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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO: EL 1788/2023

Date Heard: 20 February 2025

Date Delivered: 15 April 2025

In the matter between:

**TENANTS OF THE EASTERN CAPE
DEVELOPMENT CORPORATION**

Applicant

and

THE EASTERN CAPE DEVELOPMENT CORPORATION

Respondent

JUDGMENT

MULLINS AJ

[1] This is an application brought in accordance with section 38(2) of the Constitution of South Africa Act, 108 of 1996 for the certification of a proposed class action. The notice of motion frames the relief sought as follows:

- “1. That the tenants of the Eastern Cape Development Corporation be declared a class and a “class litigation certificate” for leave to institute a class litigation be granted in favour of the Applicant.
2. That the Applicant be ordered to institute such class litigation within 60 court days from the grant of this order and to serve the Respondent with such papers upon issue.
3. That the Applicant shall inform the members of the class of their right to opt-out of this litigation. Such notification shall be by way of a notice in a newspaper circulating in the area and/or any other suitable means, within 14 days from the grant of this order.
4. That there shall be no order as to costs, save where this application becomes opposed.”

[2] The Applicants are described as Tenants of The Eastern Cape Development Corporation. They are represented by one Anna Nosipho Ngqono (the “Deponent”). The Respondent is the Eastern Cape Development Corporation, an organ of state established in accordance with section 2 of the Eastern Cape Development Corporation Act, 2 of 1997.

[3] The Respondent is the registered owner of a substantial number of immovable properties situated in Butterworth and Mthatha (the “Properties”), which were “inherited” by it on the incorporation of the former homeland of Transkei into the Republic of South Africa. These Properties were originally rented out by the erstwhile Government of Transkei and are still occupied, whether by the original lessees, or their successors in title (the “Tenants”).

[4] The Applicants, whose actual number is uncertain from the papers, comprise a group of the Tenants.

[5] For many years there has been an on-going dispute between the Respondent and the Tenants as to the continued occupation by them of the Properties or, more correctly, the basis of their continued occupation. The Respondent seeks to sell the Properties, which the Tenants, including the Applicants, are attempting to frustrate on various grounds (which grounds are dealt with below).

[6] The application is premised on Section 38(c) of the Constitution, which reads:

“38 Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

- (a) ...
- (b) ...
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- ...

[7] Although the quoted section appears to confine class actions to issues of a constitutional nature, it is trite that this is not so. In Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others¹ the Supreme Court of Appeal (per Wallis JA) stated:

“[21] In my judgment it would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but to deny it in equally appropriate circumstances, merely because of the claimants' inability to point to the infringement of a right protected under the Bill of Rights. The procedural requirements that will be determined in relation to the one type of case can

¹ 2013 (2) SA 213 (SCA)

equally easily be applied in the other. Class actions are a particularly appropriate way in which to vindicate some types of constitutional rights, but they are equally useful in the context of mass personal injury cases or consumer litigation. ...”

[8] As for the institution of a class action, Wallis JA had this to say:

“[23] All of the parties accepted that it is desirable in class actions for the court to be asked at the outset, and before issue of summons, to certify the action as a class action. This involves the definition of the class; the identification of some common claim or issue that can be determined by way of a class action; some evidence of the existence of a valid cause of action; the court being satisfied that the representative is suitable to represent the members of the class; and the court being satisfied that a class action is the most appropriate procedure to adopt for the adjudication of the underlying claims. In my view they were correct to do so and we should lay it down as a requirement for a class action that the party seeking to represent the class should first apply to court for authority to do so. My reasons for adopting that requirement are the following.”² [Underlined for emphasis].

[9] And, as for the requirements necessary to make out a case for the certification of a class action the Learned Judge of Appeal stated the following:

“[26] In the course of argument the presiding judge³ put to counsel the following list of the elements that should guide a court in making a certification decision. They were:

- the existence of a class identifiable by objective criteria;
- a cause of action raising a triable issue;
- that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class;

² The reasons why certification is a prerequisite are set out in paragraph [24] of the judgment. This aspect need not be dealt with for the purpose of this judgment.

³ In the court *a quo*.

- that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;
- that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class;
- that the proposed representative is suitable to be permitted to conduct the action and represent the class;
- whether given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members.

There is an element of overlapping in these requirements. For example, the composition of the class cannot be determined without considering the nature of the claim. The fact that there are issues common to a number of potential claimants may dictate that a class action is the most appropriate manner in which to proceed, but that is not necessarily the case. A class action may be certified in respect of limited issues, for example, negligence in a mass personal-injuries claim, leaving issues personal to the members of the class, such as damages, to be resolved separately.” [Underlined for emphasis].

[10] The Deponent describes herself as an adult female person residing as a tenant at [...] S[...] Crescent, Butterworth, Eastern Cape. Attached to her founding affidavit is a list of the Applicants, numbering 77 individuals, whom she claims to represent. They are all Tenants of the Respondent’s Properties situated in either Mthatha or Butterworth in accordance with agreements of lease.

[11] Due to the lapse of time many Applicants are no longer in possession of a copy of the contract they concluded with the Respondent, or its predecessor in title. Some of the Applicants have been in occupation for decades. However, a lease agreement concluded between the Respondent and one of the Applicants is attached as an example. It is common cause that this lease agreement applies across the board.

[12] On 19 September 2022 the Respondent dispatched a letter addressed to “Dear Tenant of ECDC” under the heading “INVITATION TO COME FOR

NEGOTIATIONS FOR ACQUISITION OF LEASED PROPERTY". The letter goes on to state that the Respondent had resolved to dispose of all stand-alone houses and the Tenants were being afforded an opportunity to purchase the Properties based on:

“... a first right of refusal mechanism, subject to terms and conditions, or via a public auction process.”

[13] According to the Deponent the Tenants responded to the invitation, but were met with unreasonable selling prices.⁴ In the result the Respondent commenced with the public auction process.

[14] On 22 August 2023 the Respondent dispatched further correspondence to all the Tenants, again inviting them to express an interest in purchasing the Properties leased by them. The Tenants had until 15 September 2023 to respond, failing which the Properties would be sold on a public auction.

[15] On 13 September 2023 an attorney representing various Tenants sent an email to the Respondent requesting an extension to 15 October 2023 in order to take proper instructions.

[16] The Respondent appears to have ignored this communication, because on 3 October 2023 it held a public auction at which certain Properties were sold.

[17] That event prompted a prior application for the certification of a class action (the “First Certification Application”), which was apparently successful, but because the proposed class action was not instituted timeously the order lapsed and was abandoned. This is thus the second attempt to have a class action certified. Neither that application, nor the judgment and order was placed before me and I am thus in the dark as to the basis upon which the class action was certified and the conditions, if any. In the circumstances I have to deal with the matter *de novo* on the papers before me.

⁴ How she knows this is not stated. No details are forthcoming.

[18] On 20 November 2023, under case no. 1914/2023, and after the First Certification Application had already been launched, one Booï and seven others brought an urgent application in this court to interdict their Properties from being sold by public auction, which auction was due to take place on 23 November 2023, and for a further order to preclude the Respondent from evicting them. The application was successful. It would be apposite to quote the interim order that was granted:

- “1. Leave is granted for this application to be dealt with as one of urgency in terms of rule 6(12).
2. Pending the final determination of the application for certification of a class [action] brought in this court under case number EL1788/2023 and the subsequent launching of class action proceedings:
 - (a) The Respondent is interdicted and restrained from proceeding with the public auction of immovable properties situated at Mthatha and Butterworth scheduled for 11h00 on Thursday 23 November 2023.
 - (b) The Respondent and/or any persons acting under the instruction of the Respondent are interdicted and restrained from evicting the Applicants from their respective properties being leased from the Respondent or its successor-in-title.
3. The Respondent is directed to pay the costs of the application.”

[19] Although paragraphs 2(a) and (b) refers to auction sales scheduled to take place on 23 November 2023, on a perusal of the judgment, which is attached to the founding affidavit, it is clear that the Learned Judge's intention was that the auction sales of all the Respondent's Properties was to be suspended pending the outcome of the First Certification Application. Be that as it may, as the relief that was granted in the First Certification Application was abandoned, the interim order lapsed automatically and is no longer of any relevance.

[20] The Deponent submits that a case has been made out for certification, in that:

- (a) The proposed class has been clearly defined and the members thereof can be objectively identified;
- (b) A triable issue has been raised, namely the refusal by the Respondent to grant the Applicants the right of first refusal and/or a claim based on unjustified enrichment due to the maintenance expended on, and/or improvements made, and/or alterations effected, to the Properties over the years;
- (c) The issues of law and fact are common to the members of the class;
- (d) The proposed Applicants are representative of the class.

[21] In addition to filing an opposing affidavit on the merits the Respondent took issue with the Deponent's attorney's authority and with the Deponent's authority to represent the 77 Applicants listed in her founding affidavit. This prompted an application to file supplementary affidavits in which 45 of the 77 persons originally listed attested to supporting affidavits.

[22] The Respondent initially opposed this application, but subsequently withdrew its opposition. The attorney's mandate and the Deponent's authority to represent the Applicants who filed supporting affidavits is thus not in issue.

[23] In its answering affidavit the Respondent, represented by a senior legal advisor, disputed that the requirements for the institution of a class action had been established.

[24] By way of background the Respondent stated that it is the owner of numerous properties in the Eastern Cape, both commercial and residential. During 2022 a decision was taken to sell many of the residential properties situated in the erstwhile Transkei, but to first offer them to the existing Tenants. Given the poor state of the accounts (i.e., the arrear rental) it tried, as a last resort, to come up with various cost

saving proposals, one of which was to give the Tenants an opportunity to purchase the property occupied by them on favourable terms. Some Properties have in fact been sold on this basis and transfers are in the process of taking place.

[25] Where a Tenant did not respond to an invitation to negotiate for the purchase of his/her Property, or an agreement could not be reached, some of the Properties have already been sold by public auction. 34 Properties have already been sold in this manner.

[26] Insofar as the present application is concerned the Respondent states that of the 77 Properties listed, the status of 74 thereof is as follows:

- (a) In respect of 2 of the Properties the addresses do not exist;
- (b) In respect of 7 of the Properties they have already been sold and transferred;
- (c) In respect of 13 of the Properties they have already been sold and are in the process of being transferred;
- (d) In respect of 14 of the Properties they consist of flats and there is no intention to sell them;
- (e) In respect of 27 of the Properties Tenants who had made offers to purchase had not complied with the agreements reached;
- (f) In respect of 5 of the Properties there are sub-division applications in progress and there are no plans to sell them;
- (g) In respect of 2 of the Properties they are zoned for commercial use and are not for sale;
- (h) In respect of 4 of the Properties sale agreements are being renegotiated with the Tenants;

(i) In respect of 2 of the Properties evictions are currently under way.

[27] Significantly, the Property occupied by the Deponent was sold by public auction on 3 October 2023 and the transfer is pending. This occurred before the launching of this application.

[28] According to the Respondent many of the Tenants (not only the ones listed as Applicants) owe substantial sums of money in arrear rental and they (the Tenants) expect this debt simply to be written off. The Respondent, as a state owned enterprise, is subject to the MFMA and cannot do so. While it attempts to reach favourable arrangements with Tenants, it is obliged to sell the Properties at market-related prices, whether to an existing Tenant or to an outside buyer.

[29] Also, according to the Respondent, of the 77 Properties listed a staggering R44,882,118.00 is owed in arrear rental, which is an average of R582,106.00 per property.⁵ Only three properties are not in arrears (as at the date of the filing of the answering affidavit). The Deponent owes R1,192,749.54 in arrear rental.

[30] With regard to the merits the Respondent conceded that many of the Properties were subject to lease agreements concluded with its predecessor, the Transkei Development Corporation, but that those agreements have all been cancelled and debt recovery proceedings are underway. The majority of the occupiers of the 77 Properties have already been handed over for collection, which includes the Deponent. This process is independent of the potential sale of the Properties and/or eviction of current occupiers.

[31] The Respondent challenges the applicability of a class action on the basis that the application does not distinguish between, or identify, which Applicants challenge the sale of the Property occupied by them on the basis of alleged:

⁵ I added up the individual outstanding amounts myself.

- (a) Maintenance done, and what it consists of. In any event, clause 11 of the lease agreement states that the lessee is responsible for the maintenance of the interior of the structure and it is unclear whether the alleged maintenance is in respect of the interior or the exterior;
- (b) Improvements / alterations done, and what this consists of. In any event, clause 12 of the lease agreement states: *“The LESSEE shall not make or permit to be made any alterations or additions to the premises or to any installation therein, whether structural or otherwise, ... without the written consent of the LESSOR, which consent shall not be unreasonably withheld.”* The Respondent has no record of anyone requesting permission to effect improvements / alterations and therefore no compensation is payable;
- (c) Defects to the Properties, which are dealt with in clause 9. It requires a Tenant to notify the Respondent within 21 days of the defect occurring (so as to afford the Respondent an opportunity to make good). No such notices have ever been received and therefore, if a Tenant attended to the defect him- or herself, no compensation is payable;
- (d) Failure to afford an Applicant a right of first refusal.

[32] The Respondent also attacks the application based on the paucity of information provided. Even the Deponent fails to set out what her case is and, despite being in a position to do so, she does not say whether her claim is for the remedying of defects and/or maintenance and/or effecting improvements, nor what the nature of this work entailed and the quantum of her damages.

[33] Another angle advanced by the Respondent is that the Applicants have a perfectly valid defence against any claim for arrear rental and/or eviction: namely, a counterclaim. There are, according to the Respondent, on-going cases before the courts and in many instances counterclaims have indeed been instituted. It is further relevant that the Respondent acknowledges that the principle *“huur gaat voor koop”*

is applicable in every instance. Thus, if there is a valid lease a Property that is sold will be subject to the terms of that lease.

[34] In conclusion, the Respondent submitted that the Applicants had not satisfied any of the requirements for the certification of a class action (an aspect to which I return below).

[35] I turn now to the 45 supporting affidavits. In addition to confirming the Deponent's authority, save in respect of a few instances, the affidavits are generic in nature and deal primarily with the Respondent's alleged failure to afford the Applicants a right of first refusal. In some instances work done on a Property is mentioned, but only in passing. Very scanty details are provided and no figures are mentioned.

[36] In its supplementary answering affidavit (in response to the supporting affidavits) the Respondent denies that there is a legally enforceable right of first refusal. It submits that this does not appear from the written lease agreements (which is correct), nor is there compliance with section 2(1) of the Alienation of Land Act, 68 of 1981. What the Respondent elected to do was to invite the Tenants to enter into negotiations to acquire the Properties occupied by them, rather than the Properties being sold by public auction. The Respondent states that it was not obliged to do this, nor to agree to sell a Property to a Tenant.

[37] Although one of the requirements for the certification of a class action is a cause of action raising a triable issue, one must guard against entering into the merits and demerits of the parties' respective cases and to attempt to resolve disputes of fact (of which there are many in this matter). It must not be forgotten that certification is a procedural step and not an exercise in weighing up the probabilities. Those are for a trial court to determine in due course in the event of a class action being certified. It is only if the Applicants' case is totally without merit that this requirement would be taken into account in refusing certification.

[38] To quote Children's Resource again:

“[39] It must be borne in mind that, as a result of the procedure we now lay down, the party seeking certification will have set out in a draft pleading and in affidavits the basis for the proposed action. In so doing the court will probably have more material available to it in regard to the cause of action than would be the case with a normal exception. That will enable the court to make a proper assessment of the legal merits of the claim and, sensitively applied in this new area of law and procedure there should not be a difficulty. Unless it is plain that the claim is not legally tenable, certification should not be refused. The court considering certification must always bear in mind that once certification is granted the representative will have to deliver a summons and particulars of claim and that it will be open to the defendant to take an exception to those particulars of claim. The grant of certification does not in any way foreclose that or answer the question of the claim’s legal merits in the affirmative.”

[39] Provided the proposed class can establish a *prima facie* case – a triable issue – the strength of the proposed class action should not be a bar to certification. In other words, when it comes to assessing the strength of a claim, the bar is set very low.

[40] Insofar as defining an identifiable class is concerned, there is one thing the Applicants, and whoever else may in due course elect to join them, have in common: they are all Tenants (or occupiers) of the Properties owned by the Respondent. In addition, they all face the potential of the respective Properties being sold and, in due course, eviction therefrom.

[41] Defining the class is one thing. Identifying the individuals who fall within the class is something else. In paragraph 3 of the notice of motion the right to “*opt out*” is provided for. However, during argument the Applicants brought an application to amend paragraph 3 of the notice of motion to provide for the right to “*opt in*”. The application was not opposed and the notice of motion was amended accordingly. In the circumstances the class will include only those individuals who choose to be a member thereof.

[42] Even so, manageability and commonality remain an issue. Is the potential number of individuals too extensive and are their circumstances such that the issues are too broad? In Children's Resource those questions were dealt with thus:

“[31] ... The broader the class the less likely it will be that there is the requisite commonality.”

[43] In Wal-Mart Stores Inc., Petitioner v Betty Dukes et al⁶ Scalia J stated (in the Supreme Court of the United States of America) that the claims:

“... must depend upon a common contention ... That common contention, moreover, must be of such a nature that it must be capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”
[Underlined for emphasis].

[44] An example of the “one stroke” scenario is a bus accident (the example in Children's Resource is a train derailment) in respect of which multiple delictual claims arise. The cause of action and the facts to prove it rely on a relatively narrow issue: was the bus-driver negligent? That each individual claimant has a separate damages claim based on his/her individual circumstances is another matter entirely.

[45] The Applicants' problem in this regard is immediately apparent. They do not rely on one cause of action. There are a multiplicity of actions. Some resist the sale of the Property they occupy and/or their eviction therefrom on the basis that they are owed compensation for having done maintenance; others for having effected improvements; others for having effected alterations; others for having repaired defects. The only common denominator is that they all claim that they are entitled to a right of first refusal, which they claim has not been afforded to them.

[46] Apart from the alleged right of first refusal there is no commonality and in this regard I can, once again, do no better than to quote from Children's Resource:

⁶ 131 S Ct 2541

“[44] This does not require that every claim advanced in the class action, save possibly in relation to quantum, be identical. It requires that there be issues of fact, or law, or both fact and law, that are common to all members of the class and can appropriately be determined in one action. Dealing with the issue of commonality in *Wal-Mart* Scalia J said that the claims:

...⁷

In my view that is correct. The simplest example of such a common issue would be the issue of negligence in a case involving the derailment of a train. That could give rise to different claims, such as damages for personal injuries by passengers, dependents’ claims for loss of support in respect of those killed, claims for loss of or damage to goods being carried on the train and damage to other property arising as a result of the derailment, but there would be sufficient commonality on the issue of negligence to sustain a class action.

[45] That highlights the point that the class action does not have to dispose of every aspect the claim in order to obtain certification. It might in an appropriate case be restricted to the primary issue of liability, leaving quantum to be dealt with by individual claimants. Certain common issues could be certified for the entire class, and other subsidiary issues certified in respect of defined sub-classes. But the question in respect of any class or sub-class is always whether there are common issues that can be determined that will dispose of all or a significant part of the claims by the members of the class or sub-class.” [Underlined for emphasis].

[47] As I have already alluded to, in the present matter there is no one cause of action. There are five potential causes of action which have been identified by the Applicants themselves. The only common denominator is that every Applicant makes the allegation that he/she was not given a right of first refusal. I should add that if the Applicants do have right of first refusal (and I make no finding in this regard) that would not entitle them to acquire the Properties they occupy as of right. It would merely afford them an opportunity to make an offer, subject to such

⁷ Scalia J has already been quoted above.

conditions as may be applicable in each particular case. The Respondent, while disputing that it is legally obliged to afford a right of first refusal, has nevertheless undertaken to do so.

[48] There is, however, a more fundamental problem facing the Applicants. Where the Applicants' case falls apart is in respect of the relief they seek. They do not seek to enforce a right, but to prevent the Respondent from enforcing its right to sell and/or evict them from the Properties, by raising a defence thereto: be it a claim based on having done maintenance to a property; effecting repairs; effecting improvements; remedying defects and/or being afforded a right of first refusal.

[49] It is difficult, if not impossible, to envisage how the Applicants will formulate the particulars of claim on behalf of multiple plaintiffs. It will have to be along the lines of: when (or if) the Respondent sells my Property by way of public auction; or, when (or if) the Respondent brings an application for my eviction, I have a defence thereto, in whole or part, based on one or more of the grounds referred to. These are not causes of action. They are defences to a potential action / application which may or may not be instituted by the Respondent.

[50] It is furthermore relevant that the Respondent's right to sell the Properties is not being challenged. The Applicants' case is that if and when it does so:

- (a) They must be given a right of first refusal;
- (b) They must be compensated for what they may have expended on the Property.

[51] The first issue is not seriously in dispute. The Respondent is affording the Tenants a right of first refusal, albeit denying a legal obligation to do so. The second issue is a right that the law recognises. If a particular Applicant can prove improvements he/she will be entitled to compensation therefore (subject, of course, to the terms of the applicable lease agreement).

[52] Even if a class action particulars of claim could be formulated along these lines, it stands to reason that the *facta probanda* in respect of every claim will be different. There can be no “one size fits all” scenario. No “one stroke”. There will be 77, or 45, or who knows how many distinct claims, each one relying on the specific facts applicable to the particular Property in question.

[53] It is for this reason that an application for certification should contain a draft particulars of claim in order to assist the court in making a proper assessment as to whether or not it would be appropriate to certify a class action. In this regard see the quote from Children’s Resource in paragraph 38 above.

[54] In the unreported case of Bartosch v Standard Bank of South Africa Ltd and Others⁸ Chetty J formulated this requirement in even stronger terms:

“The application must be accompanied by draft particulars of claim setting out the cause of action, the class, and the relief sought. The affidavits need to set out the evidence available to support the cause, as well as evidence it is anticipated will become available, and the way it will be procured.”

[55] Not only is the notice of motion silent in this regard, the founding affidavit and supporting affidavits fall woefully short of what is envisaged.

[56] As already alluded to, it is not the Applicants’ case that the Respondent is not entitled to sell the Properties they occupy. If that were the case the Wal-Mart “one stroke” test would probably have been met. Their claims arise (if they have one) only if and when a sale is in the offing. Their claims for compensation for monies expended on the Properties (under the various different headings) will be a reaction thereto. No two cases will rely on the same facts.

[57] In De Bruyn v Steinhoff International Holding NV & Others,⁹ on the absence of a triable issue, Unterhalter J (as he then was) stated:

⁸ [2014] ZAECPHC 52

⁹ 2022 (1) SA 442 (GJ).

“265. Commonality is judged by asking whether the issue of law or fact, once determined, resolves the issue for the class. If, by contrast, the determination of the issue requires multiple individual determinations, then commonality is lacking. ...” [Underlined for emphasis].

[58] In *Mukaddam v Pioneer Foods (Pty) Ltd and Others*¹⁰ the Constitutional Court considered the factors to be considered when deciding whether to certify a class action. Dealing with the list of factors to be taken into account the Constitutional Court stated that they were not exhaustive. In this regard Jafta J stated the following:

“[47] ... In deciding whether a class action should be allowed, that court is bound to apply the standard or test laid down by a superior court. This accords with the principle of judicial precedent. This means that in future the High Courts will be bound to apply the interests of justice standard and in determining where those interests lie in a given case, guidance will be sought from the factors mentioned ...” [Underlined for emphasis].

[59] Ultimately it comes down to the determination of what is in the interests of justice. This requires the exercise of a discretion: taking all the relevant factors into account, is it in the interests of justice to certify a class action in the specific circumstances based on the specific facts of the particular matter?

[60] I considered certifying a class action on the limited issue of whether the Applicants have a right of first refusal. However, whichever way that dispute is resolved, it will not resolve the other disputes. In any event, whether it is legally obliged to do so or it is doing so based on a policy decision, the Respondent has undertaken to afford the existing Tenants an opportunity to acquire his/her Property before it is sold on public auction. In some instances this has happened. There is thus no real dispute in this regard. Furthermore, insofar as there may be a dispute in this regard, it would be far more convenient to resolve it by way of a test case. It could probably be done on application.

¹⁰ 2013 (5) SA 89 (CC)

[61] Given the conclusion I have come to I find that it is not necessary to consider the other requirements (referred to in paragraph 9 above) for the certification of a class action.

[62] It follows that in the exercise of my discretion I am not satisfied that it will be in the interests of justice to certify a class action.

[63] With regard to costs there is no reason to deviate from the usual rule that the unsuccessful party should pay the costs. Although it was submitted in argument on behalf of the Applicants that I should apply the Biowatch principle on the basis that the matter concerned section 25 of the Constitution (not to be deprived of one's property) and section 26 (which deals with the right to housing), this was not the grounds upon which the Applicants approached the court. No case was made out on the papers.

[64] The costs are to be paid by the Deponent and the 45 persons who filed supporting affidavits, which affidavits appear on pages 55 – 197 of the application for leave to file supporting affidavits. Such costs are to include reserved costs wherever so ordered. With regard to counsel's fees, the matter was a complicated one deserving of an order based on scale C.

[65] I make the following order:

- (a) The application is dismissed.
- (b) The Deponent to the founding affidavit and the 45 persons who filed supporting affidavits (which appear at pp. 55 – 197 of the application for leave to file supporting affidavits, dated 15 August 2024) are to pay the costs of the application jointly and severally, the one paying the others to be absolved, such costs to include any reserved cost orders.
- (c) Counsel's fees are to be taxed on scale C.

NJ MULLINS
ACTING JUDGE IN THE HIGH COURT

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