THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1008/2023

In the matter between:

BASFOUR 3327 (PTY) LTD	**APPELLANT**
and	
ROBERT THWALA	**FIRST RESPONDENT**
LUCY THWALA	**SECOND RESPONDENT**
MINENHLE MAHLANGU	**THIRD RESPONDENT**
FEZEKA THOMO	**FOURTH RESPONDENT**
SOUTH AFRICAN POLICE SERVICE, VOLKSRUST	**FIFTH RESPONDENT**
DEPARTMENT OF AGRICULTURE, RURAL DEVELOPMENT AND LAND REFORM	**SIXTH RESPONDENT**

Neutral citation: *Basfour 3327 (Pty) Ltd v Thwala and Others* (1008/2023) [2025] ZASCA 105 (18 July 2025)

Coram: MAKGOKA, KGOELE and UNTERHALTER JJA

Heard: Disposed of without oral hearing in terms of s 19(*a)* of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 18 July 2025.

Summary: Land tenure – Extension of Security of Tenure Act 62 of 1997 – rights of occupier to make improvements to property – whether erected structure lawful without consent of, or meaningful engagement with, the owner.

ORDER

On appeal from: Land Claims Court, Randburg (Flatela J sitting as court of first instance):

1 The appeal is upheld with no order as to costs.

2 The order of the Land Claims Court dismissing the appellant's application is set aside and is replaced with the following order:

'1 The unauthorised brick foundation, and whatever building has taken place upon that foundation, constructed by the first to fourth respondents, which replaced the mud structures that served as a storeroom and a place for traditional ceremonies on a portion of the farm Uitkyk 121 HS, in the district of Volksrust, Mpumalanga ("the farm Uitkyk"), is declared unlawful;

2 The first to fourth respondents are ordered to demolish the unlawfully constructed structure on the farm Uitkyk within 30 (thirty) days from the date of this order;

3 The first to fourth respondents are ordered to remove all the building material gathered for the purposes of constructing the unlawful structure on the farm Uitkyk within 30 (thirty) days after the date of this order;

4 If the first to fourth respondents fail to comply with the orders in paragraphs 2 and 3 above, the sheriff for the district of Volksrust is authorised to demolish the unlawfully constructed building and remove all building material on the farm Uitkyk.

5 Each party is to pay their own costs.'

JUDGMENT

Kgoele JA (Makgoka and Unterhalter JJA concurring):

[1] At the core of this appeal lies a determination of whether a structure erected on a farm without the prior engagement and consent of the owner of the farm is lawful. If so, whether consequential relief by way of demolition is just. The appeal is against part of the order of the Land Claims Court, Randburg (the LCC), per Flatela J. That court dismissed an application by Basfour 3327 (Pty) Ltd (the appellant) for, amongst other relief, an order declaring unlawful, a structure erected by the first to fourth respondents (the respondents) on its farm. The appellant sought its demolition. The appeal is with the leave of the LCC.

[2] The appeal was disposed of without oral argument in terms of s 19(*a*) of the Superior Courts Act 10 of 2013.[1] The respondents' heads of argument were filed late. They applied for condonation therefor, which application the appellant did not oppose. The application is granted.

[3] The appellant is the registered owner of the remaining extent of portion 7 of the farm Uitkyk 121 HS (the farm). The first respondent, Mr Robert Thwala and the second respondent, Ms Lucy Thwala are the children of the late Mr Kantoor Thwala (Mr Thwala snr) and Mrs Lethy Khanyi (Mrs Khanyi). The third respondent, Mr

[1] Section 19(*a*) provides: '**19. Powers of court on hearing of appeals**
The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law-
(a) dispose of an appeal without the hearing of oral argument.'

Minenhle Mahlangu and the fourth respondent, Mr Fezeka Thomo, are the first respondent's children. The fourth respondent was not residing on the farm; he only visited occasionally. Mr Thwala snr was employed by a previous owner of the farm.

[4] When the appellant purchased the farm in 2006, Mr Thwala snr had already passed away, but his widow, the late Mrs Khanyi, had permission from the previous owner to reside on the farm. Therefore, when the proceedings in the matter commenced in the LCC during 2017, the late Mrs Khanyi was a long-term occupier as contemplated in Extension of Security of Tenure Act 62 of 1997 ('ESTA'). She passed away in October 2018. The fifth and sixth respondents, are respectively, the South African Police Service (Volksrust) and the Department of Agriculture, Rural Development and Land Reform. No relief was sought against them, and they were cited for any interest they might have had in the matter. They did not participate in the proceedings a quo, nor in this Court.

[5] The late Mrs Khanyi, together with the respondents, occupied a cluster of homesteads on a portion of the farm built of mud walls and corrugated iron. The bulk of the homesteads were used for dwelling purposes, except for two. One structure was used for traditional ceremonies, and the other, as a storeroom.

[6] In June 2017, the appellant's employee, Mr Louis De La Rey Hattingh (Mr Hattingh), discovered that the respondents were erecting a new brick-and-mortar house (the 2017 structure) on the farm next to the existing homestead, without the appellant's consent. As 'the person in charge'[2] of the farm, he requested that they stop the construction. When they refused, the appellant successfully obtained an

[2] A 'person in charge' is defined in s 1 of ESTA as 'a person who at the time of the relevant act, omission or conduct had or has legal authority to give consent to a person to reside on the land in question.'

interim order against the first, second and third respondents in the LCC on 9 June 2017. The fourth respondent was not cited as a party to the proceedings at that time. The LCC issued a rule nisi declaring the 2017 structure unlawful and interdicting the respondents, from amongst other things, proceeding with the construction of the new structure.

[7] Before the return date of the rule nisi, the LCC made several unsuccessful attempts to mediate the dispute between the parties. Eventually, the application was referred to oral evidence, which was heard by Ncube J in 2022.

[8] Mr Hattingh's testimony primarily focused on the meeting he had with the respondents, where he explained the farm rules. One such rule was that no one was allowed to build new structures without the appellant's knowledge and consent.

[9] The first and third respondents gave evidence. Although not a party to the proceedings, the fourth respondent was called to testify on their behalf. They conceded that Mr Hattingh had brought to their attention the rule that they were not supposed to build new structures on the farm without the appellant's consent. They maintained, however, that the Department of Rural Development and Land Reform officials advised them that they did not need any permission from the appellant to make their homesteads habitable. They further contended that since they were improving the old, dilapidated mud structure, they were entitled to build a new structure without the appellant's consent. In support of this contention, the respondents' counsel relied on the decision of the Constitutional Court in *Daniels v Scribante and Another* (*Scribante*).[3]

[3] *Daniel v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) (*Scribante*).

[10] It became common cause during the hearing of oral evidence that the 2017 structure was erected to replace the dwelling of the late Mrs Khanyi, without the appellant's prior consent and knowledge. Although the court acknowledged the respondents' explanation that the existing mud structures of the homesteads needed to be made habitable, it rejected their reliance on *Scribante* for their defence. It held that *Scribante* was no authority for the proposition that an occupier could build a new structure on a farm without the consent of the owner or person in charge; and further that, *Scribante* concerned itself with improving an existing structure. It reasoned that even in the case of improvements, *Scribante* required meaningful engagement between the occupier and the owner or person in charge.

[11] Accordingly, the court concluded that the respondents were not entitled to construct an entirely new structure without the appellant's consent. Consequently, Ncube J: (a)declared the 2017 structure unlawful; (b) prohibited the respondents from building an entirely new structure without the explicit written permission of the appellant or person in charge; (c) prohibited them from proceeding with the construction, and (d) ordered its demolition. The order was granted on 5 October 2022. The respondents failed to comply with the order. Their conduct led to the sheriff demolishing the 2017 structure on 14 March 2023, pursuant to a warrant of execution authorised by the LCC on 3 February 2023.

[12] In April 2023, hardly a month after the sheriff demolished the 2017 structure, the respondents, unbeknown to the appellant, demolished parts of the homestead used for traditional ceremonies and a storeroom. When Mr Hattingh first noticed this, the respondents had already commenced erecting a brick-and-mortar structure (the 2023 structure) from the ground up. As the appellant had not been consulted about this, it sought an order on an urgent basis for: (a) a declaratory order that the

construction of the 2023 structure was unlawful; (b) an order prohibiting further construction of the structure; and (c) an order for the demolition of the structure. I refer to these as the declaratory, prohibitory, and demolition relief. In addition, in paragraph 8 of its notice of motion, the appellants sought an order declaring the respondents to be in contempt of Ncube J's order.

[13] The application served before Flatela J in the LCC on 17 April 2023, who on 18 April 2023, granted an interim order against the respondents prohibiting them from continuing with the construction of the 2023 structure without the appellant's consent. Even though the fourth respondent was cited in these proceedings, it appears that he did not participate in the application before Flatela J, as his confirmatory affidavit remains unsigned.

[14] On the return day of the rule nisi, the respondents opposed the application. They denied that their conduct was unlawful, stating that it was consistent with Ncube J's judgment, which allowed them to demolish the mud structures and rebuild them to be habitable. However, the respondents did not deny the appellant's averments that Mr Hattingh was neither approached for his engagement nor his consent. Additionally, they argued that the matter was res judicata because the relief requested by the appellant was similar to the relief sought and granted by Ncube J.

[15] The LCC summarily dismissed the *res judicata* defence. Regarding the merits, it approached the matter as contempt of court proceedings in respect of Ncube J's order. It dismissed the application on the basis that the respondents were not in wilful contempt of that order. Furthermore, it accepted the respondents' explanation that they believed they were entitled to erect new structures in the same place where the demolished mud structures had been. The LCC reasoned that the prayers for the

declaratory, prohibitory, and demolition relief were not stand-alone prayers but were dependent on a finding that the respondents were in contempt of court. In addition, it remarked that:

'[E]ven if one were to treat the relief sought by the [appellant] to have the newly erected structure unlawful and demolished as a separate relief from the contempt [of court] application, it would be non-suited for this Court to grant such relief. The interests of justice dictate that there be finality to litigation. The respondents are entitled to make their structure habitable concomitant with their right to human dignity.'

[16] In this Court, the appellant accepted the LCC's finding that the respondents were not in contempt of Ncube J's order. It thus focused on the dismissal of the declaratory, prohibitory, and demolition relief. The submission made was that the LCC erred in its characterisation of the entire application as hinging solely on whether the respondents were in contempt of Ncube J's order. The appellant argued that its failure to deal with the declaratory, prohibitory, and demolition relief was a misdirection.

[17] In addition, the appellant contended that the LCC misdirected itself by not following *Scribante.* Lastly, the appellant asserted an additional reason why the 2023 structure was unlawfully erected and should be demolished. It submitted that the respondents had erected the structure without procuring and submitting building plans. The respondents, on the other hand, support the order of the LCC. They also contended that the appellant had conceded that the relief it sought hinged on a finding whether the respondents were in contempt of Ncube J's order. For this alleged concession, the respondents relied on a passage in the LCC's judgment granting leave to appeal where it remarked that:

'[D]uring the hearing, I expressly asked counsel for the applicant whether prayers 2, 5, 6 and 7 are premised on paragraph 2 of Judge Ncube's order. The answer was in the affirmative.'

[18] There are two issues that arise. The first question is whether the LCC was correct in its characterisation of the proceedings to be concerned only with contempt of court, and that its dismissal of the further relief sought rested upon its finding in respect of contempt. The second question is whether the 2023 structure was unlawfully erected and, if so, whether an order for its demolition should be issued.

[19] The first question need not unduly detain us. I agree with the appellant that the contempt of court prayer was but one of the orders sought by the appellant and not the mainstay of its application. It was a stand-alone prayer that warranted separate consideration. The LCC erred in concluding that, because the respondents were not in contempt of court, this was dispositive of the rest of the relief sought by the appellant.

[20] The respondents' reliance on the alleged concession made by the appellant's counsel, referred to by the LCC in the leave to appeal judgment, cannot salvage the respondents' case either. An objective assessment of the application that served before the LCC required it to determine all of the relief that was sought. The declaratory, prohibitory, and demolition relief was not framed as being conditional upon a finding in the contempt relief in the notice of motion, nor was it so supported in the founding affidavit. The declaratory, prohibitory, and demolition relief had to be considered as discrete issues, independent of the contempt issue. By failing to regard them as such, and by not considering them, the LCC erred.

[21] As to the merits of the appeal, it is important to note at the onset that the rights and duties of occupiers and land owners in terms of ESTA were determined in *Scribante.* The Constitutional Court held that an owner's consent cannot be a

prerequisite when the occupier wants to bring the dwelling to a standard that conforms to conditions of human dignity.

[22] Pertinent to the issue of whether the occupier may effect such improvements in total disregard of the owner, the Constitutional Court held:

'That an occupier does not require consent cannot mean she or he may ride roughshod over the rights of an owner. The owner also has rights. The very enjoyment by an occupier of rights conferred by ESTA creates tension between that enjoyment and an owner's rights. The most obvious owner's right that is implicated is the right to the property under s 25 of the Constitution. If an occupier were to be entitled to act in an unbridled manner, that would mean an owner's rights count for nothing. Under s 5 of ESTA an owner enjoys the exact same rights as does an occupier. The total disregard of an owner's property right may impinge on her or his right to human dignity. That would be at odds with s 5(a) of ESTA. Unsurprisingly, s 6(2) of ESTA requires that an occupier's right to security of tenure be balanced with the rights of an owner or person in charge.

Although consent is not a requirement, meaningful engagement of an owner or person in charge by an occupier is still necessary. It will help balance the conflicting rights and interests of occupiers and owners or persons in charge. In this regard I agree with the submissions of the amicus curiae, which argued for the need for meaningful engagement between an owner and occupier.

In *Hattingh* Zondo J said:

"In my view the part of s 6(2) that says 'balanced with the rights of the owner or person in charge' calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner. The effect of this is to infuse justice and equity in the enquiry . . . ."

. . .

If engagement between an occupier and owner or person in charge gives rise to a stalemate, that must be resolved by a court. The occupier cannot resort to self-help.'[4]

[4] *Scribante* paras 61, 62, 63 and 65.

[23] The main ground of appeal relied on by the appellant was that the LCC misdirected itself by not following *Scribante* when it found that the respondents were entitled to make their homesteads habitable. According to the appellant, *Scribante* does not give the occupier an untrammelled right to demolish a structure and erect a new one. The right recognised therein is the right to improve an existing structure. Even more so, the argument continued, this right cannot be exercised without engagement with the owner.

[24] While the respondents' contention that the mud structures needed improvement is acknowledged, several reasons support the contention that the LCC failed to follow the decision in *Scribante*. First, it was common cause before the court that no engagement or consent was sought from the appellant to erect the 2023 structure. As a result, the respondents' reliance on Ncube J's judgment is misplaced. This is because Ncube J concluded that meaningful engagement is necessary even if improvements to the existing structure were sought to be made. That conclusion, based on *Scribante,* is, with respect, correct. The respondents could, therefore, not unilaterally make improvements even if no consent was required from the appellant. The lack of engagement, on its own, renders the erection of the 2023 structure unlawful.

[25] The second reason relates to the nature of the improvements the respondents were making – whether these were new structures or improvements to existing ones. To recap, the respondents contend that they were effecting improvements by rebuilding where the old structures had stood. They demolished the old structures as they were uninhabitable, and consent was not necessary. However, this overlooks the fact that even if consent was not necessary, meaningful engagement with the appellant was still required. The appellant alleged that this was because the

respondents had entirely demolished part of the homestead previously used for the traditional ceremonies and a storeroom. Instead, they began with the construction of a brick-and-mortar foundation where the two structures had been.

[26] Two observations should be made. First, the pictures attached to the record of the appeal lend credence to the appellant's assertion that a new foundation was constructed. But most importantly, the appellant, in addition to the fact that the structure was entirely new, maintained that it was more prominent in size than the two structures intended to be improved. In my view, the respondents were not in the process of improving the existing structures. Second, even if they were making improvements, the respondents do not have unfettered rights to improve their existing dwellings, as *Scribante* makes plain. Such improvements must be 'reasonably necessary' to render the dwelling habitable in conformity with the rights to human dignity. Meaningful engagement is necessary so that both parties can determine what is reasonable and necessary. Since the structure was erected without prior consent or meaningful engagement with the appellant, the court should have declared the 2023 structure to be unlawful.

[27] To sum up, the LCC erred in: (a) concluding that a finding on contempt was dispositive of the entire application and (b) failing to declare the 2023 structure unlawful. In light of these conclusions, it is not necessary to consider the appellant's submission that the respondents were obliged to obtain approved building plans to erect the 2023 structure. What remains is whether it would be just to order the demolition of the structure. The court has a discretion whether to grant such relief, which must be exercised after taking into consideration all the facts.

[28] It is unclear from the papers how far the building had been constructed. From the pictures attached to the founding affidavit, only the construction of a foundation is depicted, and some bricks were stacked not far from it. The respondents did not provide any justification for why the order of demolition of the structure should not be made. On the other hand, the appellant explained in detail the hardships it would endure if such an order is not made. Key amongst those is that the unauthorised construction constitutes an encroachment on its property. I agree. If the structure is not demolished, it would impede the appellant's enjoyment of its full rights to the land. For instance, the presence of the structure would inhibit the appellant from cultivating its land. Therefore, ordering compensation in this matter will not be appropriate.

[29] Secondly, regarding possible hardships that the respondents might suffer if the structure is demolished, it is common cause that the respondents were improving the structure that was used as a storeroom, as well as the one for traditional ceremonies. As a result, the demolition would not leave them homeless, and they would not face significant hardship in demolishing it, as it was still in the foundation stage.

[30] Thirdly, sight should not be lost of the fact that the respondents did not comply with the earlier order. They proceeded for a second time, without acting in good faith and in an attempt to circumvent the appellant's rights, to build without engaging it. The fact remains that a court order exists prohibiting the respondents from undertaking unauthorised building of structures on the farm. The fact that the respondents were not found in contempt of the previous order does not alter the position. The respondent cannot just disregard the court order. Perhaps the demolition order will secure greater adherence this time and prompt the first to fourth

respondents to reflect more carefully on their conduct in the future. Under the circumstances, I am of the view that it would be just and fair that demolition of the 2023 structure should follow.

[31] Regarding costs, the general principle is that costs ordinarily follow the result. However, in litigation between private parties where constitutional issues are raised, this is a matter within the discretion of a court considering the issue. It is a discretion which must be exercised judicially, having regard to all the relevant considerations.[5] In matters of this nature, this Court has held that the default position is not to award costs unless there are special circumstances which warrant such a deviation.[6] No such circumstances are present here. The respondents had sought to assert a constitutional right, albeit misguidedly. Accordingly, each party shall bear their own costs, both in the LCC and in this Court.

[32] The following order is made:

1 The appeal is upheld with no order as to costs.

2 The order of the Land Claims Court dismissing the appellant's application is set aside and is replaced with the following order:

'1 The unauthorised brick foundation, and whatever building has taken place upon that foundation, constructed by the first to fourth respondents, which replaced the mud structures that served as a storeroom and a place for traditional ceremonies on a portion of the farm Uitkyk 121 HS, in the district of Volksrust, Mpumalanga ("the farm Uitkyk"), is declared unlawful;

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[5] *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 138.

[6] *Haakdoringbult Boerdery CC & Others v Mphela and Others* [2007] ZASCA 69; 2007 (5) SA 596 (SCA); 2008 (7) BCLR 704 (SCA); para 76.

2 The first to fourth respondents are ordered to demolish the unlawfully constructed structure on the farm Uitkyk within 30 (thirty) days from the date of this order;

3 The first to fourth respondents are ordered to remove all the building material gathered for the purposes of constructing the unlawful structure on the farm Uitkyk within 30 (thirty) days after the date of this order;

4 If the first to fourth respondents fail to comply with the orders in paragraphs 2 and 3 above, the sheriff for the district of Volksrust is authorised to demolish the unlawfully constructed building and remove all building material on the farm Uitkyk.

5 Each party is to pay their own costs.'

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A M KGOELE

JUDGE OF APPEAL

On record:

For appellant:	H S Havenga SC
Instructed by:	Peet Grobbelaar Attorneys, Pretoria
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Instructed by:	Legal Aid South Africa, Ermelo
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