

**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT, PRETORIA)**

|                                          |                                                                                                |
|------------------------------------------|------------------------------------------------------------------------------------------------|
| DELETE WHICHEVER IS NOT APPLICABLE       |                                                                                                |
| (1) REPORTABLE: YES/NO.                  |                                                                                                |
| (2) OF INTEREST TO OTHER JUDGES: YES/NO. |                                                                                                |
| (3) REVISED.                             |                                                                                                |
| DATE 17.05.2010                          | <br>SIGNATURE |

Case no: 49374/2007

Date: 18 May 2010

In the matter between:

**NKWALI BROTHERS FARMING CC**

Applicant

And

**SHALUZA THELA**

1<sup>st</sup> Respondent

**SONTO THELA**

2<sup>nd</sup> Respondent

**ANNA MASEKO**

3<sup>rd</sup> Respondent

**KHAKHI MASEKO**

4<sup>th</sup> Respondent

**ZWELI MASEKO**

5<sup>th</sup> Respondent

**DOCTOR MASEKO**

6<sup>th</sup> Respondent

**AMOS MASONDO**

7<sup>th</sup> Respondent

**MANDLA THABETHE**

8<sup>th</sup> Respondent

**ELLIOT NKOSI**

9<sup>th</sup> Respondent

**NYELUNGA PHAKATHI**

10<sup>th</sup> Respondent

**MADODA NKWANYANA**

11<sup>th</sup> Respondent

**SHADRACK NGWENYA**

12<sup>th</sup> Respondent

**PIXLEY KA SEME MUNICIPALITY**

13<sup>th</sup> Respondent

**DEPARTMENT OF LAND AFFAIRS,  
MPUMALANGA PROVINCE**

14<sup>th</sup> Respondent

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**JUDGMENT**

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**MATOJANE J**

[1] The applicant is a registered owner of the farm Elandsfontein 85, Registration Division HS, Mpumalanga Province on which it farms cattle. It acquired the property at an auction on the 17<sup>th</sup> of January 2006. The property was previously owned by one Mr G A Rocher who was an employer of some of the respondents. The applicant invokes the prevention of illegal eviction from and unlawful occupation of Land Act 19 of 1998 ('PIE') to seek the eviction of the first to the twelfth respondents from the property.

[2] The respondents contend that they have rights of an 'occupier' as defined in terms of section 1 of the Extension of Security of Tenure Act, No 62 of 1997 ('ESTA'). The court is called upon to determine the rights of the respective parties in terms of the two acts which are mutually exclusive.

[3] The purpose of PIE is to regulate evictions for all illegal or unlawful occupiers who are residing on any premises or piece of land anywhere in South Africa. Therefore if it is proved that a farm dweller is illegally residing on a farm without the consent of the

owner, that dweller is an illegal occupier and eviction proceedings may be instituted under PIE. If the farm dweller falls within the definition of an occupier in the terms of ESTA then the owner has to institute the eviction proceedings in terms of ESTA.

[4] Counsel for the respondents in his Heads of Argument and in court submitted that the High Court has no jurisdiction to hear this matter. He argued that the Land Claims Court has exclusive jurisdiction in terms of section 17 and 20 of ESTA. The relevant section of the Act is quoted below:-

*"17. (1) a party may, subject to the provisions of sections 19 and 20, institute proceedings in the magistrate's court within whose area of jurisdiction the land in question is situate, or the Land Claims Court.*

*(2) If all the parties to proceedings consent thereto, proceedings may be instituted in any division of the High Court within whose area of jurisdiction the land in question is situate.*

*20. (1) The Land Claims Court shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power-*

- (a) to decide any constitutional matter in relation to this Act;*
- (b) to grant interlocutory orders, declaratory orders and interdicts;*
- (c) to review an act, omission or decision of any functionary acting or purporting to act in terms of this Act; and*
- (d) to review an arbitration award in terms of the Arbitration Act 1965 (Act No. 42 of 1965), in so far as it deals with any matter that may be heard by a court in terms of this Act.*

*(2) Subject to the provisions of section 17(2), the Land Claims Court shall have the powers set out in subsection (1) to the exclusion of any court contemplated in section 5 166(c), (d) or (e) of the Constitution."*

[4] From the reading of section 20 as a whole it is clear that the Land Claims Court has exclusive jurisdiction in the performance of its functions in terms of ESTA. The applicant alleges that respondents are 'unlawful occupiers' as defined in PIE and the respondents on the other hand, alleges that they have rights of an 'occupier' under ESTA and PIE is not applicable. None of the parties claim performance of any of the functions of the court in terms of ESTA. Put differently, I am

not called upon to regulate tenure rights and the conditions under which the right of persons to reside on land may be terminated, this is the exclusive jurisdiction of the Land Claims Court in terms of section 20(2). Accordingly, this court, in my view, has the ordinary power to interpret the provisions of ESTA in order to determine which of the two Acts apply in the dispute before me. See **Agrico Masjinerie (Edms) Bpk v Swiers** 2007 (5) SA 305.

[5] According to section 1(1) of ESTA a person is deemed an occupier if he resides on land which belongs to another person, and who has on 4 February 1987 or thereafter had consent or another right in law to reside on the farm. In paragraphs 15, 16, 17, 18, 19, 24 and 25 of the founding affidavit, first respondent explains the circumstances surrounding their occupation of the farm as follows:-

*"15. I arrived on this farm in or during 1968. I was 14 years at the time, having been born on the 20<sup>th</sup> of February 1954. I came to join my father, George Thela and my mother Ana, who were already working and residing on this farm. At that time my parents were working for Mr G A Rocher the senior. Apparently my father had arranged with Mr Rocher the senior that I should take up employment on the farm as one of the farm workers. Mr Rocher accepted me and gave his consent allowing me to reside on the farm together with my parents.*

*He endorsed my reference book. This practise was done as an acknowledgment that I had a permission to occupy the farm. I enclose hereto a copy of my reference book marked TH1.*

*16. Immediately upon my arrival on the farm I stated working as a farm labourer as well, for Mr Rocher the senior. The system of work that was adopted at time was I would alternate with my father. My father would work for Rocher the senior on the farm for a period of six months in a year and thereafter he would be transferred to a neighbour farm and during that period I would work for the remainder of the six month period on the farm. When he returns after a period of six months, I would be transferred to that neighbouring farm or another farm as Rocher the senior would arrange for a period of six months, whilst my father would be working his period of six months on the farm. At that stage Rocher was not paying us in cash for services rendered. He gave us an accommodation and he would provide us with food.*

*17. Although we were working in such cycles of six-month per year, we continued to stay on the farm. Such occupation was always with the consent of the owner of that farm. This system of rotation was adopted, apparently, by the farmers around the area in order to rest the farmworkers for a certain*

period in the year. During that period when the employees were put to rest they were allowed to work on the neighbouring farms just to get an extra income either in cash or in kind. Hence our employer would arrange with the owners of the neighbouring farms to take us during our period of rest. However, my mother was not working in rotation. She was always based on the farm and residing there.

18.1 My father passed away many years ago. I do not have his death certificate and I do not remember if there was one. I do not know the exact year of his passing on. I pause to mention that I do not have a formal education. It is now not easy to meticulously remember some of the things. All I can say is that it is over twenty years now since he passed on and he pre-deceased my mother.

18.2 Upon his death I assumed the responsibilities in regard to his funeral and its arrangements. I approached Mr Rocher the senior to make a request that he allow us to burry my father on the farm. He showed me a site where we could burry him and he was buried as such on the farm and with Mr Rocher's consent. Mr Rocher told me at the time that whenever one of us passes on, we must just burry those deceased on that site (henceforth graveyard) and we have continued to do so.



18.3 My mother has also passed on. She was also buried on this farm. At the time of her death she was no longer employed due to her old age, but she was still residing on the farm.

19.1 It came to pass that Mr Rocher the senior passed on. His son, Mr Rocher the junior, took over the running of the farm. I cannot remember the year when Mr Rocher the senior passed away. But upon his passing on Mr Rocher the junior continued to accept me and my family to stay and continued to work for him on the farm. He also did away with the rotation system and everybody worked continuously and also residing on this farm.

19.2 He started paying me R10.00 per month and after the harvest he would give me sixty bags of maize meal. I would sell some of the bags of the maize meal to the neighbouring villages. That enabled me to raise money to buy some cattle of my own. Mr Rocher the junior gave his consent allowing me to graze my cattle on the farm.

24. Now I turn to deal with each of the respondents as cited in this application. I wish to bring to this Honourable Court the circumstances regarding their occupation of the farm. To the



extent that some information may not be within my personal knowledge, same has been obtained from the relevant respondent and also verified through consultation with other respondents who have such information.

24.1 The second respondent is my biological child. She has never worked on the farm. She has resided on the farm through me.

24.2 The third respondent is my sister. Her correct names are Selina Velaphi Maseko. The Rochers used to call her by our mother's name. In actual fact they called her Anna omncane (Anna the junior). She used to work for Rocher the senior. Later on she worked for Rocher the junior. All her children, including the fourth respondent were born and grew up in this farm. To the extent that they did, they attended school in the nearby villages. They have never been and/or lived outside this farm.

24.3 The fourth respondent is my nephew. He is the son to the third respondent. I know that he has worked for Rocher the junior until he left the farm as explained above. I do not know personally as to when he started working for Rocher the junior. He informs me that he started during 1993. I can

*confirm that he has always been living on this farm all his life and he was never left or stayed outside this farm.*

*24.4 The fifth respondent is also my nephew. He is the son of the third respondent. I can confirm that to the best of my knowledge he worked for Rocher the junior until his departure. He has been residing on this farm and has never left. He informs me that he also started working for Rocher the junior in 1993. I have already mentioned herein above that the children of the third respondent grew up on this farm.*

*24.5 The sixth respondent is the eldest son of the third respondent. He has also worked for Rocher the junior until his departure. He informed me that he started working on this farm in 1991 and since then he has never left.*

*24.6 The seventh respondent was born and grew up on this farm and has worked for Rocher the junior. His parents used to work for Rocher the senior on this farm until they passed on and they were also buried in this farm in the graveyard.*

*24.7 I know the eighth respondent. He arrived in this farm shortly after my arrival. He came along without parents and he was still very young at that stage. He worked for both Rocher*

*the senior and Rocher the junior. Until to date he has never left this farm.*

*24.8 I know the ninth respondent. He came some years ago to join his parents who were already working for Rocher the senior on the farm. He stayed with them and worked for both Rocher the senior and Rocher the junior until the latter's departure. His parents passed away and they were also buried in this farm.*

*24.9 The tenth respondent informs me that he came in 2001. He came to join his son will had been working here for Rocher the junior. He did not work for either of the farmers.*

*24.10The eleventh respondent was born in this farm. His parents worked for both Rocher the senior and the junior. His parents have since passed on and were buried in the graveyard on this farm. He informs me that he started working for Rocher the junior since 1993 until the latter's departure.*

*24.11The twelfth respondent is also known to me. He came to this farm many ears ago. He worked for both Rochers and he resided in this farm ever since his arrival.*

*25. I wish to pause herein to state that all of the above respondents, with the exception of the tenth respondent, occupied this farm upon and with the consent of the previous owners. The previous owners allowed us to reside on this farm and to regard it as our permanent home. It will be noted that they gave us a graveyard wherein we buried our deceased ones and the graves are there to prove."*

[6] In my view, the consent of the previous owner to the occupation of farm by the respondents was never lawfully withdrawn before the farm was sold. The respondents continued to reside in the farm despite the fact that the new owners had never consented to their occupation. It follows that the consent referred to in s3(2)(a) should include that of the previous owner if effect is to be given to the intention of the legislature. Consequently, respondents are deemed to be occupiers in terms of s3(2)(a) of the Act. See **Hen-Boisen and Another NO v Loliwe** 2000(1) SA 796 LCC.

[7] In its replying affidavit, applicant states that third respondent and her son, fourth respondent, left the farm with the previous owners for Pretoria and returned to the farm later. Applicant states further that the eighth respondent had resigned from Rocher's employ and only returned to the farm after Rocher's departure. Twelfth respondent according to applicant never worked for Rocher

and had been evicted from another farm when he came to reside on the farm. Counsel for the applicant submitted that in leaving the farm, these respondents ceased to occupy the property as contemplated in ESTA and are unlawful occupants as defined in PIE. I disagree for the reasons that follow:

[8] Section 25(3) provides that if an occupier vacates the land concerned freely and willingly, while being aware of his or her rights in terms of this Act, he or she shall not be entitled to institute proceedings for restoration in terms of section 14. It is clear that the said respondents were not aware of their rights in terms of ESTA at the time they left, they therefore have a right to claim restoration in terms of section 14 of the Act. Though they are unlawful occupiers in terms of PIE, they still have the opportunity to apply to regularize their occupation and the order of eviction will defeat the purpose of the Act, which is to facilitate legally secure tenure for vulnerable people living on land that belongs to someone else.

[9] As the respondents were in occupation of the farm prior to the 4th of February 1997, they are occupiers as defined and they had consent to live in the property. I find that their eviction has to be done in terms of the provisions of ESTA and not PIE.

[10] The following order is made:

1. The application is dismissed
2. Each party is to pay their own costs.



MATOJANE, J