




**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG**

Case No: LCC174/2016

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
31/05/2019	
DATE	SIGNATURE

Heard: 4 December 2018
Judgment: 31 May 2019

In the matter between:

COSMOPOLITAN PROJECTS JOHANNESBURG (PTY) LTD

Applicant

and

MARIA LEOA

1st Respondent

JOHN KGAKA

2nd Respondent

AUGUSTINAH RANKAI

3rd Respondent

MIRIAM LETSOLO

4th Respondent

JOHANNES RABOROKO	5 th Respondent
JOHANNES TUMANE	6 th Respondent
REGINA CHAONA	7 th Respondent
ALETTA MASILO	8 th Respondent
JOSEPH MAJRAH	9 th Respondent
THERESIA THEOGA	10 th Respondent
MIRRIAM SEETANE	11 th Respondent
ANNACLETA THABISI	12 th Respondent
MARIA SIBEKO	13 th Respondent
CHRISTINAH RABOROKO	14 th Respondent
NAPO ABRAHAM RABOROKO	15 th Respondent
THABANG MOLETSI	16 th Respondent
THAPELO SEEMA	17 th Respondent
MICHAEL KGAKA	18 th Respondent
JOYCE MOSAE	19 th Respondent
AGNESS NTLANE THEOGA	20 th Respondent
JOYCE KGAKA	21 st Respondent
CECILIA HLUNGWANI	22 nd Respondent
JUSTINA MOKOENA	23 rd Respondent
THABISO MOKOENA	24 th Respondent
MALEFU MOJAKI	25 th Respondent
ABSOLOM RAMALOPE	26 th Respondent
ANGELINA PHANTSI	27 th Respondent
LERATO MOITHERI	28 th Respondent

SEKANE MOKHAE	29 th Respondent
PROMISE NKAMBULE	30 th Respondent
KOKOTLE TSOINYANE	31 st Respondent
JWALANE CONSTANCE MOJAKI	32 nd Respondent
THABO SITHABELA	33 rd Respondent
MOJAKI PAUL MOKOTO	34 th Respondent
VIOLET RABOROKO	35 th Respondent
VICTOR NKONE	36 th Respondent
KUFUWE MAPILOKO	37 th Respondent
EUGENIA MAPILOKO	38 th Respondent
COLIN MAKEKA	39 th Respondent
JOSEPH BOLO	40 th Respondent
PAULUS MATHEBULA	41 st Respondent
JOHN MAKEKA	42 nd Respondent
MATHABANG KOLA	43 rd Respondent
TLELIMA TASENEKE	44 th Respondent
NTOYI JOSHEPH MAKEKA	45 th Respondent
MACHAKO LIFALAKANE	46 th Respondent
ALPHONSINA MOKOENA	47 th Respondent
ALPHONS MOKOENA	48 th Respondent
ALINA MAKEKA	49 th Respondent
PAULINA MAKEKA	50 th Respondent
EKURHULENI METROPOLITAN MUNICIPALITY	51 st Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	52 nd Respondent

THE HEAD OF THE PROVINCIAL OFFICE OF THE NATIONAL DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM 53rd Respondent

MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR HUMAN SETTLEMENTS, GAUTENG 54th Respondent

JUDGMENT

BARNES AJ

INTRODUCTION

1. This is an application for eviction in terms of the Extension of Security of Tenure Act 62 of 1997 ("ESTA" or "the Act"). The affected land is the Remaining Extent of Portion 44 of the Farm Waterval 150, Registration Division IR, Gauteng ("the land") of which the applicant is the registered owner. The first to fiftieth respondents are ESTA occupiers residing on the land.
2. The applicant purchased the land from Greenfields Gardens (Pty) Ltd in 2014 for development purposes. The development sought to be undertaken by the applicant entails the construction of approximately 13 000 housing stands, approximately 2000 rental apartments, a number of school sites, a shopping

centre and a taxi rank. The applicant pleads that the necessary approvals in terms of the Township Planning and Township Ordinance Act 1986 have been obtained.

3. After purchasing the land in 2014, the applicant entered into negotiations with the first to fiftieth respondents in an attempt to secure their agreement to vacate the land in order to make way for the development. The first to fiftieth respondents were represented by Lawyers for Human Rights (“LHR”) in these negotiations. The applicant proposed that the first to fiftieth respondents relocate to alternative land to be purchased by it and become joint owners of such land through a Communal Property Association (“CPA”) to be established.
4. The applicant purchased alternative land, namely portion 105 (a portion of portion 1) of the Farm Rietfontein, 153 IR (“the alternative land”). It is vacant land with no infrastructure, services or housing.
5. The negotiations culminated, in January 2016, in the majority of the first to fiftieth respondents signing a *pro forma* document prepared by the applicant, in which they agreed to relocate to the alternative land and purported to waive their rights under ESTA. I will, for the sake of convenience, refer to these as “the consent forms.”
6. The consent forms were intended to be annexures to a settlement agreement

to be concluded between the parties in terms of which the first to fiftieth respondents agreed to relocate to the alternative land. Ultimately however, only the first to thirty fourth respondents were prepared to conclude the settlement agreement. The thirty fifth to fiftieth respondents refused to do so. Some of these respondents had consistently refused the applicant's relocation proposal, others had earlier accepted it, through signature of the consent forms, but subsequently changed their minds. As a consequence, LHR withdrew as the attorneys of record for the thirty fifth to fiftieth respondents and continued to act only for the first to thirty fourth respondents.

7. In August 2016, the applicant instituted this application. In it, the applicant distinguishes between the first to thirty fourth respondents, whom it terms "the consenting occupiers" and the thirty fifth to fiftieth respondents, whom it terms "the refusing occupiers."
8. The applicant seeks, as against the consenting occupiers, an order making the settlement agreement an Order of Court. As against the refusing occupiers, the applicant seeks an eviction order in terms of ESTA. The applicant further seeks an order requiring all the respondent occupiers to vacate the land by an appropriate date.
9. Since its commencement in August 2016, this litigation has been beset by a range of interlocutory skirmishes, resulting in a number of interlocutory applications, postponements, compliance orders, contempt applications and

the like. There are also a host of condonation applications. As a result the application has become unduly prolix with the papers running to well over 1000 pages. Given the conclusion that I ultimately reach in this judgment, it is unnecessary to deal with these interlocutory applications.

10. Throughout the litigation, the stance of the first to thirty fourth respondents has been that they consider themselves bound by the settlement agreement concluded with the applicant but are unable to move onto the alternative land in the absence of infrastructure, services or housing. The first to thirty fourth respondents launched a counter-application in which they seek an order compelling the fifty first respondent, the Ekurhuleni Metropolitan Municipality, to install infrastructure and services on the alternative land. In their counter application, the first to thirty fourth respondents also seek certain relief against the fifty second to fifty fourth respondents. It is unnecessary for present purposes to deal with this.

11. The first to thirty fourth respondents changed their stance significantly when the matter came to be argued before Court. They then resisted relocating to the alternative land. They did so *inter alia* on the bases that the alternative land is unfit for human habitation and that there are no structures, alternatively no structures comparable to those which they presently occupy, on the alternative land. Counsel for the first to thirty fourth respondents argued that these factors meant that, as a matter of law, his clients could not be required to relocate to the alternative land.

12. The stance of the thirty fifth to fiftieth respondents, throughout the litigation, has been that the applicant is not entitled to an order for their eviction. This contention is made on the basis that the requirements of ESTA, including but not limited to the requirements of section 8 of ESTA, have not been met. The thirty fifth to fiftieth respondents also contend that the alternative land is unfit for human habitation.
13. During the course of the litigation, the fifty first respondent undertook to provide temporary emergency services only for the respondent occupiers in the event of their relocation being ordered by the Court. The remainder of the relief sought in the counter application is opposed by the fifty first to fifty fourth respondents.
14. The applicant does not oppose the relief sought in the counter application but contends that it ought to be postponed for determination at a later date and urges that the relocation/eviction of the respondent occupiers should be ordered at this stage. At the hearing of the application, the applicant tendered to construct and provide a 2 roomed zinc house for each of the respondent occupiers in the event of their relocation being ordered by the Court.

The First to Thirty Fourth Respondents

15. The first issue to be addressed is the position of the first to thirty fourth respondents given their change of stance in the application. The applicant

argued that this was impermissible and contended that the first to thirty fourth respondents are bound by their pleaded case and the settlement agreement that they have signed. Counsel for the applicant submitted that the relocation of the first to thirty fourth respondents to the alternative land must accordingly be ordered by the Court.

16. The legal status of settlement agreements in the context of ESTA is regulated by section 25 thereof which provides as follows:

"25 Legal status of agreements

- (1) The waiver by an occupier of his or her rights in terms of this Act shall be void, unless it is permitted by this Act or incorporated in an order of a court.
- (2) A court shall have regard to, but not be bound by, any agreement in so far as that agreement seeks to limit the rights of an occupier in terms of this Act.
- (3) ..."

17. The consent forms signed by the first to thirty fourth respondents are annexures to the settlement agreement and incorporated therein by reference. The consent forms are in identical terms and provide in relevant part as follows:

"I, XXXXX, the undersigned head of my household, hereby confirm that by placing my signature hereunder and my name on the

household list that I agree to accept the offer:

1. I will move out of my home on [the land] and waive all rights I enjoy on [the land] in terms of the Extension of Security of Tenure Act 62 of 1997.
2. In consideration for me leaving [the land], the current property owner [the applicant] will purchase an alternative portion of land, known as portion 105 (a portion of portion 1) of the Farm Rietfontein 153 IR (alternative property).
3.
4. The alternative property will be registered in the name of a Communal Property Association in terms of the Communal Property Association Act 28 of 1996 for the sole and use and enjoyment of the fifty-two (52) households currently living on [the land].
5. The [applicant] will further make payment of two thousand five hundred rand (R2500.00) per household that relocates to the alternative property.
6. The [applicant] will provide transportation to assist in the relocation of the fifty-two 52 occupier households to the alternative property.
7.”

18. The settlement agreement provides in relevant part as follows

“3 SETTLEMENT

- 3.1 The Applicant shall purchase [the alternative land] for the benefit of the Respondents to be registered in the name of the CPA for

the sole purpose of relocating the respondents.

- 3.2 The Respondents shall vacate [the land] and relocate to [the alternative land] by no later than the Due Date. The Respondents' consents and confirmation that they will vacate [the land] are annexed hereto marked **Annexure 'X1' to 'X34'**, the terms of which are to be read as if specifically incorporated herein.
- 3.3 Subject to the fulfilment of the Conditions as set out in paragraph 5 below, [the alternative land] shall be registered in the name of the CPA.
- 3.4 Should the Respondents fail to vacate [the land] on the Due Date, then in such event the Applicant will be entitled to seek the eviction of that Respondent and her household refusing to relocate to [the alternative land], in accordance with relevant legislation. It is noted that there are other occupiers on [the land] who have refused to accept the settlement offer contained herein. Such individuals and households are not party to this agreement.
- 3.5 For purposes of any eviction proceedings against that Respondents that may become necessary, the Respondents hereby condone and/or waive any time period for notice and the institution of proceedings provided for in the relevant legislation."
19. The "due date" is defined in the agreement as no later than two business days after the date of transfer of the alternative land to the applicant.
20. Clause 6.1 of the agreement provides that failure by the respondents to vacate the land by the due date constitutes a breach of the agreement.
21. Clause 7.1 of the agreement provides as follows:

“7 CONSEQUENCES OF BREACH

7.1 In the event that the Respondents breach this Agreement, the Applicant shall be entitled to cancel this Agreement and in such event this Agreement shall be null and void *ab initio* and the Applicant will be entitled to immediately proceed to secure a Court Order referred to in clause 3.4 above for the eviction of the Respondents from [the land].

22. It was common cause that the transfer of the alternative land to the applicant has taken place and that the first to thirty fourth respondents are in breach of the settlement agreement.

23. The settlement agreement is no model of clarity in relation to the consequences of breach by the respondents. Clause 3.4 provides that in the event that the respondents fail to vacate the land by the due date, the applicant will be entitled to seek their eviction in accordance with the relevant legislation. This is of course ESTA. Presumably however, although this is not made explicit in the agreement, the applicant would seek to rely on the consent forms and section 3.5 of the agreement, in which the respondent occupiers purportedly waive their rights under ESTA. This appears to be the first to thirty fourth respondents understanding of the situation for they plead that as a consequence of their breach of the agreement, they face the threat of “imminent eviction” and are accordingly in an “emergency housing situation.”

24. What is clear is that the waivers in the consent forms and in section 3.5 of the agreement are, by virtue of section 25(1) of ESTA, void. It follows that to the

extent that the settlement agreement purports to entitle the applicant to obtain the eviction of the first to thirty fourth respondents without following the requirements of ESTA, it is invalid and unenforceable.

25. The applicant is entitled to an order for the eviction of the first to thirty fourth respondents only if it meets the requirements of ESTA.
26. Therefore, what falls to be considered is whether the applicant has met the requirements stipulated in ESTA for the eviction of the first to thirty fourth respondents. The enquiry is of course the same in relation to the thirty fifth to fiftieth respondents.
27. The very first requirement that must be established by the applicant in this regard is that in section 8 of ESTA. It is to this requirement that I now turn.

Section 8 of ESTA

28. Section 8 provides as follows:

“8 Termination of right of residence

- (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;
- (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.”

29. It is clear from the above that the termination of an ESTA occupier’s right of residence must be both lawful and just and equitable.

30. In *Snyders and Others v De Jager and Others* 2017 (3) SA 545 (CC), the Constitutional Court held as follows:

“If a person has a right of residence on someone else’s land under ESTA, that person may not be evicted from that land before that right has been terminated. In other words, the owner of the land must terminate the person’s right of residence before he or she can seek an order to evict that person. However, it must be borne in mind that the termination of a right of residence is required to be just and

equitable in terms of s 8(1) of ESTA.”¹

31. Addressing itself to section 8(1)(e) of ESTA, the Constitutional Court held as follows:

“ESTA requires the termination of the right of residence to also comply with the requirement of procedural fairness to enable the person to make representations why his or her right of residence should not be terminated. This is reflected in section 8(1)(e) of ESTA. A failure to afford a person that right will mean that there was no compliance with this requirement of ESTA. This would render the purported termination of the right of residence unlawful and invalid. It would also mean that there is no compliance with the requirement of ESTA that the eviction must be just and equitable.”²

32. In this case, the applicant did not itself terminate the respondent occupiers’ rights of residence. It says that its predecessor in title, Greenfields Gardens, did so. The applicant pleads as follows in this regard:

“I have been advised that prior to the purchase of [the land], Greenfields Gardens entered into a settlement agreement with the other households in terms of which they agreed to relocate to a neighbouring land, however, the first to fiftieth respondents refused to accept the terms of the settlement agreement, remained on [the land] and claimed the right to occupy [the land] in terms of ESTA.

...

As a consequence of the first to fiftieth respondents refusal to accept the terms of Greenfields Garden’s settlement agreement, Greenfields Gardens caused to be sent a letter withdrawing its consent of the occupiers’ right of occupation and residence in terms of section 8 of ESTA. I humbly refer the Court to annexure ‘AC4’ attached hereto

¹ At para 68.

² At para 76.

which is dated 8 February 2013.”

33. Annexure “AC4” to the applicant’s founding affidavit is the sole basis on which it relies for its contention that the first to fiftieth respondents’ rights of residence were validly and fairly terminated in terms of section 8 of ESTA and is worth quoting in full. It is dated 8 February 2013. It is prepared by Mills and Groenewald, Greenfields Garden’s attorneys at the time and is addressed to “all occupiers of the land” care of Gilfillan Du Plessis Inc. It reads as follows:

**“NOTICE TO OCCUPIERS OF INTENTION TO APPLY FOR
EVICTION ORDER IN TERMS OF SECTION 9(2)(d) OF THE
EXTENSION OF SECURITY OF TENURE ACT, 1997**

We confirm that we act on behalf of Greenfields Gardens (Pty) Ltd, the registered owner of the following property:

**REMAINING EXTENT OF PORTION 44 OF THE FARM WATERVAL
150 ALBERTON, GAUTENG**

We hereby give you notice in terms of Section 9(2)(d) of the abovementioned Act.

Your occupation of the property is hereby terminated on the following grounds:

- The owner has obtained the right to develop the aforementioned land;
- The occupiers have refused to settle the matter notwithstanding the owner tendering alternative suitable accommodation and several attempts to settle the matter on an amicable basis;
- Your refusal to vacate the property is *mala fide* and an attempt to extort unreasonable demands from the owner.

Our client reserves the right to supplement the reasons for eviction in the eviction application, if necessary.

You are hereby given two calendar months' notice to vacate the property failing which our client will bring the necessary eviction application.

We will advise you of the time, date and place where the application will be heard.

-
34. What is immediately apparent is that this is a Notice in terms of section 9(2)(d) of ESTA which purports also to terminate the first to fiftieth respondents' rights of residence in terms of section 8 of ESTA. As Mr Botha, who appeared for the thirty fifth to fiftieth respondents correctly submitted, this sort of hybrid approach is impermissible. A section 9(2)(d) Notice is correctly and appropriately issued only after an ESTA occupier's right of residence has been validly and fairly terminated in terms of section 8.
 35. But the difficulties with this Notice are deeper and more profound. The Notice reveals that the first to fiftieth respondents' rights of residence were terminated because they declined to accept a proposal by Greenfields Gardens that they vacate their homes and relocate to alternative land. Clearly, the respondent occupiers were not obliged to accept this proposal. It is difficult to see how this ground of termination could ever be lawful, let alone just and equitable.
 36. Furthermore, as Mr Botha correctly pointed out, no details of Greenfields Gardens' proposal or of the alternative land are provided in either the Notice

or the founding affidavit to enable the Court to assess the contention that the respondent occupiers acted unreasonably in declining to accept it. In any event it is difficult to see how, as a matter of principle, declining such a proposal could ever be said to be unreasonable.

37. The claim in the Notice that the respondent occupiers' refusal to vacate the land is *mala fide* and an attempt to extort unreasonable demands from the owner is also entirely unsubstantiated in both the Notice and the founding affidavit and is, on the face of it, unfounded and unreasonable.
38. Finally, no allegation is made in either the Notice or the founding affidavit that the first to fiftieth respondents were given an opportunity to be heard before the decision was taken to terminate their rights of residence. As Mr Botha submitted, had this been done, it would have provided an opportunity to discuss the possibility of accommodating the respondent occupiers or at least some of their number in the proposed development.
39. The applicant contended in argument that *"its business will be severely prejudiced unless the land is made available by the eviction of the occupiers."*
40. It also contended that *"in balancing the respective interests of the parties, the formal housing that will be provided by the applicant to tens of thousands of persons in the future township, together with the associated infrastructure, social services and employment opportunities, far outweighs the refusing*

occupiers interests to continue residing on [the land] without any reasonable prospect of improving their impoverished position.”

41. Neither prejudice to the applicant nor the benefits that may redound to others as a result of the development can extinguish the respondent occupiers' rights under ESTA. Those rights include the right to be heard in relation to the decision to terminate their rights of residence and the right to a decision in that regard that is lawful, just and equitable. The respondent occupiers were afforded none of these rights in this case. They were afforded no opportunity to be heard. Their rights of residence were terminated because they declined to accept a proposal to vacate their homes and move to alternative land, a ground that is neither lawful nor just nor equitable.
42. In the circumstances, the applicant has not established that the requirements of section 8 of ESTA have been met and is accordingly not entitled to an eviction order.
43. Given the above, it would serve no purpose to make the settlement agreement an order of court. Nor is it necessary to consider the counter-application.
44. Given the practice of this Court not to make costs orders in matters such as this which fall within the genre of social litigation, I intend to make no order as to costs.

45. I accordingly make the following order.

Order

1. The application is dismissed.
2. There is no order as to costs.

A handwritten signature in black ink, consisting of a large, stylized initial 'B' followed by a wavy line extending to the right, all written over a horizontal line.

BARNES AJ

Acting Judge of the Land Claims Court

Appearances:

For the applicant: Adv A Venter instructed by DMO Attorneys

For the 1st to 34th respondents: Adv S Mohapi with Adv S Ngwane instructed by
Mashele E N Attorneys

For the 35th to 50th respondents: Adv J Botha instructed by Kgaugelo Baloyi
Incorporated

For the 51st to 54th respondents: Adv M Majozi instructed by the State Attorney