somewhat different. The surveyors advised that 69.8154 hectares (36.4 per cent of the Penhill Farms) were actively occupied; 86.4374 hectares (45.08 per cent) have been fenced off for grazing; and 35.4937 hectares (18.51 per cent) were unoccupied. One of the inferences to be drawn from the difference is that there had been further settlement between March and August of 2015. Indeed, the surveyor observed in his report that

‘The situation on the ground is dynamic and changing frequently. New settlement/occupation and “subletting” are happening continuously.’

[9] It is possible, however, that the first inspection following the court’s request was less accurate than the surveyor’s observations. Whatever the reason for the discrepancy, there are at least 35.4937 hectares of land unoccupied and on which the Provincial Government wishes to develop housing and settle the Ithemba farmers.

[10] What is more startling is the significant difference between the occupation alleged when the application was first moved and the position established by the land surveyor some four years after the interdict was sought. In June 2011 only some 90 hectares were occupied, including fields used for grazing. About 110 hectares was thus available for settlement of the Ithemba farmers and for other developments proposed by the Provincial Government.

[11] The interdict sought would have protected the clear right of ownership that vests in the Provincial Government. But Allie J refused it, finding that the Penhill Farmers had a ‘legitimate expectation’ to use the entire property, exceeding 200 hectares, and had thus to have been given ‘lawful notice’ before seeking the interdict. She also held that the Provincial Government had given ‘actual authority’ to occupy and use the entire land for farming purposes. The full court confirmed that finding.

[12] Before traversing the development of the settlement and the history of negotiations between the parties, I should observe that these findings are mutually destructive. If the Penhill Farmers had actual consent, then the question of legitimate expectation would not have arisen. The question is one of fact, and mutually exclusive facts cannot be pleaded in the alternative, as the courts below failed to appreciate. The Penhill Farmers could not rely on consent, and then, if that was not established, rely in the alternative on the right to a hearing before they are prevented

from unlawfully occupying land that they had not occupied before. In any event, a legitimate expectation to a hearing arises only where there is a decision taken by an administrative body: the launch of proceedings to protect a right can hardly be said to be administrative or executive action.

The history of occupation and of negotiations between the Provincial Government and the Penhill Farmers

[13] I have indicated already that the first farmer settled on Penhill Farms in 1994, and that further settlement occurred thereafter. The entire farm was never occupied, which Mr Ada and Mr Cloete confirmed in their answering affidavits in the application. Mr Ada said:

'The portion of the farm occupied by [the Penhill Farmers] and currently used for farming purposes is only a small portion of the total size of the farm and will not adversely affect any housing project implemented on the farm.'

They also did not deny that the vacant land was designated for imminent use by the Provincial Government.

[14] In response to the allegations that they were responsible for new structures being erected, the Penhill Farmers pointed out that the property was very large and was occupied by 'a substantial number of persons who are not members of the [Penhill Farmers]. Any one of these persons could have erected the structure.' Penhill Farmers do not thus claim that they occupy all of the property, and they deny that they are responsible for settlement by other people.

[15] The question that then arises is whether the Provincial Government ever gave them consent to occupy the entire property, as the courts below found. Such consent is essentially argued to have arisen from negotiations between the parties over the years. There were a number of meetings held from 2004 onwards to regularize their existing use of portions of Penhill Farms. Minutes of these meetings, and draft documents put up by the Penhill Farmers, show various attempts to structure their arrangements formally. On 9 December 2004, a meeting was held between the

Penhill Farmers, the Provincial Government and the City of Cape Town. They agreed to ‘give attention to the zoning of the land for agricultural purposes, the provision of services to the small scale farmers on the land and the conclusion of a formal lease agreement with [the Penhill Farmers] to regularize its members occupation of the land’. Members of Penhill Farmers then drew up an action plan to deal with services.

[16] In May 2005 the Provincial Minister of Agriculture (also in fact an MEC) wrote to the Provincial Minister of Human Settlements requesting him to submit a project plan and information about the nature of the farming to be conducted so that a lease agreement could be drafted for each farmer. In October 2005 the former recorded in a letter to Mr Cloete that a meeting had been held at which it was agreed that the conclusion of lease agreements between the individual farmers and the Department of Human Settlements was a priority.

[17] In August 2006, a firm of consultants engaged by the Provincial Department of Agriculture provided it with a ‘project plan’ for the development of the small-scale farming on Penhill Farms. The Department of Agriculture confirmed in a letter to Mr Cloete on 6 September 2006 that the Penhill Farmers could use the project plan as a basis for concluding lawful lease agreements with the individual farmers.

[18] On 23 November 2006, the Provincial Government advised the Penhill Farmers that property would be made available to individual farmers for leases for a period of nine years and 11 months. The Department of Transport and Public Works (Public Works) would take over all risk, and profit and loss, but should any of the properties not be used for farming they would have to be handed back to the Department of Local Government and Housing. Public Works would manage the leases while Agriculture would facilitate farming and mentor the farmers. However, no leases were actually concluded, and it was clearly the understanding of the Provincial Government that the leases would be with the individual farmers in respect of each portion of Penhill Farms farmed by them.

[19] On 27 February 2007, the Chief Director of Planning and Development in the Provincial Department of Local Government and Housing wrote to Mr Cloete advising that, while the department was committed to making land available for the farming project on Penhill Farms, there was increasing pressure to provide housing in the area and some of the land might be required for housing. This was followed by a meeting on 19 July 2007 between City of Cape Town representatives, the Provincial Department of Agriculture and the Penhill Farmers where the proposed development was discussed. The following year, on 9 April 2008, another meeting was held with the same representatives where the City advised all present that it proposed a holistic development of the Blue Downs area, into which Penhill Farms fell, with the financial assistance of the Development Bank. The minutes recorded that:

'It was agreed that a User Agreement will be entered into with two parties. The definition of User Agreement and Lease Agreement in legal terms is the same thing. The proposed ten (10) year period cannot be acceded to due the greater Bluedowns development plan and the proposed plan has now been submitted to the City of Cape Town for comments. The agreed term for the User Agreement will be for three (3) years with a condition for renewal for a longer period subject to the finalization of a study for greater Bluedowns development and a rental will be at market related (sic).'

[20] A draft lease agreement was prepared by the Provincial Government (Local Government and Housing). The Penhill Farmers were said to be the lessee. A plan was attached. It is not clear whether the plan was in respect of the entire property or only portions. The Penhill Farmers maintain that it was in respect of the entire property but it is not apparent from the plan. They attach significance to this. Indeed it is the high watermark of their case based on actual consent to occupy the entire property.

[21] At a meeting on 30 April 2008, the Penhill Farmers were advised that the draft lease had been prepared and had been sent to the legal services department for input. They presented their own draft lease to the chairman. The Provincial Government engaged a property valuator to prepare a property valuation in order to

determine a market related rental for possible letting to ‘small farmers’. The date of the valuation was 2 June 2008. The valuation related to Penhill Farms but also to other properties – some 248 hectares in all.

[22] The next meeting was on 9 October 2008. There was a discussion of the term of the draft lease that prohibited the erection of any permanent structure: the Penhill Farmers pointed out that there were already permanent structures on the property. There was also disagreement over the rental to be paid. The valuator had recommended that it be five per cent of the value, which was set at R1 000 per hectare. The Penhill Farmers proposed one per cent of value.

[23] The parties met again on 19 November 2008. The same issues were discussed. Several other meetings were held over the course of the following two years but no agreement was reached. On 14 January 2011 another meeting was held where the same issues were raised again. The Provincial Government’s representative confirmed again that it was willing to assist the Penhill Farmers but that the property was situated along a major transport route and was needed for urban development. The Penhill Farmers registered dissatisfaction at not being included in the discussions about the relocation of the Ithemba farmers but stated that ‘they are not against the Ithemba farmers also farming at Penhill, but that they need to be part of future discussions’. The notice to demolish structures was issued shortly after this and the urgent application followed in May 2011.

Consent

[24] The courts below found that there was actual consent for the Penhill Farmers to occupy the entire property, and that is what the Penhill Farmers argue again on appeal. It can be seen, however, from the minutes of meetings and the content of correspondence that there were negotiations over the occupation of the portions already farmed. But there was nothing either express or implicit in any of the discussions that approved the Penhill Farmers’ taking occupation of the entire property.

[25] As I have said, they place store on the plan attached to the draft lease prepared by the Provincial Government and on the valuation done in respect of Penhill Farms as well as on the negotiations to regularize their position over the years. But does any of this indicate unequivocal conduct that justifies an inference that there was consensus regarding the term of the contract they allege? In *Standard Bank of South Africa Ltd & another v Ocean Commodities Inc & others* 1983 (1) SA 276 (A) this court said (at 292B-C):

'In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged.'

[26] In *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A) Corbett JA, after citing the test in *Ocean Commodities*, referred to a different and less stringent formulation (at 165B-C): 'a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence'. He did not determine which test was preferable as it was unnecessary for the determination of the case. The requirement that unequivocal conduct is required before a contract will be held to have come into existence was also confirmed in *McDonald v Young* [2011] ZASCA 31; 2012 (3) SA 1 (SCA) para 19.

[27] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & others (Centre on Housing Rights and Evictions & another, Amici Curiae)* [2009] ZACC 16; 2010 (3) SA 454 (CC) dealt with consent of an owner to occupy property in determining whether there had been compliance with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. The issue there was whether eviction had been effected lawfully. There are five different judgments in the matter but the result was agreed. The only relevance of *Residents of Joe Slovo* to this matter is that the court made it clear that by 'consent' is meant not simply acquiescence, but voluntary agreement. Consent cannot be conferred unless it is

asked for and given (para 55). The court endorsed the test mooted by Corbett JA (above at 165B-C) as to drawing an inference that all parties agreed on occupation: consent must be the 'most plausible probable conclusion from all the proved facts and circumstances' (para 58).

[28] Where is the unequivocal conduct of both the Provincial Government and the Penhill Farmers, showing that the Provincial Government had consented to the occupation by the farmers of the entire property, to be found in any of their meetings or other interaction? During the course of argument before us, counsel for the Penhill Farmers accepted that the Provincial Government had not acted consistently or unequivocally over the course of the discussions that took place over the years. All the discussions related to regularizing the existing occupation by the Penhill Farmers – not future conduct. There is no evidence of unequivocal conduct that establishes, as the most plausible probable inference, that the Provincial Government had consented to the Penhill Farmers occupying the entire property. There was thus no consent and the full court erred in finding that there was.

Legitimate expectation

[29] The full court held also that the decision by the Provincial Government to use a portion of the property for the Ithemba farmers and for a housing development constituted administrative action – 'it had a direct effect on the rights and legitimate expectations of the' Penhill Farmers. The consequence of the 'decision' was that there was less land available to be used when, throughout the negotiation period, they 'were brought under the impression that the entire property was available for their beneficial occupation'. Nothing in the factual matrix bears this out. (See *Minister of Environmental Affairs and Tourism & others v Phambili Fisheries (Pty) Ltd* [2003] ZASCA 46; 2003 (6) SA 407 (SCA) paras 64-69.) And a decision by an owner of property to use it can hardly amount to administrative action that impacts adversely on a person who has no right to use or occupy it.

[30] The finding that the Penhill Farmers had a right to be consulted about the future use of property to which they had no right is quite astonishing. And equally astonishing are the following two conclusions, which are at odds with each other:

'In the result I am satisfied that the respondents had authority to occupy the entire 200ha of the property and that they enjoyed a legitimate expectation to proper notice and consultation with regard to any restriction of such occupation, whether by way of a substantial housing development on the property or the relocation of the Ithemba Farmers onto the property.'

In *Vanger v Thomson & Meyer* 1915 CPD 752, Juta JP (Kotzé J concurring) said, where inconsistent and mutually exclusive facts had been pleaded by a defendant:

> 'I do not think that a defendant can say, "I did not buy," and "I paid." Mr *Upington* has cited cases in our Courts and in the High Court at Kimberley to the effect that it is nothing unusual for a defendant to plead that he did not enter into a contract and that the contract was cancelled, but he has cited no case which says that a defendant may plead that he did not buy and that he paid. It would be very difficult to conceive of a defendant going into the box and *bona fide* denying the purchase – especially in the present case in view of the account showing that a large sum has been paid off – and also saying that he had paid. Having eliminated the possibility of all special pleas, as I already said, I cannot believe that this is a *bona fide plea*. The magistrate was therefore quite right in not allowing these two pleas to stand.'

[31] If there was actual consent, the Provincial Government would not have been entitled to an interdict. How then can the Penhill Farmers honestly allege in the alternative that promises had been made and expectations arisen which gave rise to a right to notice and consultation? The full court thus erred in finding both that there was both consent and a legitimate expectation that the Penhill Farmers be heard.

[32] The effect of the full court's decision would be that when government, provincial or local, attempts to negotiate with unlawful occupiers in order to regularize their occupation, it will be precluded from asserting its right to use unoccupied land. The consequences could be dire.

[33] The Provincial Government is entitled to the interdict that it seeks. It, and people in the Western Cape, have been severely prejudiced by the delay in the court system. It is also entitled to the costs in the courts below and on appeal. Although the Penhill Farmers argued that they were asserting constitutional rights, that is not in fact the case. They had no right at all to the whole property, and they are commercial farmers. They were seeking to enhance their commercial positions and they did so very successfully in the period between the launch of the application and the set down of this appeal.

[34] Accordingly:

1 The appeal is upheld with the costs of two counsel where so employed.

2 The order of the full court is set aside and replaced with the following:

‘(a) The first respondent is interdicted and restrained from-

(i) Settling on any of the portions of the properties listed in annexure A to the notice of motion and which are demarcated in red on the plan attached hereto (the unoccupied areas);
(ii) Erecting structures on any portion of the unoccupied areas;
(iii) Claiming rights over any portion of the unoccupied areas by cordoning off such portion;
(iv) Inciting or encouraging other persons to settle on any portion of the unoccupied areas, or to erect structures on such portions.

(b) The first respondent is directed to pay the costs of the application.’

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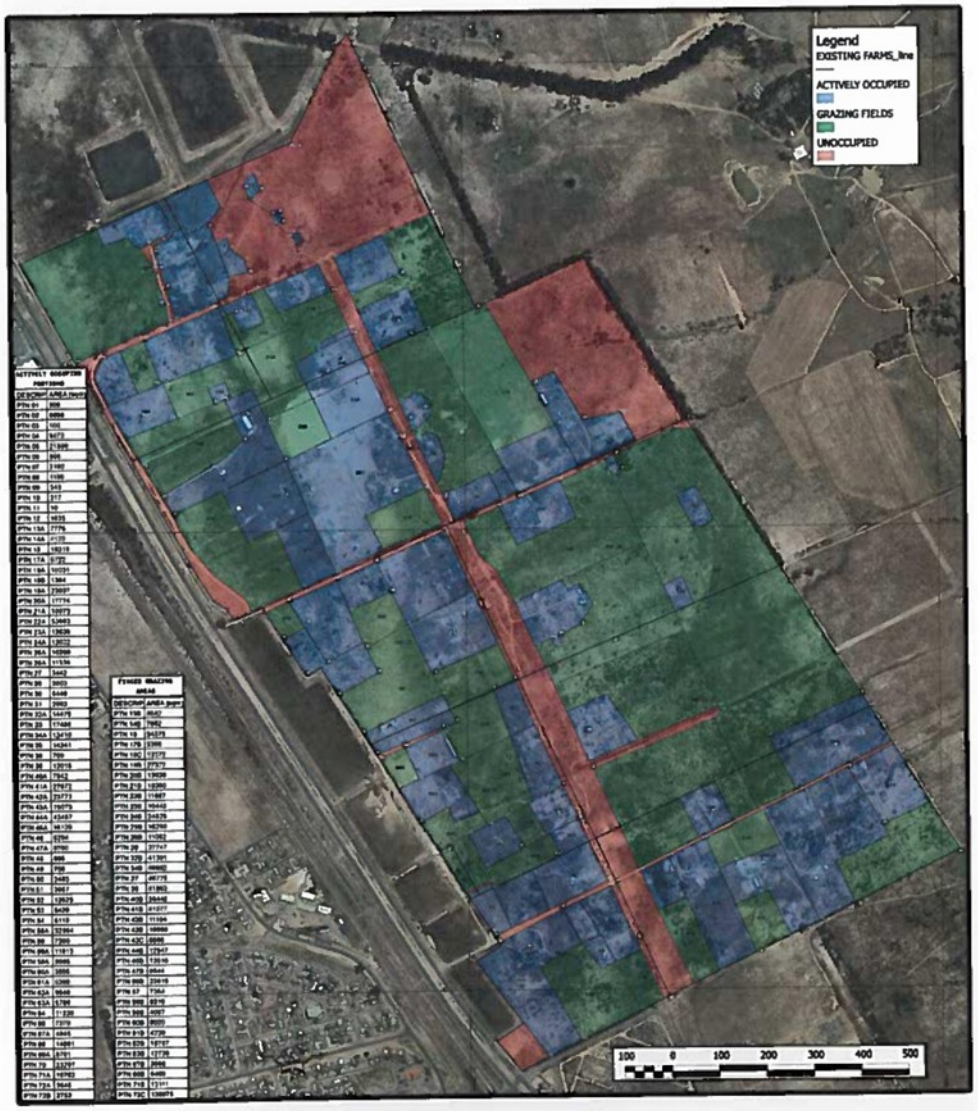
C H Lewis

Judge of Appeal

ANNEXURE C



NOTES
- Projection: Gauss Conform
- Ellipsoid: WGS84
- Datum: Hart94/Lo.19

PENHILL (JACOBSDAL)
Informal Farmers: Land Occupied

COMPILED BY

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SCALE	DATE
1/3000 (@ A0)	August 2015

REF NO.	REV NO.
STEL/9255/Penhill/1	1

APPEARANCES

For the Appellant:	P B J Farlam (with him K Pillay and T Mayosi)
Instructed by:	State Attorney, Cape Town State Attorney, Bloemfontein
For the First Respondent:	S Magardie (with him R Matsala)
Instructed by:	Legal Resources Centre, Cape Town Webbers, Bloemfontein