IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER: LCC143/09**

Before: Loots AJ
Delivered on 29 January 2014

CRADLE CITY 528 (PTY) LTD	**Applicant**
and	
ALLAN MABILO	**1st Respondent**
MOLUNGISI ZUMA	**2nd Respondent**
ALBERT ZIMBA	**3rd Respondent**
EDWARD RATAU	**4th Respondent**
ALI SEHASWANE	**5th Respondent**
SYDNEY TSWI	**6th Respondent**
NORMAN MASHAMATIE	**7th Respondent**
BONGENI ZUMA	**8th Respondent**
KELETSO MOLEA	**9th Respondent**
GODFREY MOLATSI	**10th Respondent**
COLBERT LITEPO	**11th Respondent**
MARIA NJKWENI	**12th Respondent**
LOVEMORE BANDA	**13th Respondent**
EMMANUAL MANCHO	**14th Respondent**
JOSEPH SKHONA	**15th Respondent**
GLORIA STOFILE	**16th Respondent**
MOSES MASILA	**17th Respondent**
MAVIS DUBE	**18th Respondent**
MANALA MAHLANGU	**19th Respondent**

WILFRED RAMANE	**20th Respondent**
ZODWA MOSIME	**21st Respondent**
VICKSON SITHOLE	**22nd Respondent**
SEUN MTHAMBO	**23rd Respondent**
DONALD MILANZI	**24th Respondent**
VANLOTTEN MKHWANAZI	**25th Respondent**
JIM MDOMU	**26th Respondent**
BONGO QWABI	**27th Respondent**
MPULE RAMELA	**28th Respondent**
JONATHAN CHIBWE	**29th Respondent**
MARIA MASUMBOKA	**30th Respondent**
SOOTHO MOTSOENENG	**31st Respondent**
ERIC MSANE	**32nd Respondent**
MATOME RELELA	**33rd Respondent**
JOHANNES MALATSI	**34th Respondent**
RAMARURO FREDDIE	**35th Respondent**
MOTSUMI (MIKE MOLOKOMME)	**36th Respondent**
ALFRED KEETSI	**37th Respondent**
BAKANU MOLEBATSI	**38th Respondent**
NAKEDI RAMONI	**39th Respondent**
VIRGINIA RAMONGANE	**40th Respondent**
LYDIA RAMONGANE	**41st Respondent**
EDSON KHUMALO	**42nd Respondent**
MIRIAM SKHOSANA	**43rd Respondent**

MOIOKOMME, MOSONI	**44th Respondent**
UNKNOWN OCCUPIERS OF LINDLEY FARM 528 PORTION 13	**45th Respondent**
CITY OF JOHANNESBURG LOCAL MUNICIPALITY	**46th Respondent**
DEPARTMENT OF LAND AFFAIRS	**47th Respondent**
CITY OF MOGALE LOCAL MUNICIPALITY	**48th Respondent**

JUDGMENT: APPLICATION TO STRIKE OUT AFFIDAVIT FILED BY 1st TO 44th RESPONDENTS IN RESPONSE TO RULE NISI ISSUED ON 31 OCTOBER 2014

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[1] The Applicant has applied for the eviction of the 1st to 45th respondents (the occupiers) in terms of the Extension of Security of Tenure Act 62 of 1997. The applicant alleges that it is the owner of a property described as Lindley Farm 528 Portion 13, which is close to the Lanseria Airport. The occupiers reside on that property. This judgment is in respect of an application brought by the applicant to strike out an affidavit filed on behalf of the occupiers in response to a *rule nisi* issued by this court on 27 September 2013.

[2] I have decided to refuse the application to strike out. A decision of this nature does not usually warrant extensive reasons, but in this case the history of the litigation is pertinent to my reasons for refusing the application.

[3] The application for eviction was allocated to me in early 2011. On reading the papers, I found reference to a previous Land Claims Court case involving the same piece of land and the same occupiers, which had been presided over by the late Judge President Bam. That was an application brought by the occupiers against the previous landowner, Lindley Farm 528 (Pty) Ltd (Lindley Farm), after they had been forcibly evicted without a court order. Judge Bam had ordered that the occupiers be re-instated and that their dwellings be reconstructed by the landowner according to minimum

specifications.

[4] A few months later Lindley Farm brought an application for the variation of the order, alleging that it could not afford to rebuild according to the specifications. The application was set down for hearing before Judge Bam. On the day on which it was to be heard there was no appearance for the occupiers. It appears from the court file that at approximately 12 noon Judge Bam granted the variation order in the absence of the occupiers.

[5] When I discussed the matter with Judge Bam he suggested that a conference should be convened involving all the parties in both cases. Such a conference was held on 22 March 2011, presided over by Judge Bam and myself. At that conference it became apparent that the same attorney and advocate who had acted for the previous owner, Lindley Farm, were acting for the new landowner, cited as Cradle City 528 (Pty) Ltd. The attorney acting for the occupiers said that he had never received notice of the application for variation referred to in paragraph [4] above. Counsel for the applicant undertook to furnish proof of service of the notice.

[6] The minutes of the next conference, held on 28 June 2011, record that the attorney for the occupiers had not been provided with proof of service on it of the notice of the application for variation. He requested the landowner's representatives to consent to a rescission. This request was refused. The attorney for the occupiers then said that they would be obliged to bring an application for rescission. He said that his clients' attitude was that the eviction application could not proceed until the landowner's obligations in terms of the reinstatement order made by Judge Bam had been fulfilled.

[7] To date proof of service of the application for variation has not been produced. The attorney for the occupiers never brought the application for rescission. Initially, this was probably because a solution to the occupiers' need for long-term security of tenure was being sought through negotiations with the municipality and provincial authorities responsible for housing. Unfortunately an acceptable solution was not found. The attorney for the occupiers then indicated that he could not continue acting

pro bono and he eventually withdrew as attorney of record after a notice of bar[1] was faxed to his office.

[8] The applicant's attorneys applied for a date for the hearing of the eviction application. The Registrar informed the Department of Rural Development & Land Reform (DRDLR) of the fact that the respondents were now unrepresented[2] and the it arranged for Lawyers for Human Rights (LHR) to be appointed as the attorneys for the occupiers. The applicant's attorneys faxed a further notice of bar to (LHR). Since no answering affidavit was delivered, the applicants set the application for eviction down for hearing for three days, beginning on Wednesday 25 September 2013.

[9] On that day there was no appearance for the occupiers. The legal representatives for the applicant requested me to grant the eviction order – in effect a default judgment. I was uneasy about the fact that the occupiers were not present or represented and asked the Registrar to telephone LHR. During a conference call in my chambers, attended by the representatives of the applicant, the attorney at LHR who was on record advised that they were in the process of withdrawing as the attorneys of record because the occupiers did not want to be represented by lawyers appointed by government.[3] She said that she had been contacted by an attorney called Mr Pather who had been requested by the occupiers to represent them and she had already handed over the relevant files to him.

[10] Mr Pather was then contacted and put on speaker phone. He confirmed that he had received the files from LHR, but said that he had not yet been able to read all the documents or consult with the occupiers. He did not know that the application for eviction had been set down for 25th September 2013. He said that he had tried unsuccessfully to contact the applicant's attorney, Mr Bekker, by phone a number of times and had then faxed a letter to him. Mr Bekker

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[1] Rule 32(1) of the Land Claims Court Rules requires an applicant to serve a notice of bar if the respondent has delivered notice of intention to oppose, but has not delivered an answering affidavit timeously.
[2] See Rule 9(1). A panel of attorneys available to assist unrepresented parties in land reform cases has been established under the auspices of the DRDLR,
[3] The previous attorneys who acted for the occupiers placed on record at a rule 30 conference that their clients do not trust governments officials because certain officials of the DRDLR were present when they were forcibly evicted by the previous land owner.

initially said that he had no knowledge of this letter. Two days later, however, he acknowledged that it had been received by his office.

[11] I informed Mr Bekker and Mr Marx in chambers that I could not consider the application for eviction in the absence of the occupiers in circumstances where there was uncertainty as to whether the notices of bar and set down had come to the attention of the occupiers. They were insistent that they were entitled to have the application heard since they had faxed[4] the notices to LHR at a time when they were on record as the attorneys for the occupiers. I then said that they could argue their case for a hearing on Friday 27 September 2013, provided that Mr Pather was advised of this.

[12] On 27th September 2014 Mr Pather was in court for the occupiers, but counsel for the applicant objected to his participation in the proceedings since he was still not formally on record for the occupiers. I suggested to Mr Pather that he should remain in court and observe the proceedings, which he did. It subsequently transpired during the proceedings that the reason why he was not yet on record was that attorney for the applicant, Mr Becker, had told him that he would challenge his authority if he did not have a signed power of attorney from every one of the forty-four occupiers cited as respondents.[5] The applicant's counsel argued robustly for a hearing of the eviction application, but I continued to express my reservations because of the uncertainty as to whether the occupiers had been made aware of the notices of bar and set down[6] and the fact that their legal representation was compromised.

[13] Eventually, the applicant's counsel handed up a draft order in terms of which the occupiers would be evicted once land for their occupation had been provided by the municipality. The draft order was reasonable in that it also provided for compensation to the occupiers and assistance with relocation. I then suggested that the draft order could be issued in the form of a *rule nisi* calling upon the occupiers and the

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[4] The Land Claims Court Rules allow the delivery of documents by facsimile – see the definition of deliver in Rule 2.

[5] Rule 7 requires a power of attorney to be furnished only if there is a challenge to the authority of the attorney on record.

[6] Although the Rules allow delivery by fax (see fn 4 above), the court may question whether the fax came to the knowledge of the relevant person.

municipality to show cause why the order should not be made. The applicant agreed to this course of action.

[14] The *rule nisi* was issued with 31 October 2013 as the return date. On the afternoon of 30 October 2014 the occupiers delivered an affidavit in response to the notice to show cause. This was a rather last-minute response, but the *rule nisi* did not stipulate that the affidavit must be delivered by any particular date. It simply called upon the respondents to show cause by 31 October 2014 why the order should not be made. At the hearing on 31 October 2014 the applicant applied to strike out this affidavit.

[15] The application to strike out claims the following order in paragraph 2 of the notice of motion:

> "Striking the First to Forty Fifth Respondents' Answering Affidavits by virtue of the fact that they have been ipso facto barred from filing answering affidavits by reason of their non-compliance with the provisions of Rule 55(2) of this Honourable Court and have failed to formally apply to this Honourable Court to lift the Bars and/or condone their non-compliance".

The reference to Rule 55(2) does not make sense. That rule provides:

> In deciding whether a case is sufficiently advanced to make the determination of a hearing date appropriate, the presiding judge may assume that any party that is under bar in respect of the delivery of an answering affidavit, response or plea, will not be delivering such document.

There is nothing that the respondents had to comply with in terms of this rule. However, the basis on which the application was argued was that the affidavit should be struck out because it amounted to an answering affidavit and the occupiers were under bar in that respect.

[16] I suggested at the hearing on the return day of the *rule nisi* that the parties should agree that the affidavit delivered on behalf of the occupiers in response to the *rule nisi* should stand as the answering affidavit in the application for eviction so that the matter could proceed to a hearing on the merits. The applicant was not prepared to agree to this. Its counsel insisted that his instructions were to proceed with the application to strike out. The matter was accordingly postponed to 3 December 2013 to enable the

occupiers to respond to the application.

[17] In heads of argument filed after the hearing on 3 December, at the request of the court, counsel for the applicant highlighted the difference between Land Claims Court Rules 32 (1) and (2) and Rules 26 and 27 of the Uniform Rules for the High Courts.. With regard to Land Claims Court Rule 32, the heads of argument state the following:

> "This rule differs in two respects from the Uniform Rules 26 and 27. In terms of the Uniform Rules, a party is *ipso facto* barred from delivering the relevant document. However, that party continue[s] to be a party to the proceedings.
> In terms of Land Claims Court Rule 32, a party is not *ipso facto* barred from delivering the relevant document. The party that delivered the bar, must bring an application to Court to have the relevant document (affidavit in this case) set aside. However, once the Affidavit is set aside, the party under bar may not participate in the litigation anymore."

This statement made it apparent that the application to 'strike out' was intended to be an application in terms of Rule 32(2) to set aside an answering affidavit filed out of time after notice of bar.

[18] Counsel for the applicant accepted that the court has a discretion as to whether to set aside an answering affidavit delivered after a period of bar has expired and proposed that the court should take into account the following factors –

(i) whether the affidavit raises a defence;

(ii) whether the respondent knew of the bar; and

(iii) whether the respondent's behavior in not delivering the affidavit timeously warrants an order excluding it from the litigation against it.

Without accepting that this is the correct test to apply when considering whether to set aside an answering affidavit in terms of Rule 32(2), my response to counsel's submission, if we were dealing with an answering affidavit, would be that I should not exercise my discretion to set it aside since possible defences are disclosed, there is uncertainty as to whether the respondents knew of the bar and their conduct does not warrant being excluded.

[19] Counsel's argument is, in any event, misdirected because we are not dealing with an answering affidavit. We are dealing with an affidavit to show cause why the order

proposed by the applicant, which included an eviction order, should not be made. It is true that the affidavit to some extent deals with the occupiers' defence on the merits, but how else is a respondent in these circumstances supposed to show cause why an eviction order should not be granted? The whole purpose of a *rule nisi* is to enable a person who may be affected by an order which a court is considering making to make representations as to why it should not be made. Inevitably, such an affidavit must deal with the merits of the claim, but it is not an answering affidavit and Rule 32(2) does not apply to it.

[20] I have taken the trouble to elaborate on my reasons for dismissing the application to strike out because the applicant has made it clear that it believes that this court is frustrating its right to develop the land which it owns. The Land Claims Court is charged with the responsibility to prevent arbitrary evictions of persons who are occupiers of land as defined in terms of ESTA.[7] Eviction orders can be granted only where all the requirements of the Act have been complied with. The purpose of the Act is to give effect to section 26 of the Constitution.[8] In all matters concerning the enforcement of the Bill or Rights[9] the courts are required to ensure that the parties are able to vindicate their rights, which includes ensuring that parties are represented. In land tenure matters the achievement of long-term security of tenure solutions is of the utmost importance and any party who purchases land upon which there are occupiers must realize that, while eviction is possible, obtaining vacant possession can be a long and arduous process.

Costs

[21] The normal practice in the Land Claims Court is to order that each party should pay its own costs[10] unless there is good reason to order otherwise.[11] In this matter there is good reason to order otherwise. When the applicant brought the application to strike out on the return day of the *rule nisi* I warned its counsel that the application had little

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[7] Section 17(1) of ESTA.
[8] The Constitution of the Republic of South Africa, Act 108 of 1996.
[9] Chapter 2 of the Constitution.
[10] See *Haakdoornbult Boerdery CC v Mphela* 2007 (5) SA 596 (SCA) 618 and case law cited therein.
[11] *New Adventure Investments 19 (Pty) Ltd v Mbatha* 1999 (1) SA 776 (LCC) at 779 G—H.

prospect of success, however, the applicant insisted on proceeding with it. In the circumstances the applicant must pay the costs occasioned by the application to strike out the affidavit filed by the occupiers in response to the *rule nisi*.

Order

The application to strike out the affidavit delivered by the first to forty fourth respondents in response to the *rule nisi* issued by this court on 31 October 2013 is dismissed with costs.

C E LOOTS AJ
LAND CLAIMS COURT
29 January 2014