IN THE CONSTITUTIONAL COURT
(REPUBLIC OF SOUTH AFRICA)

Case no: CCT 96/15

In the matter between:

SOPHY MOLUSI	First applicant
DAVID MAMAGOLA	Second applicant
ISAAC SELOLWANE	Third applicant
K L TWARISANG	Fourth applicant
JOSEPH RAMOKANE	Fifth applicant
FRANS MOKANSI	Sixth applicant
and	
FRANCOIS DANIËL JAMES VOGES N.O.	First respondent
FREDERIKA MARIA CHRISTINA VOGES N.O.	Second respondent
THE HEAD OF THE NORTH WEST PROVINCIAL OFFICE OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	Third respondent
THE RUSTENBURG LOCAL MUNICIPALITY	Fourth respondent

APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1. We respectfully submit that the eviction order that was granted in the Land Claims Court ("LCC") in this matter harks back to the pre-1994 approach to evictions. One is, respectfully, left with the impression that the eviction order was granted outside of the scope of the strong constitutional protections against eviction in section 26(1) and 26(3) of the Constitution as well as the detailed provisions of the Extension of Security of Tenure Act, Act 62 of 1997 ("ESTA").

2. Instead, the judgments of the LCC and the SCA create the impression that eviction from one's home continues to be considered in terms of the common law, while ESTA provides only a limitation or adaptation of the common law.

   See: para 16 of LCC judgment, p 46, Vol 1 of the record
   paras 35 and 40 of the SCA judgment, pp 126 and 129, Vol 1

3. To the extent that the LCC judgment paid lip service to the provisions of the Constitution and ESTA, it did so in a manner which is completely incompatible with the provisions and the developed jurisprudence in respect of ESTA evictions.

4. The Supreme Court of Appeal ("SCA") confirmed the order of the LCC (by a majority of three judges to two), in a judgment that respectfully also follows a line of reasoning in terms of which a landlord is required

merely to give notice of termination, whereafter an eviction order almost follows as a matter of course.

5. As is evident from the judgments of the LCC and the SCA, very little procedural or substantive fairness was required of the notice of termination and there followed the scantest of analyses of the "all the relevant circumstances of the occupiers", being the constitutional pre-condition for an eviction (section 26(3)).

6. The above approach is completely at odds with the jurisprudence of this Court in respect of evictions in general, and ESTA evictions in particular. The judgments also pay no respect to the fundamental break with pre-1994 eviction laws as required by the Constitutional provisions and ESTA.

See: *Port Elizabeth v Various Occupiers 2005(1) SA 217 CC at paras 14 to 19*

Hattingh and others v Juta 2013 (3) SA 275 CC at paras 32 and 33

Diedericks v Univeg Operations (LCC 18/2011) [2011] ZALCC 11 at paras 6 and 9.6

Jaftha v Schoeman a.o.; Van Rooyen v Stoltz a.o. 2005 (2) SA 140 (CC) at par. [25] – [34]

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd a.a. 2012 (2) SA 104 (CC) at par. [35] – [38]

(The latter case was decided with reference to the PIE Act (Prevention of Illegal Evictions and Unlawful Occupation of Land Act 19 of 1998) but it should be equally applicable to ESTA – the interests of vulnerable people are at stake.)

7. The problems with the judgments and orders of the LCC and the SCA unfortunately go further than the negation of the constitutional rights and statutory provisions that must be respected in such an eviction case, and the constitutional analyses that must precede the exercise of the power to evict. These judgments, respectfully, breach the most fundamental rules relating to pleadings, the evaluation of evidence in motion proceedings and the principles of where the onus lies in cases such as the present one.

8. The LCC, and subsequently the SCA, upheld a claim based on a set of facts which do not appear anywhere from the founding papers. And it gets, respectfully, even worse – the set of facts upheld weren't even raised as an afterthought in a replying affidavit, as none was filed. The factual basis for the cancellation of the right to occupy was raised during argument in the LCC from the bar. The minority judgment in the SCA (per Shongwe J) correctly described this as "trial by ambush". It could be added that it was trial based on excipiable founding papers.

See: para 18, SCA judgment, lines 4 to 6, p 116, Vol 2
para 19, SCA judgment, line 10, p 116, Vol 2

9. Before dealing with the various errors of fact, law and the misguidance of their discretion, by the courts below, we point at this stage only to the fundamental flaw in the respondent's case, namely, that ESTA requires of the termination of the right of residence (section 8(1)) to be just and equitable.

10. This requires of a court to deal with the requirements of justice and equity in the context of the specific facts of a case. If a central factual requirement in the case of a landowner is effectively repudiated during argument, no termination exists, and certainly no just and/or equitable termination.

11. A judicial discretion that is based on non-existent facts must, with respect, be set aside as a matter of principle. The reliance by the majority judgment in the SCA on *Brisley v Drotsky* was, with respect, incorrect and a failure to appreciate the correct nature of the discretion at stake. *Brisley v Drotsky* involved a particularly undeserving tenant in formal housing, who abused the court processes, and the case involved the PIE Act, more particularly its outer reaches that have been described as an unintended consequence.

See: 2002 (4) SA 1 SCA at paras 2 and 3

Ndlovu v Ngcobo, Bekker and Another v Jika (1) [2002] ZASCA 87; [2002] 4 All SA 384 (SCA) at paras 14 to 17

12. To the extent that this case presents a mixture of constitutional and non-constitutional issues, we respectfully submit that this is a matter where this Honourable Court should engage with all relevant issues as the result of the matter is a gross violation of the basic constitutional rights of the applicants.

13. In the final instance, eviction judgments must be imbued by the provisions and the values of the Constitution and must give expression to the detailed provisions and principles of ESTA. A court must, with respect, apply its mind meticulously to the requirements laid down in sections 8 to 10 of ESTA.

See: *Hattingh a.o. v Juta* 2013 (3) SA 275 (CC) at par. [32].
De Kock v Juggels [2002] 1999 ZALC 13 at paras 10 to 22

Port Elizabeth Municipality v Various Occupiers 2005(1) SA 217 at par. [37]

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others (*Centre on Housing Rights and Evictions and another, Amici Curiae*) 2010 (3) SA 454 (CC at par. [69]

Savage and others v Order of the Sisters of the Holy Cross, Cape Province a.o. [2015] JOL 33739 (WCC)

Transnet t/a Spoornet v Informal Settlers of Good Hope & others [2001] 4 All SA 516 (W)

Lingwood & another v Unlawful Occupiers of R/E of Erf 9 Highlands [2008] JOL 21506 (W) at par [30] a.f.

Land- en Landbouontwikkelingsbank van Suid-Afrika v Conradie 2005(4) SA 506 (SCA) at par. [12]

THE FACTS AS PLEADED BEFORE THE LCC

14. Considering the importance of this matter to the applicants, the record is markedly terse. The founding papers are a manifestation of the formalistic way of pleading in eviction matters prior to the constitutional era.

15. In essence, a number of generic allegations are repeated, by rote, in respect of each and every of the applicants. Overt formalism may still be forgiven if such is all that is called for. However, the present matter presents more of a cut and paste exercise than an application of the mind.

16. In respect of the first applicant the following allegations were made (Record, Vol 1 page 12, par. 4.1 to 4.6):

16.1 On 3 October 2001 the first applicant and the respondents entered into a written lease agreement in terms of which the respondents leased a room on the property in question to the first applicant.

16.2 The first applicant took occupation of the room on 3 October 2001.

16.3 The respondents were entitled to cancel the lease agreement, which they did on 19 May 2009 with a notice served by the Sheriff.

16.4 A copy of the notice of cancellation was attached an annexure marked “FV6” (Record, page 20). The following is of note:

16.4.1 According to the title of the notice, the first applicant was notified of termination of right of residence in terms of section 8(1) of ESTA (Record, page 20, line 3 to 4).

16.4.2 It was stated that the notice was important and that it was given in terms of ESTA (Record, page 20, line 11 to 12).

16.4.3 The last paragraph on the first page of the notice read as follows :

> "Take further notice that you failed to perform in terms of the lease agreement between yourselves and the owner/s of the property, in that you failed to pay the agreed monthly rental since May 2008, which amounted to a fundamental breach of the lease agreement, and/or failed to rectify the position after receiving due demand, in terms of which agreement your right of residence is herewith terminated."

16.5 The basis for cancellation was that the first applicant failed to perform in terms of the lease agreement between her and the respondents, in that she failed to pay the agreed monthly rental since May 2008, which amounted to a fundamental breach of the lease agreement, and/or failed to rectify the position after receiving due demand, in terms of which agreement her right of residence was terminated.

16.6 The first applicant's right to occupy the property therefore terminated on 19 May 2009 but, despite demand, the first applicant failed to vacate the property. (It must be pointed out at the outset that there was indeed no demand.)

17. Apart from dates of the agreements and occupation, and that the leases were verbal in some instances, these allegations were repeated exactly in respect of the twelve occupiers who were cited in the LCC. In respect of the present second to sixth applicants, the repetition of the allegations appear at the following places in the Record:

17.1 Second applicant: Page 13 to 14.1, par. 6.1 to 6.6.

17.2 Third applicant: Page 14.4 to 14.5, par. 10.1 to 10.6.

17.3 Fourth applicant: Page 14.5, par. 11.1 to 11.6.

17.4 Fifth applicant: Page 14.6, par. 12.1 to 12.6.

17.5 Sixth applicant: Page 14.7 to 14.8, par. 14.1 to 14.6.

18. The wording of the written agreements were all exactly the same in respect each occupier who had a written agreement. An example, that of the first applicant, is in the Record at pages 18 to 19.

19. The allegations pertaining to the terms of the oral agreements were also exactly the same in each instance, namely that the respondents and the particular occupier entered into a verbal agreement of lease in terms of which the respondents leased to a particular occupier a particular room on the property. An example of these allegations (in respect of the third applicant) is in the Record at page 14.4, paragraph 10.1.

20. It is noteworthy that the amount of the rental and the frequency of payment were not alleged in respect of the verbal leases.

21. Written leases were alleged in respect of the first and second applicants. In respect of the third to sixth applicants, verbal leases are alleged.

22. On the face of it, the exact similarity of the breach – non-payment of rent since May 2008 – strikes as highly improbable. The respondents seemingly allege that the occupiers embarked on a collective rent boycott.

23. In any event, the allegation of non-payment is denied directly and in no uncertain terms. The applicants (occupiers) all allege that they did, as usual, offer to pay their monthly rental but that the respondent (landowner) refused to accept payment.

24. First, it must be accepted that on the record that this central allegation by the landowner was denied. Secondly, and to the extent that probabilities are relevant in motion proceedings, the occupiers' version is the more probably one. The minority in the SCA accepted this. The majority regarded it as irrelevant.

See: SCA judgment, para 17 (per Shongwe JA), p 115, Vol 2

Compare SCA judgment, para 40 (Mpati P), p 129, Vol 2

25. The absence of any reply by the landowner, respectfully, settles this issue in our submission.

26. Absent from the founding affidavit are also all those categories of factual allegations required by settled jurisprudence as a prerequisite for a just and equitable eviction. These are:

26.1 the requirement of meaningful engagement, especially when dealing with a group of persons;

(See *Schubart Park Residents' Association a.o. v City of Tshwane Metropolitan Municipality a.a. 2013(1) SA 323 (CC) at par. [42] – [51])*

Diedericks v Iniveg Operations (supra) at para 10

26.2 the requirements listed in section 8(1)(e) of ESTA, relating to the procedure followed in terminating residence and giving the occupiers an opportunity to make representations.

26.3 an investigation of possibilities of alternative accommodation, more specifically, any alternatives to eviction itself;

26.4 a *bona fide* attempt at placing all the relevant personal circumstances of the occupiers before the court;

26.5 facts that justify a favourable discretion considering the provisions of section 8(1)(a) to (d).

27. The absence of pleaded facts in this regard, also results automatically in a failure by the landowner to deal with the facts in respect of each and every individual or individual family. It is, with respect, important to remember that the facts pleaded in eviction matters must, as much as is possible, deal with the individuals. After all, it is individuals who are evicted at the end of the day.

See: *City Council of Springs v Occupants of Kwa-Thema 210* 2000(1) SA 476 (LCC) at par. [11] a.f.

28. The LCC, with respect, completely ignored the central factual dispute in the matter. It found that the real reason for the eviction was the intention and wish of the landowner to develop the land. The LCC found as follows:

"Further, the applicants outlined details on which the property is to be utilised on vacation by the respondents."

29. For this proposition it relied on the matter of *Labuschagne and Another v Ntshwane* 2007 (5) SA 129 (LCC).

(Record, page 45, par. [13], line 21 to 25)

30. The first problem is that no such detail appears from the record. The Applicants could simply not defend themselves against the alleged wish to develop. The nature and details of the development remains a mystery. Development is important, but it should serve the Constitution, not mammon. Its details should be scrutinised.

31. Secondly, *Labuchagne* must be read in conjunction with *Land- en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) at the end of par. [12]:

> I agree that the question whether the termination of an occupier's right of residence is just and equitable must be considered from the perspective of both the owner and the occupier. However, the rest of the observations of the learned Judge are too broadly stated. There may very well be instances where a court might find that it was not just and equitable to terminate an occupier's right of residence for the reason that the owner wishes to sell the property. But *non constat* that that will be the only factor to be considered, nor that such factor will be decisive. To determine what is just and equitable the factors enumerated in s 8(1) of the Act must be considered, together with all other relevant factors.

(There is no fundamental difference between termination of residence to develop land or to sell land.)

32. The LCC also did not refer to the notices of termination which only made mention of the alleged non-payment of rental (Record, page 20 to 21).

33. The LCC, instead, relied on statements made by the landowner's legal representative during argument. Notice of the termination of the right to occupy was not given as a result of any breach, but simply by the alleged inherent right to give reasonable notice to terminate. We deal with the legal implications of this assertion below.

34. The acceptance of the underlying reasons for termination from statements made from the bar, can only be explained on the basis that the court regarded the real underlying reasons for the termination as irrelevant. This is why we respectfully submit that the reasoning of the LCC and the SCA harks back to the pre-1994 legal position. The reasons for termination are an essential part of the ESTA enquiry. That the reasons for termination must be just and equitable, goes without saying.

35. See: *Malan v City of Cape Town* 2014 (6) SA 315 (CC) [62] – [64]

(In this case the issue was cancellation of a lease by mere notice in respect of a public housing scheme but it is submitted that the same

considerations of public interest will be applicable to notice of termination to an occupier under ESTA.)

THE FATAL LEGAL FLAWS IN THE LCC AND MAJORITY SCA JUDGMENTS

The issue of alternative accommodation

36. The LCC did not properly investigate the issue of alternative accommodation.

37. Its eviction order does not make provision for either the local authority or the landowner to provide alternative accommodation. We respectfully submit that this is a fatal error.

38. It is clear from the record and the probation report that the applicants are all very poor people. We submit that the issue of alternative accommodation must not only be properly considered, but that there is a positive duty to ensure that such is available.

39. Although the primary duty to provide housing to indigent people falls on the state, it is not correct to assert that a private landowner has no duty at all. The limited horizontal application of the right to housing has been recognised in our law.

See: *Occupiers of Mooiplaats v Golden Thread Ltd a.o.* 2012 (2) SA 337 (CC) at par. [17].

City of Johannesburg v Blue Moonlight (supra) at para 96

The first item of the fourth pre-amble to ESTA, which envisages the joint efforts of occupiers, land owners, and government bodies, where possible.

The Role of Local Governments in Evictions, J van Wyk, PER/PELJ 2011/14/3 at 4.6 and .4.12.

40. In addition, and related to this, is the fact that eviction orders should not be granted if they would leave the occupiers homeless.

See: Breaking the Tie: Evictions from Private Land, Homelessness and a new normality, S Wilson, SALJ, 2007, Vol 126 p 270

A failure to consider the feasibility of a development in terms of section 4 of ESTA

41. Section 4 of ESTA provides for a landowner and the state, in conjunction, to provide alternative accommodation for occupiers.

42. As is apparent from the ESTA jurisprudence, section 4 of ESTA is a much ignored provision. In this regard, we respectfully submit that the courts, especially the LCC, have failed to develop a jurisprudence around section 4, more particularly around section 4 as a method of alleviating the consequences of evictions.

43. Section 4 of ESTA also makes it clear that the constitutional rights which ESTA gives effect to, go further than the right against arbitrary evictions provided for in section 26(3). ESTA goes further by providing a mechanism that gives effect to the rights enshrined in section 26(1), section 26(2) and section 25(6) of the Constitution.

44. Courts should, with respect, not treat ESTA merely as a defensive shield against arbitrary and unfair evictions. Courts should also treat ESTA as legislation that promotes the basic access to housing and tenure of security. The present matter is a matter where such is specifically called for.

45. It is appropriate to refer to the preamble to ESTA:

> WHEREAS many South Africans do not have secure tenure of their homes and the land which they use and are therefore vulnerable to unfair eviction;
>
> WHEREAS unfair evictions lead to great hardship, conflict and social instability;
>
> WHEREAS this situation is in part the result of past discriminatory laws and practices;
>
> AND WHEREAS it is desirable-
>
> that the law should promote the achievement of long-term security of tenure for occupiers of land, where possible through the joint efforts of occupiers, land owners, and government bodies;
>
> that the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners;

that the law should regulate the eviction of vulnerable occupiers from land in a fair manner, while recognising the right of land owners to apply to court for an eviction order in appropriate circumstances;

to ensure that occupiers are not further prejudiced …

An incorrect appreciation of the nature of the discretion

46. ESTA grants to the adjudicating court a discretion to evict. The origin of the discretion is in the Constitution itself where section 26(3) requires all relevant circumstances to be considered.

47. In this regard, ESTA has brought about similar changes as those brought about by the Prevention of Illegal Eviction and Unlawful Occupation of Land act 19 of 1998 ("PIE"). In fact, it can safely be asserted that the protections in ESTA, both procedural and substantive, would be stronger than that of PIE. Matters decided under PIE may therefore also be instructive.

48. The discretion must be exercised after due and meticulous regard has been paid to the constitutional provisions and values as well as the provisions of applicable legislation, in this instance ESTA.

See: *Mooiplaats*, *supra*.

49. Again, we respectfully submit that the eviction order should be set aside as the LCC, as well as the SCA majority, failed to approach the matter in accordance with the developed jurisprudence. They, respectfully,

failed to apply a constitutionally appropriate balance between the property rights of the landowner and the security of tenure of the occupiers.

THE ERRORS OF FACT AND DISREGARD FOR THE BASIC RULES OF PLEADINGS

50. The findings made by the LCC and the majority of the SCA which are, with respect, incorrect, are set out in the applicants' statement of disputed facts (Record, page 166 a.f.)

51. The respondents based their whole case in the LCC on an allegation that the lease agreements were terminated because of non-payment of rent by the applicants. This reason for the termination of the leases is repeated time and again in the founding affidavit in respect of each of the applicants, as set out above.

52. The founding affidavit made no mention of any other basis for termination of the lease agreements. But when the application was heard, the respondents suddenly relied in argument on termination of the leases by reasonable notice in terms of the common law because the leases were not for fixed periods. This new ground for cancellation was raised for the first time in the heads of argument, accepted by the LCC and confirmed by the SCA.

53. The application was therefore argued on behalf of the respondents and ultimately adjudicated on a totally different basis than the case made out in the respondents' founding affidavit.

54. It is trite law that a party may not rely on issues that were not raised in the pleadings. The Supreme Court of Appeal has made this clear on many occasions.

See: *Minister of Safety and Security v Sekhoto and another* [2011] 2 All SA 157 (SCA) at par. [57];
Minister of Safety and Security v Slabbert [2009] JOL 24658 (SCA) at par. [9] and further;
Eskom Holdings Ltd a.a. v New Reclamation Group (Pty) Ltd [2009] JOL 23269 (SCA) at par. [17].
Fischer v Ramahlele (203/2014) [2014] ZASCA 88 (4 June 2014) at pa. [13] and [14]

55. It is also trite law that, in application proceedings, the affidavits do not only constitute evidence, but also fulfil the purpose of pleadings. This is confirmed by the minority judgment of the SCA (per Shongwe JA)

See: *Diggers Development (Pty) Ltd v City of Matlosana and another* [2012] JOL 28177 (SCA) at par. [18];
Naidoo and another v Sunker and others [2012] JOL 28488 (SCA) at par. [19];
Standard Bank of SA Limited v Gordon and others [2011] JOL 27838 (GSJ).

56. Both the LCC and the SCA allowed the respondents' fundamental turn-about and decided the case on the different basis advanced on behalf

them. We respectfully submit that this was wrong, not only in terms of the common law but especially in view of the fact that the proceedings were for the eviction of poor people under ESTA. The reliance on *Brisley v Drotsky (supra)* is with respect incorrect.

57. We submit that the respondents should not have been allowed to rely on reasonable notice of termination of the lease agreements. This is a totally different issue than that which the applicants were called upon to answer. The reason for termination must surely be considered as a relevant circumstance or factor as it is termed in section 8(1) of ESTA, and must therefore be considered.

58. The Rules of the Land Claims Court specifically provide that a respondent must be properly informed of the grounds upon which the application is based. In accordance with Form 2 of Schedule 1 to the Rules, the applicants were informed as follows in the notice of motion Record, page 4, line 8 to 9):

> "The grounds on which the application is based are set out in the affidavit by FRANCOIS DANIEL JAMES VOGES."

59. Under these circumstances the applicants correctly (and comprehensively) addressed only the grounds set out by Mr Voges. Addressing anything further would have been irrelevant.

> *See also rule 32(1) of the LCC which requires a founding affidavit "as to the facts upon which the applicant relies*".

60. It was common cause that the applicants derived their consent to reside on the farm from the lease agreements. In other words, the applicants' rights of residence on the farm could only have been terminated after termination of the leases. The basis of termination of the leases was therefore a decisive issue between the parties.

61. There are various considerations that were not canvassed due to the respondents' failure to alert the applicants to the basis upon which the eviction was ultimately sought and granted. We deal with these aspects hereunder with reference to section 8(1)(a) to (e) of ESTA.

62. The contents of the applicants' answering affidavit in the LCC would have been totally different if the applicants were not ambushed into dealing only with termination of the leases on a basis that was not proceeded with, namely non-payment of rent.

63. The problem goes further. In the LCC the respondents relied on the applicants' version that the first respondent during May 2008 refused to accept rent and said that he was going to demolish the dwellings. They maintained that this constituted a cancellation of the periodical leases by notice

See: Record, page 75 a.f., par. 23 to 25.

64. The reliance that the respondents placed before the LCC on the written notices (Record, page 20 to 21), allegedly served by the sheriff, was that they constituted compliance with section 9(2)(d)(i) of ESTA and not that it constituted a termination of a right of residence

See: Record, page 78, par. 26

65. In the SCA the respondents again changed their stance. There they relied on the notice allegedly served by the Sheriff on 19 May 2009 as the notice of termination of the leases.

See: Record, page 78, par. 28

THE CORRECT APPROACH TO THE LAW AND THE FACTS

66. At the risk of abrogating our task of analysis to a consideration of the minority judgment of the SCA, we respectfully submit that very little needs to be added to the SCA minority judgment.

67. The LCC and the SCA should have found that the respondents were bound by their initial ground for termination of the leases, namely non-payment of rent, as pleaded in their founding affidavit. This ground was not proven but in fact effectively refuted by the applicants.

68. It is trite law that, in the absence of agreement to the contrary, there must be demand for payment before a lease can be cancelled.

69. In any event:

69.1 Termination of a periodical lease by mere notice must be reasonable in terms of the common law. This largely depends on the frequency of payment of rent and in the event of monthly payments (as was the case with the written leases *in casu*) notice must be a calendar months' notice, not from the middle of a month to the middle of the next.

See: The Law of Sale and Lease by A J Kerr (2nd edition) on page 248.

69.2 With regard to the verbal leases *in casu*, nothing was said about the frequency of payment and the respondents did not prove that the notice period was reasonable.

69.3 Even on the common law and the respondents' own later version, there was no termination of the leases and there was no "lawful ground" for termination as required by section 8(1) of ESTA.

70. Over and above a lawful ground for termination, the respondents had to show that the termination of the leases was just and equitable in terms of section 8(1) of ESTA. They failed to do so.

71. On the contrary, due to the respondents' change of stance, the termination of the leases was clearly unjust and inequitable.

72. With regard to section 8(1)(a), the applicants did not deal in their answering affidavit with the fairness of the lease agreements and the provisions thereof, nor the fairness of termination by mere notice. They dealt with the case they were confronted with, namely termination due to non-payment of rent. Yet it was held against them, towards the end of paragraph [35] of the majority judgement in the SCA (Record, page 126, last line), that “none was suggested” by the applicants with regard to unfairness in the terms of the leases. It was also found in paragraph [42] (Record, page 131, first line) that “the notice of termination was reasonable”, without the applicants having been forewarned that this would be an issue.

73. With regard to section 8(1)(b) the SCA, in paragraphs [32] and [36] of the majority judgement, referred to “skirmishes” between the parties (Record, page 124 and 127). This refers to a prior application, mentioned in paragraph [4] of the LCC’s judgement (Record, page 42), which the occupiers made against the respondents to rebuild damaged rooms. However, this was never referred to or dealt with in the papers when the case served before the LCC. The LCC referred to the previous application by its own volition. It can hardly be held against the applicants that they resisted damaging of their dwellings as conduct in support of termination of residence.

74. As far as section 8(1)(c) is concerned, there are two important aspects. In the first place, the position is the same as with section 8(1)(a). The

applicants did not deal with hardship that they could suffer, because they refuted the case as pleaded against them in the founding affidavit. Yet it was held against them, in paragraph [37] of the majority judgement in the SCA that they "did not suggest any hardship that they would endure as a result of termination of their right of occupation" (Record page 128, line 1 to 4).

75. In the second place with regard to section 8(1)(c):

75.1 In paragraph [27] of the majority judgement in the SCA (Record page 121, reference is made to paragraph [16] of the LCC's judgement (Record page 46, line 20 to 23) where it was found that section 9(2)(a) was complied with as the principal reason for termination of the leases was that the respondents needed the land for further development.

75.2 In paragraph [12] of the LCC's judgement it is stated that the respondents did not pursue the argument based on non-payment of rent but "instead chose to rely on their need to develop their property as the reason for termination (Record page 45, line 11 to 14)."

75.3 The important fact of the matter is that the respondents never in their founding affidavit made any mention whatsoever of the development of their property. In its findings the LCC did not

refer to any portions of the founding affidavit and there are no references to be made. The SCA, in paragraph [27] of the majority judgment, simply re-iterated what the LCC stated without having regard to the record

See: Record page 121

75.4 In paragraph [13] of the LCC's judgment the finding is made that the respondents "outlined details on which the property is to be utilised upon vacation" by the applicants (Record page 21, line 21 to 23). This is simply incorrect. In fact there is nothing in the respondents' founding papers about utilisation of the property after vacation, let alone details thereof. Yet the SCA, in paragraph [37] (Record page 127) of the majority judgement, simply re-iterated what the LCC stated without having regard to the record and took this into consideration as an interest of the respondents for the purposes of section 8(1)(c) of ESTA.

75.5 The only manner in which development of the property could have been raised in the LCC, was by inadmissible factual averments by counsel during argument.

76. With regard to section 8(1)(d): If the applicants knew that the basis of the termination of their right of residence would have been mere termination of a periodical lease by notice, they could have negotiated with the respondents and have dealt in their answering with relevant

facts as to the possibility of renewal of the leases. As the case eventually turned out, the SCA simply held that section 8(1)(d) was not relevant

See: Record page 128, paragraph [38].

77. Section 8(1)(e) is of particular importance. It is common cause on the papers filed in the LCC that the applicants were never given an opportunity to make representations before their right to reside on the respondents' property was terminated. Such an opportunity is of particular importance where the right is terminated by mere notice and not upon breach of contract. The procedure followed by the respondents cannot be regarded as fair in terms of ESTA.

78. Eventually the respondents simply relied and succeeded on the common law, compliance of which they in any event did not prove.

LEAVE TO APPEAL

79. The requirements of leave to appeal in this type of matter are by and large trite law.

80. Matters of eviction and tenure of security clearly constitute constitutional issues. So does the interpretation of ESTA as a piece of legislation that gives effect to the aforementioned rights.

81. In addition, leave to appeal will be granted if it is in the interests of justice to do so. This involves an enquiry into the nature and importance of the matter as well as the prospects of success on appeal. In our submission, these requirements are all established in the applicants' founding affidavit in this Honourable Court, and appear from the record filed.

82. We respectfully submit that this is a matter in which leave to appeal should be granted.

RELIEF SOUGHT

83. We respectfully submit that leave to appeal should be granted and that the appeal should be upheld. In the present circumstances, the orders of the SCA and the LCC should both be set aside and replaced by a substituting order in terms of which the application should be dismissed. Remittal is not appropriate in this matter. The Respondents should return to the drawing board.

84. Applicants seek no order as to costs.

C R JANSEN SC
J J BOTHA
Counsel for applicants

Chambers, Pretoria
25 September 2015

LIST OF AUTHORITIES

1. **Brisley v Drotsky 2002 (4) SA 1 SCA*

2. *City Council of Springs v Occupants of Kwa-Thema 210* 2000(1) SA 476 (LCC)

3. **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd a.a.* 2012 (2) SA 104 (CC)

4. **De Kock v Juggels [2002] 1999 ZALC 13*

5. *Diedericks v Univeg Operations (LCC 18/2011) [2011] ZALCC 11*

6. *Diggers Development (Pty) Ltd v City of Matlosana and another* [2012] JOL 28177 (SCA)

7. **Eskom Holdings Ltd a.a. v New Reclamation Group (Pty) Ltd* [2009] JOL 23269 (SCA)

8. *Fischer v Ramahlele* (203/2014) [2014] ZASCA 88 (4 June 2014)

9. **Hattingh and others v Juta 2013 (3) SA 275 CC*

10. *Jaftha v Schoeman a.o.; Van Rooyen v Stoltz a.o.* 2005 (2) SA 140 (CC)

11. *Labuschagne and Another v Ntshwane* 2007 (5) SA 129 (LCC).

12. *Land- en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA)

13. *Lingwood & another v Unlawful Occupiers of R/E of Erf 9 Highlands* [2008] JOL 21506 (W)

14. *Malan v City of Cape Town* 2014 (6) SA 315 (CC)

15. *Minister of Safety and Security v Sekhoto and another* [2011] 2 All SA 157 (SCA)

16. *Minister of Safety and Security v Slabbert* [2009] JOL 24658 (SCA)

17. *Naidoo and another v Sunker and others* [2012] JOL 28488 (SCA)

18. **Ndlovu v Ngcobo, Bekker and Another v Jika (1) [2002] ZASCA 87; [2002] 4 All SA 384 (SCA)*

19. **Occupiers of Mooiplaats v Golden Thread Ltd a.o.* 2012 (2) SA 337 (CC)

20. **Port Elizabeth Municipality v Various Occupiers* 2005(1) SA 217

21. *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* (*Centre on Housing Rights and Evictions and another, Amici Curiae*) 2010 (3) SA 454 (CC)

22. *Savage and others v Order of the Sisters of the Holy Cross, Cape Province a.o.* [2015] JOL 33739 (WCC)

23. *Schubart Park Residents' Association a.o. v City of Tshwane Metropolitan Municipality a.a. 2013(1) SA 323 (CC)*

24. *Standard Bank of SA Limited v Gordon and others* [2011] JOL 27838 (GSJ)

25. *Transnet t/a Spoornet v Informal Settlers of Good Hope & others* [2001] 4 All SA 516 (W)