IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 31 January 2000 **CASE NUMBER**: LCC15/98
before **DODSON J**

Decided on: 20 June 2000

In the case between:

BADIRI HOUSING ASSOCIATION Applicant

and

RAMAVHOYA and others Respondents

JUDGMENT

DODSON J:

Background

[1] On 6 March 2000 I granted a rule *nisi* in this matter and at the same time ordered that oral evidence be heard on certain questions on the return day of the rule *nisi* . This judgment sets out my reasons for the order.

[2] The applicant is an association not for gain incorporated under section 21 of the Companies Act.[1] It owns a property known as Portion 137 (a portion of Portion 120) of the Farm Diepsloot 388, Registration Division JR, Province of Gauteng. I will refer to it as "the property". The applicant is in the process of developing a low income housing scheme on the property. To this end it has secured the necessary approval to establish a township on the property. The respondent lives in a house on the property with his family. The applicant seeks the eviction of the first respondent and his family in terms of section 9 of the Extension of Security of Tenure Act[2] to make way for the development. Relief is

---

1 Act 61 of 1973.

2 Act 62 of 1997.

no longer sought against the remaining respondents. I will therefore refer to the first respondent as "the respondent".

[3] The Extension of Security of Tenure Act regulates the eviction of "occupiers". I will refer to the Act as "ESTA". "Occupiers" are defined as persons who reside on (essentially rural[3]) land belonging to another and who, on 4 February 1997 or thereafter, had consent or another right in law to do so.[4] There is also another category of persons who are deemed to be occupiers who do not fit in with this definition. They are persons who previously had consent, whose consent to reside on the land was lawfully withdrawn before 4 February 1997, but who have continuously resided on the land since consent was withdrawn.[5] It was common cause that the respondent was an occupier. On the applicant's version, he was an occupier in the latter category and on the respondent's version in the former category.

[4] Transfer of the property was registered in the name of the applicant on 17 July 1996. The applicant's version of events after the transfer is as follows:

---

3 The land to which ESTA applies is essentially rural land falling outside approved or proclaimed townships. See section 2(1) of the Act which provides:

> "Subject to the provisions of section 4, this Act shall apply to all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships, but including-
>
> (a) any land within such a township which has been designated for agricultural purposes in terms of any law; and
>
> (b) any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition."

It appears to be common cause that ESTA applies in this case because the respondent is covered by paragraph (b).

4 See the definition of "occupier" in section 1 of ESTA. There are specific categories of persons who are excluded from the definition, but these are not important for present purposes.

5 Section 3(2) of ESTA. It is quoted in n 11.

(i) Neither the seller, nor the respondent nor anyone else informed the applicant of the respondent's presence or that the respondent had enjoyed consent to reside on the property prior to transfer.

(ii) The applicant says that it only became aware of the respondent's presence after acquiring the property, when it came across respondent living in a dilapidated, unserviced brick and mortar house on the property.

(iii) In November 1996, the applicant requested the respondent to move. The respondent requested that he be allowed to stay on until the first week of January 1997 after which he would leave the property. The applicant agreed to this.

(iv) The applicant arranged for the respondent to be allocated a plot in a neighbouring informal housing settlement and informed him that he could demolish the house he was in and take the building materials with him.

(v) The respondent failed to move in January 1997 and was again requested by the applicant to do so.

(vi) By April 1997, the respondent had still not moved. Instead he demanded that he be given a serviced stand in the applicant's development on the property. In reply, the applicant sent a letter which more or less recited the above sequence of events and also stated:

> "We write to you to insist that you move off from our property in Diepsloot within seven days of the date of this letter, failing which we will be forced to take legal action to have you removed from our property."

(vii) The respondent still did not move. In May 1997 the respondent was again told to leave and reminded that there was a plot available for him at the informal settlement. Respondent replied that he would only vacate the property if he received R30 000 in compensation.

(viii) This stalemate continued until these proceedings were launched in March 1998.

[5] The respondent's version is that he moved onto the property in 1980 after being persuaded to do so by the then owner who was also his employer. In agreeing to come and reside on the property, he lost the opportunity to purchase a house offered to him by a family member in Soweto. He was allowed to rebuild the house in which he now lives on the property. The respondent says that he did the rebuilding at his own expense. The then owner allowed him to live there on a permanent basis and assured him that he would never sell the particular portion on which the respondent lives.

[6] In relation to the applicant's version regarding the steps taken to get the respondent to leave the property, the respondent disputes much of what the applicant says. However, he admits that he has interacted with the applicant's officials and that he seeks compensation from the applicant for the improvements which he effected. He also admits having expressed the desire to be accommodated within the applicant's development. I will return to the facts, and respondent's version in particular, below.

Requirements for an eviction order

[7] Section 9(2) of ESTA sets out four separate requirements which must all be satisfied before a court may grant an order for the eviction of an occupier.[6] It reads:

> "9(2) A court may make an order for the eviction of an occupier if-
>
> (a) the occupier's right of residence has been terminated in terms of section 8;
>
> (b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
>
> (c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and

6 See for example *City Council of Springs v Occupants of the Farm Kwa-Thema 210* [1998] 4 All SA 155 (LCC); 2000 (1) SA 476 (LCC) at para [9]; *Atkinson v van Wyk and Another* 1999 (1) SA 1080 (LCC) at para [11].

> (d) the owner or person in charge has, after the termination of the right of residence, given-
>
> (i) the occupier;
>
> (ii) the municipality in whose area of jurisdiction the land in question is situated; and
>
> (iii) the head of the relevant provincial office of the Department of Land Affairs, for information purposes,
>
> not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Land Affairs not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with."

[8] As has been pointed out by this Court, a person seeking the eviction of an occupier under ESTA must make all the necessary averments and adduce the necessary evidence to make out a case in relation to every provision to which the court must apply its mind in deciding whether an eviction order is justified.[7] Thus if the applicant fails to comply with any one of paragraphs (a) to (d) of section 9(2) it is not entitled to the relief sought. For reasons which will become apparent, it is necessary for me to start with paragraph (d).

Compliance with section 9(2)(d)

[9] The difficulty for the applicant in this regard, was that it gave the notice referred to in section 9(2)(d)(iii) to the national office of the Department of Land Affairs rather than the head of the Gauteng regional office.[8] To cure this defect the applicant sought a two month postponement to allow for service on the head of the Gauteng regional office and to give that officer an opportunity to intervene. That, the applicant suggested, would be sufficient compliance with the proviso in section 9(2)(d). In the case

---

7 *De Kock v Juggels and Another* 1999 (4) SA 43 (LCC) at para [13];*Karabo and Others v Kok and Others* 1998 (4) SA 1014 (LCC); [1998] 3 All SA 625 (LCC) at para [13].

8 The offices were at that time at different locations in Pretoria.

of *City Council of Springs v Occupants of the Farm Kwa-Thema,210,*[9] the notice requirements of section 9(2)(d) had also not been complied with. The Court, nonetheless, held as follows :

> " [14] The object of section 9(2)(d) is twofold. Firstly, it ensures adequate notice to persons who may want to object or otherwise protect their rights. Secondly, it gives the municipality and the provincial office of the Department of Land Affairs sufficient time to take the steps which they may consider necessary to deal with the situation. Notice of at least two calendar months is required. If the objective of adequate notice is met, there might well be sufficient compliance with the section, despite the absence of exact compliance. If the required notice can be achieved in some other manner, such as by the issue of a rule *nisi*, the purpose of section 9(2)(d) will also be met. In this connection the Court ought to adopt a robust approach, as was suggested by Hoberman AJ in *Msoki v Minister of Law and Order and Others:*
>
> > 'I am mindful of the fact that, as stated by Holmes JA, in *Commercial Union Assurance Company of South Africa Ltd v Clarke* 1972 (3) SA 508 (A) at 516B-C, *`a robust and practical approach as distinct from a legal one'* is to be adopted in dealing with legislative provisions which require a claimant to give due notice prior to the institution of proceedings.'
>
> [15] On the view which I take of the matter, any deficiency in the notice to the occupiers of the Council's intention to apply for an eviction order can be cured by the issue of a rule *nisi* with a return date more than two calendar months later, and by requiring the Council to serve the rule *nisi* on the occupiers. This approach is in line with the proviso to section 9(2)(d), which recognises that the eviction litigation may commence during the notice period."[10]

[10] The court was prepared to grant a rule *nisi* provided that there was *prima facie* compliance with section 9(2)(a) to (c). I approached this matter on a similar basis. The significance of this is that the findings referred to in this judgment must be treated as *prima facie* ones.

Compliance with section 9(2)(a)

[11] Section 9(2)(a) requires that there has been a termination of the occupier's residence in terms of section 8 of ESTA. Section 8(1), which is applicable in this case, reads:

> "8(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to-
>
> (a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;

---

9 Above n 6.

10 Above n 6 at para [14] - [15].

(b) the conduct of the parties giving rise to the termination;

(c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;

(d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and

(e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence."

[12] Reading sections 8(1) and 9(2)(a) together, the following requirements emerge:

(i) a termination of the right of residence;

(ii) which was lawful; and

(iii) just and equitable with reference to "all relevant factors" and the five specific factors mentioned.[11]

---

11 Note that, if applicant's contention as to the basis that respondent is an occupier is correct, as seems to be the case, then section 3(2) is also relevant to section 8(1). Section 3(2) reads:

> "If a person who resided on or used land on 4 February 1997 previously did so with consent, and such consent was lawfully withdrawn prior to that date-
>
> (a) that person shall be deemed to be an occupier, provided that he or she has resided continuously on that land since consent was withdrawn; and
>
> (b) the withdrawal of consent shall be deemed to be a valid termination of the right of residence in terms of section 8, provided that it was just and equitable, having regard to the provisions of section 8."

However, if one approached the enquiry into compliance with section 9(2)(a) and 8(1) from this perspective, the evaluation required seems to be little different as the introductory portion of the subsection requires an evaluation of whether the consent was lawfully withdrawn and paragraph (b) requires an evaluation of the justice and equity of the withdrawal as against the five factors referred to in section 8(1). The consequences of non-compliance with the requirement of lawful withdrawal of consent may differ though. This problem does not arise here because I found *prima facie* that there was a lawful withdrawal of consent.

It was argued on behalf of the respondent that on the applicant's version, there had in fact never been any termination of the right of residence in that the applicant had never withdrawn the respondent's consent to reside on the property. I disagree. I am satisfied that the conduct of the applicant's officials in their dealings with the respondent during the period from November 1996 onwards was consistent with the termination of the respondent's right of residence. The respondent does not deny that there was interaction between himself and the applicant's officials. He does deny that he ever agreed to vacate the property. But this does not mean that the applicant did not terminate his right of residence. In fact the respondent's version, whilst differing from the applicant's on some of the detail, tends to confirm a process whereby the applicant terminated his right of residence and then attempted to secure the respondent's voluntary vacation of the property.

[13] The next question is whether the termination was lawful. That depends on the nature of the consent in term of which the respondent occupied the land. It is implicit in the applicant's having sought relief in this Court that it concedes that the respondent enjoyed consent to reside on the property and that that consent was sufficient to qualify him as an occupier in terms of ESTA. Precisely what form of consent it was, on the applicant's version, is not clear. The form of consent for which the respondent contends is also not clear on the affidavits. He simply avers that he has lived on the property since 1980 and had the consent of the previous owners. However, in an unsworn statement, filed by the respondent at a time when he was not represented, he suggests that the consent was a generous one which contemplated a permanent permission to occupy.[12] There are a number of difficulties which I have with the respondent's unsworn statement:

(i) The fact that it was not made under oath.

(ii) The applicant was never furnished with a copy and never had the opportunity of dealing with it. The applicant consented to the Court's having regard to the statement, but contended that limited evidentiary weight should be attached to it. At this point in the proceedings, I am inclined to agree.

---

12 The details are set out in paragraph [5].

(iii) Once the respondent secured legal representation, this aspect was never adequately taken up in the proper opposing affidavit which he filed.

(iv) None of the persons whom the respondent suggested were witnesses to the form of consent which pertained to his occupation deposed to affidavits.

(v) The typed document to which the respondent refers in his statement which allegedly recorded the generous terms of the consent, was not annexed.

(vi) The respondent alleges that the generous consent was originally given by a Mr Benjamin, his employer, in 1980. The title deed annexed to the applicant's papers suggests that the owner before the applicant was "Vental Boerdery CC" and that it took transfer of the property in 1986. In the absence of any further evidence from the respondent explaining the situation, I cannot accept that the form of consent which may have been granted by Mr Benjamin was also agreed to once the property was transferred to Vental Boerdery.

[14] Taking these deficiencies in the respondent's case into account, at this stage of the proceedings, the most I can infer is that, *prima facie*, the form of consent enjoyed by the respondent was a precarious consent for residential purposes which had been of long duration. It may well be that if oral evidence were to be led, the respondent could persuade the Court that a different form of consent prevailed. The version set out in the unsworn statement is not necessarily far-fetched. He refers in the statement to a Mr Francois Venter and a Mr Gabie Venter having been aware of the terms of the consent. There may well be a connection between the surname "Venter" and "Vental Boerdery" If he can show that the more generous form of consent prevailed before transfer of the property to the applicant, the respondent argues that the applicant is bound by it because section 24(2) of ESTA applies retrospectively. It reads:

> "Consent contemplated in this Act given by the owner or person in charge of the land concerned shall be binding on his or her successor in title as if he or she or it had given it."

On that basis it is arguable that the consent first granted to the applicant in 1980 might still have bound the applicant. On the other hand, there is a strong presumption against the retrospective application of legislation.[13] It is neither necessary nor desirable that I decide this issue at this stage when I am only considering whether applicant has made out a *prima facie* case and the relevant official in the Department of Land Affairs has not received notice of the proceedings. The way in which this is to be dealt with is apparent from paragraph [30] below.

[15] I proceed for the moment on the basis that the consent was a precarious consent. The law regarding the termination of a precarious consent is set out in the case of *Gemeenskapsontwikkelingsraad v Williams and Others (2)*.[14] King AJ refers to the Appellate Division cases of *Malan v Nabygelegen Estates*[15] and *Theron NO v Joynt*[16] and says:

> "It is quite clear from all the authorities that if the legal relationship between parties is a *precarium* a *conditio juris* arises in terms of which the grant can be withdrawn by the grantor at will. VAN DEN HEEVER JA in *Theron NO v Joynt* . . . says that it can be on the spur of the moment (spoorslags). Where, however, the grant is of a more permanent nature, then one cannot withdraw the grant so hastily. In *Johannesburg City Council v Johannesburg Indian Sportsground Association* 1964 (1) SA 678 (W) VIEYRA J said that where in a *precarium* there was no express term of termination the right of the *precario dans* to recall his

13 See, for example, *Workmen's Compensation Commissioner v Jooste* 1997 (4) SA 418 (SCA) at 424F-H.

14 1977 (3) SA 955 (W).

15 1946 AD 562.

16 1951 (1) SA 498 (A).

permission at any stage is a *conditio juris* and subject therefore to such equitable considerations as might arise from the nature of the permission granted and other surrounding circumstances. In this case the respondents' grant was of a permanent nature in that they had the use of ground for approximately 30 years and had erected certain improvements thereon with the knowledge and consent of the *precarios dans*. They clearly, therefore, needed time in order to enjoy their expenditure and a withdrawal of the right on the spur of the moment without any reasonable notice to do so would have amounted to a fraud on the

precario tenens entitling it to have pleaded the *exceptio doli*. VIEYRA J therefore, held that reasonable notice was necessary. In discussing reasonableness the learned Judge said that where it was intended to give the *habens* a use fromwhich he was to derive some beneficial interest for himself as opposed to a grant of a transitory nature it is understandable that there should be no recall until such a period of time had elapsed as would be reasonable in relation to the enjoyment expected, the expenditure incurred and the probabilities in relation to being able to find some substitute of similar content."[17]

17 Above n 14 at 966D - 967A. It is my view that this statement of the law holds good, notwithstanding that the *exceptio doli* has been found not to be part of our law (*Bank of Lisbon v De Ornelas and Another* 1988

[16] In the *Johannesburg City Council* case to which King AJ refers, the facts regarding notice were as follows. Arising out of a dispute regarding the use of the premises concerned, there had been threats of a cancellation of the precarious consent on 22 March 1963 and 6 April 1963. The precarious occupier was informed on 10 April 1963 that consent was withdrawn and immediate vacation was requested. A letter to the same effect was received on 1 May 1963. A petition for eviction was served on 3 May 1963 which suggested 30 June 1963 as the date by when the occupier should vacate. Taking into account that there had been a tender of full compensation for improvements by the land owner, the court considered the notice effectively given, taking into account this sequence of events, to be reasonable. The decision in that case was upheld on appeal to the Appellate Division.[18]

[17] Turning to the facts of this case, it is significant that the respondent does not specifically dispute the dates which the applicant attaches to their various interactions. These suggest interaction at intervals over a period from November 1996 until May 1997 when the respondent was requested to vacate the premises. These interactions include the letter to respondent in April 1997, which he admits receiving.[19] Proceedings for the respondent's eviction were then only commenced in May 1998. It is not disputed that the applicant was also willing to allow the respondent to remove the structure which he occupied. Even if one ignores the applicant's contention that it arranged a plot for him in the neighbouring township, these facts, viewed against the authority referred to above, still constitute compliance with the lawful obligations of a land owner, who terminates a precarious consent of this kind, to give reasonable notice.

[18] The next question is whether or not the termination of consent was just and equitable with reference to paragraphs (a) to (e) of section 8(1). Paragraph (a) requires me to evaluate the justice and equity of the termination with reference to the fairness of any agreement, provision in an agreement, or

---

(3) SA 580 (A)).

18 1964 (4) SA 779 (A). The shoddy moral authority of the case, which related to the enforcement of apartheid in respect of sports facilities, does not seem to undermine its authority in relation to the question of reasonable notice.

19 See para [4](vi).

provision of law on which the owner or person in charge relies. In this case the right of residence was based on a precarious consent. As appears from the extract from the judgment of King AJ, the period of notice to be given to an occupier under a precarious consent is based on "equitable considerations", having regard to the nature of the consent and the surrounding circumstances.[20] In the circumstances, it cannot be suggested that the provision of law on which the applicant relies is unfair.

[19] Paragraph (b) requires me to evaluate the justice and equity of the termination with reference to the conduct of the parties giving rise to the termination. The applicant's decision to terminate the residence of the respondent was made as soon as it discovered his presence. The decision was not based on any misconduct by the respondent. It was based on the applicant's need for the land concerned in order to be able to proceed with its development. The applicant is critical of the respondent's subsequent conduct, but this is disputed and is in any event not relevant to the conduct "giving rise to the termination". Both parties' conduct giving rise to the termination was understandable. The applicant wished to proceed with a new, low income housing development. It was not unreasonable for it to seek vacant possession for this purpose. The respondent was on the property because he had been allowed to do so. It had been his home for many years.

[20] Paragraph (c) requires me to evaluate the justice and equity of the termination with reference to the interests of the respective parties (and other occupiers). In this case, both applicant and respondent have compelling and competing interests. The applicant is being hindered in what appears to be an important development of low cost housing, something which is in desperately short supply in this country. The respondent is being asked to leave a home which, at the time of the termination, had been his for about sixteen years and in which he appears to have made some investment in the rebuilding process.

[21] Paragraph (d) requires me to evaluate the justice and equity of the termination with reference to the existence of a reasonable expectation of the renewal of the agreement which gave rise to the right of residence after the effluxion of its time. There is no suggestion by either party that the agreement in

---

20 See para [15].

terms of which the respondent was allowed to occupy the property was for a fixed term. This factor is accordingly not relevant to the decision of this matter.[21]

[22] Paragraph (e) requires me to evaluate the justice and equity of the termination with reference to the fairness of the procedure followed by the applicant, including whether the respondent had, or ought to have been given, an "effective" opportunity to make representations before the decision was made to terminate the right of residence. It is clear on the facts that the applicant did not give the respondent an opportunity to make representations before making the decision to terminate the consent. Even on the respondent's version, though, it would appear that the applicant subsequently gave the respondent the opportunity to make representations in relation to the implementation of its decision to terminate consent and showed considerable patience in the course of trying to get the respondent to move. However this all happened after the decision had been made. At the time of the termination of the right of residence, ESTA was not on the statute books. At law, the applicant bore no responsibility at that time to give the respondent any opportunity to make representations of any sort. In those circumstances, it seems to me that it would be unfair to have expected the applicant to give the respondent a prior opportunity to make representations.

[23] Having considered all of the factors as set out above, I am satisfied that, *prima facie*, the termination of the respondent's right of residence was just and equitable. In the circumstances, there is *prima facie* compliance with section 9(2)(a).

Compliance with section 9(2)(b)

[24] It is clear that section 9(2)(b) was complied with. This emerges, amongst other things, from the April letter addressed by the applicant to the respondent.

Compliance with section 9(2)(c)

---

21 It may be arguable that a permission to occupy for a life time is for a fixed period. However, for present purposes I am disregarding the unsworn statement in which respondent made the averment to this effect.

[25] In the context of this case, it was common cause that compliance with section 9(2)(c) means that the conditions specified in section 10 of ESTA for an order for the eviction of an occupier must be complied with. This requires compliance with section 10(1) or (2) or (3). Having regard to the disputes of fact on the papers, it is not possible to find that there was compliance with section 10(1). Nor was this strenuously suggested as a basis for compliance with sections 9(2)(c) and 10 by the applicant. The dispute as to whether or not sections 9(2)(c) and 10 had been complied with related primarily to whether or not the requirements specified in section 10(2) or (3) had been satisfied.[22]

[26] The applicant faces various difficulties in relation to section 10(3). Before it can apply, the applicant must show, amongst other things, that it provided the dwelling which the respondent occupies and that it needs the dwelling in question for occupation by a person which it employs or is about to

---

22 Subsections (2) and (3) of section 10 read as follows:

> "10(2) Subject to the provisions of subsection (3), if none of the circumstances referred to in subsection (1) applies, a court may grant an order for eviction if it is satisfied that suitable alternative accommodation is available to the occupier concerned.
>
> (3) If-
>
> (a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;
>
> (b) the owner or person in charge provided the dwelling occupied by the occupier; and
>
> (c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,
>
> a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to-
>
> (i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and
>
> (ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted."

employ.[23] In this case, the applicant did not provide the dwelling. Moreover, it wants the dwelling removed so that the erven on which it stands can be sold to potential property buyers who are not alleged to be its employees. It seems therefore that section 10(3) cannot apply to this matter.

[27] For section 10(2) to be complied with, there would have to be evidence before the Court regarding the availability of suitable alternative accommodation.[24] Suitable alternative accommodation is defined in section 1 of ESTA as:

> "alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to-
>
> (a) the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services;
>
> (b) their joint earning abilities; and
>
> (c) the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active;"

[28] The evidence before the Court as to suitable alternative accommodation was the subject of a dispute of fact. The applicant said that it had arranged for a vacant plot in the neighbouring, legal informal settlement to be made available to the respondent to which he could remove the materials of which the dwelling is constructed. Although he admits having had some discussions about a possible relocation, the respondent disputed that such a plot was made available to him. The applicant, in turn, annexed to the replying affidavit of its project manager, an affidavit by an official of the Northern Metropolitan Council stating that a plot had been kept available for the respondent for a year, but later reallocated because the respondent failed to take occupation. At the time of deposing to the affidavit on 24 January 2000, there were no plots available, but the official indicated that plots would become available "during the first quarter of this year." It was impossible to adjudicate this aspect without the benefit of oral evidence. Although neither party applied for the matter to be referred to oral evidence,

---

23 See section 10(3)(b) and (c).

24 See in this regard the Court's comments in *De Kock v Juggels* above n 7 at para [24].

I have the power to do so of my own accord, both in terms of existing authority[25] and this Court's inquisitorial powers in terms of section in terms of section 32(3)(b), read with section 28O, of the Restitution of Land Rights Act.[26] I have accordingly referred the matter of the availability of suitable alternative accommodation for the hearing of oral evidence.

[29] If the evidence is ultimately that such a vacant plot is available and if it is ultimately found that compensation is payable for improvements in terms of section 13(1) and (2)[27] of ESTA which would

---

25 See, for example, *Room Hire Co (Pty), Ltd v Jeppe Street Mansions (Pty), Ltd* 1949 (3) SA 1155 (T) at 1165; *Du Plessis En 'n Ander v Tzerefos* 1979 (4) SA 819 (O) at 838A. The applicable rule of the Land Claims Court Rules is rule 33(8)(a).

26 Act 22 of 1994.

27 Section 13 reads:

> "13 **Effect of order for eviction**
>
> (1) If a court makes an order for eviction in terms of this Act-
>
> (a) the court shall order the owner or person in charge to pay compensation for structures erected and improvements made by the occupier and any standing crops planted by the occupier, to the extent that it is just and equitable with due regard to all relevant factors, including whether-
>
> (i) the improvements were made or the crops planted with the consent of the owner or person in charge;
>
> (ii) the improvements were necessary or useful to the occupier; and
>
> (iii) a written agreement between the occupier and the owner or person in charge, entered into prior to the making of improvements, provides that the occupier shall not be entitled to compensation for improvements identified in that agreement;
>
> (b) the court shall order the owner or person in charge to pay any outstanding wages and related amounts that are due in terms of the Basic Conditions of Employment Act, 1983 (Act 3 of 1983) the Labour Relations Act or a determination made in terms of the Wage Act, 1957 (Act 5 of 1957); and
>
> (c) the court may order the owner or person in charge to grant the occupier a fair opportunity to-
>
> (i) demolish any structures and improvements erected or made by the occupier and his or her predecessors, and to remove materials so salvaged; and
>
> (ii) tend standing crops to which he or she is entitled until they are ready for harvesting, and then to harvest and remove them.

cover, or substantially cover, the cost of re-erecting the respondent's dwelling on such a vacant plot, then my *prima facie* view is that this would satisfy the requirements of section 10(2) of ESTA. However, the Court will also need proper evidence before it to enable it to carry out its duty to order the payment of compensation "to the extent that it is just and equitable". This aspect was not adequately dealt with by either party in their affidavits and has been referred to oral evidence.

Order

[30] When I made the order on 6 March 2000, I omitted to make provision for the hearing of oral evidence on the nature of the consent which bound the applicant. This was an omission on my part which needs to be rectified. This is a matter on which oral evidence ought to be heard on the same basis as the other two issues in respect of which oral evidence will be heard on the return day. There is also an error in so far as the respondent is called upon in paragraph 1.2 of the order to show cause why the applicant should not be ordered to pay compensation. The reference to respondent should have appeared in paragraph 1.1 of the order. Given that the order was an interlocutory one, I am entitled to vary it[28] and justice requires me to do so. No party will be prejudiced by a belated

---

(2) The compensation contemplated in subsection (1) shall be determined by the court as being just and equitable, taking into account-

(a) the cost to the occupier of replacing such structures and improvements in the condition in which they were before the eviction;

(b) the value of materials which the occupier may remove;

(c) whether any materials referred to in paragraph (b) or contributions by the owner or person in charge were provided as part of the benefits provided to the occupier or his or her predecessors in return for any consideration; and

(d) if the occupier has not been given the opportunity to remove a crop, the value of the crop less the value of any contribution by the owner or person in charge to the planting and maintenance of the crop.

(3) No order for eviction made in terms of section 10 or 11 may be executed before the owner or person in charge has paid the compensation which is due in terms of subsection (1): Provided that a court may grant leave for eviction subject to satisfactory guarantees for such payment."

28 In the current context, the words of Van Dijkhorst J in *Duncan NO v Minister of Law and Order* 1985 (4) SA 1 (T) at 3B - C are relevant:

"It is therefore a simple interlocutory order. It is open to reconsideration, variation or rescission

amendment. I have established that the order was only served some time after 2 June 2000. Should the head of the provincial office of the Department of Land Affairs file a notice of appearance, I will provide in the order for the Registrar to deliver a copy of this judgment and the amended order to him or her. The following is accordingly the order made on 6 March 2000, amended to deal with the matters referred to in this paragraph and certain minor amendments which were agreed to by the parties at a subsequent conference in terms of the rule 30 of the Land Claims Court rules:

1 a rule *nisi* is issued -

1.1 calling on the head of the provincial office of the Department of Land Affairs, Gauteng and the first respondent to show cause on the date referred to in paragraph 8 why an order should not be granted evicting the first respondent and all those holding under him in accordance with the provisions of sections 12(1) and (2), read with section 13(3), of the Extension of Security of Tenure Act 62 of 1997 ("ESTA");

1.2 calling on the applicant to show cause on the date referred to in paragraph 8 why, in the event of an order of eviction being granted, an order should not be granted directing the applicant to pay compensation to the first respondent in terms of section 13(1)(a) and (2) of ESTA in an amount equal to the reasonable cost of demolishing the structure in which he currently resides and re-erecting it on a vacant plot in the neighbouring informal settlement referred to in the affidavits filed in this matter;

2 oral evidence must be heard on the date referred to in paragraph 8 -

---

on good cause shown.

. . .

In *Bell v Bell* 1908 TS 887 at 894 INNES CJ stated that Courts will not lightly vary their own orders even though they may be of a merely interlocutory character. On the other hand, the words of Damhouder Practijcke in Civile Saken 146.2 and 4 are apposite. It is not dishonourable to come fromerror to the light of the truth and he who corrects himself needs not be corrected by another."

2.1 on whether or not there is a vacant plot or erf available for settlement by the first respondent and his family in the neighbouring informal settlement;

2.2 to enable the court to determine the amount of compensation, if any, payable by the applicant to the first respondent in the event of an order of eviction being granted as contemplated in paragraph 1.1;

2.3 on the terms of the respondent's consent to reside on the applicant's property.

3 the head of the provincial office of the Department of Land Affairs, Gauteng must deliver-

3.1 a notice of appearance within 10 court days of service in terms of paragraph 7, if he or she wishes to participate in the proceedings;

3.2 any affidavit which he or she wishes to deliver dealing with the matters referred to in these proceedings within 15 court days of service;

4 the applicant -

4.1 must deliver an affidavit or affidavits dealing the matters referred to in paragraphs 1.2, 2.2 and 2.3 and

4.2 may deliver an affidavit or affidavits replying to the affidavit referred to in paragraph 3.2, if any,

within 15 court days of receipt of the affidavit referred to in paragraph 3.2 (or of expiry of the time period for delivering same);

5 the first respondent -

5.1 must deliver an affidavit or affidavits dealing the matters referred to in paragraphs 1.2, 2.2 and 2.3 and

5.2 may deliver an affidavit or affidavits replying to the affidavit referred to in paragraph 3.2, if any,

within 15 court days of receipt of the affidavits referred to in paragraph 4 (or of expiry of the time period for delivering same);

6 no witness may be called at the hearing referred to in paragraph 8 who has not deposed to an affidavit or in respect of whom a summary of the evidence to be led has not been delivered within the time limits contemplated for the filing of affidavits, except with the leave of the Court;

7 the applicant must effect service of -

7.1 this order;

7.2 the notice of motion, as amended in the course of the proceedings;

7.3 the founding, opposing and replying affidavits;

7.4 the unsworn statements filed by the first respondent; and

7.5 form 10 of schedule 1 to the Land Claims Court Rules;

on the head of the provincial office of the Department of Land Affairs, Gauteng;

8 the date for the hearing of the matters referred to paragraphs 1 and 2 of this order -

8.1 is to be determined at a conference to be convened in terms of rule 30 of the Land Claims Court Rules;

8.2 must be a date not less than two months after the date of the service of this order;

9 costs will be costs in the cause;

10 in the event of the head of the provincial office of the Department of Land Affairs participating in the proceedings in accordance with paragraph 3,

10.1 the applicant must deliver a typed transcript of the proceedings in open court on 31 January 2000 to him or her, within 10 court days of being called upon to do so;

10.2 the Registrar must immediately deliver a copy of this judgment to him or her.

_____

JUDGE DODSON

For the applicants:
Adv J Heher instructed by *Gary Janks Attorneys, Johannesburg*.

For the respondents:
Adv N Janse Van Nieuwenhuizen instructed by *Legal Resources Centre, Pretoria*.