**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case No: 512/2016

In the matter between

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| **THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM** | **APPELLANT** |

and

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| **NORMANDIEN FARMS (PTY) LTD** | **FIRST RESPONDENT** |
| **MANDLA NKOSI JOSEPH MATHIMBANE** | **SECOND RESPONDENT** |
| **BONGINKOSI DAVID MATHIMBANE** | **THIRD RESPONDENT** |
| **PHUMELELO FLORENCE MATHIMBANE** | **FOURTH RESPONDENT** |
| **MLAMULI OBED MATHIMBANE** | **FIFTH RESPONDENT** |
| **SIPHO MATHIMBANE** | **SIXTH RESPONDENT** |
| **MIRIAM JELE** | **SEVENTH RESPONDENT** |
| **BERNARD JELE** | **EIGHTH RESPONDENT** |
| **MARTHA JELE** | **NINTH RESPONDENT** |
| **ALBERT JELE** | **TENTH RESPONDENT** |
| **APOSTOL JELE** | **ELEVENTH RESPONDENT** |
| **SWEET BETTER JELE** | **TWELFTH RESPONDENT** |
| **JOHANNES JELE** | **THIRTEENTH RESPONDENT** |
| **THE MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES** | **FOURTEENTH RESPONDENT** |

And in the matter between

Case No: 370/2017

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| **MANDLA NKOSI JOSEPH MATHIMBANE** | **FIRST APPELLANT** |
| **BONGINKOSI DAVID MATHIMBANE** | **SECOND APPELLANT** |
| **PHUMELELO FLORENCE MATHIMBANE** | **THIRD APPELLANT** |
| **MLAMULI OBED MATHIMBANE** | **FOURTH APPELLANT** |
| **SIPHO MATHIMBANE** | **FIFTH APPELLANT** |
| **MIRIAM JELE** | **SIXTH APPELLANT** |
| **BERNARD JELE** | **SEVENTH APPELLANT** |
| **MARTHA JELE** | **EIGHTH APPELLANT** |
| **ALBERT JELE** | **NINTH APPELLANT** |
| **APOSTOL JELE** | **TENTH APPELLANT** |
| **SWEET BETTER JELE** | **ELEVENTHAPPELLANT** |
| **JOHANNES JELE** | **TWELFTH APPELLANT** |

and

| | |
|---|---|
| **NORMANDIEN FARMS (PTY) LTD** | **FIRST RESPONDENT** |
| **THE MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES** | **SECOND RESPONDENT** |
| **THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM** | **THIRD RESPONDENT** |
| **DIRECTOR-GENERAL, DEDPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM** | **FOURTH RESPONDENT** |
| **REGIONAL LAND CLAIMS COMMISSIONER KWAZULU-NATAL** | **FIFTH RESPONDENT** |

**Neutral citation:** *Minister of Rural Development and Land Reform v Normandien Farms & others; Mathimbane & others v Normandien Farms* Cases 512/2016 & 370/2017 [2017] ZASCA 163 (29 November 2017)

**Coram:** Leach, Saldulker & Swain JJA and Lamont & Rogers AJJA

**Heard**: 7 November 2017

**Delivered:** 29 November 2017

**Summary:** Civil procedure – application for condonation and reinstatement by appellants in Case 370/2017 ('occupants') granted in interests of justice despite egregious non-compliance with rules relating to heads of argument.

Contempt of court – occupants failed to establish beyond reasonable doubt that respondent ('Normandien') in contempt of appellate process – contempt application, including related postponement application, dismissed.

Land reform – whether Minister has power under Land Reform: Provision of Land and Assistance Act 126 of 1993 to make land available solely for purposes of grazing – court a quo erred in compelling Minister to exercise permissive powers in favour of occupants – Minister's appeal succeeds.

Environmental law – Normandien had standing to seek removal of occupants' livestock on land overgrazed in violation of Conservation of Agricultural Resources Act 43 of 1983 (CARA) – labour tenants not exempt from CARA – removal of animals in terms of CARA not an eviction for purposes of Land Reform (Labour Tenants) Act 3 of 1996 – occupants' appeal dismissed.

Costs – *Biowatch* principle applicable to costs in court a quo and on appeal as between Minister and Normandien, ie parties to bear their own costs.

Costs – no grounds for interfering in court a quo order that occupants pay Normandien's costs on punitive scale.

Costs – occupants' application for condonation and reinstatement necessitated by joint failings by attorneys and counsel – contempt and postponement application an abuse having no substantive merit – attorneys ordered personally to pay Normandien's costs of opposing said applications on attorney/client scale – attorneys and counsel precluded from recovering fees from occupants in respect of these applications.

Appeals – practice – papers in opposed interlocutory applications to be indexed and paginated.

## ORDER

**On appeal from:** The Land Claims Court, Durban (Meer J sitting as court of first instance).

(a) In Case 512/2016 (the appeal by the Minister of Rural Development and Land Reform):

(i) The appeal succeeds.

(ii) The order of the court a quo is amended by deleting para 3 and by altering para 5 so that it commences thus: 'The First to Thirteenth Respondents, jointly and severally…'.

(iii) The parties shall bear their own costs of the appeal.

(b) In Case 370/2017 (the appeal by Mandla Nkosi Joseph Mathimbane and eleven others):

(i) The appellants' applications for condonation and for the reinstatement of the appeal are granted.

(ii) The appellants' Durban attorneys, MC Ntshalintshali Attorneys, shall personally pay the respondent's costs of opposing the said applications on the attorney and client scale, including the costs of two counsel.

(iii) The appellants' contempt and postponement application dated 11 October 2017 is dismissed.

(iv) The appellants' Durban attorneys, MC Ntshalintshali Attorneys, shall personally pay the respondent's costs of opposing the said contempt and postponement application on the attorney and client scale, including the costs of two counsel.

(v) The appellants' counsel and Durban attorneys, MC Ntshalintshali Attorneys, shall not be entitled to recover any fees from the occupants in respect of the applications mentioned above.

(vi) The appeal is dismissed with costs, including the costs of two counsel.

**JUDGMENT**

**Rogers AJA (Leach, Saldulker and Swain JJA and Lamont AJA concurring)**

**Introduction**

[1] There are two matters before us, arising from proceedings instituted in the Land Claims Court (LCC) by the present first respondent, Normandien Farms (Pty) Ltd (Normandien), for the removal of livestock from its farm Albany in KwaZulu-Natal. The first matter is an appeal by the Minister of Rural Development and Land Reform (Land Minister). He was the 14th respondent in the LCC. The second matter is an application for condonation and reinstatement where the would-be appellants are twelve members of the Mathimbane and Jele families. They were the 1st to 12th respondents in the LCC (the occupants). The 13th respondent was the Minister of Agriculture, Forestry and Fisheries (Agriculture Minister). The 14th respondent was the Regional Land Claims Commissioner, KwaZulu-Natal (Regional Commissioner).

[2] In the LCC Meer AJP found in favour of Normandien and dismissed a counter-application by the occupants. She refused applications for leave to appeal by the Land Minister and the occupants. This court on petition granted the Land Minister and the occupants leave to appeal to this court.

**Background**

[3] The farm forms part of a larger estate on which Normandien conducts forestry and timber-processing operations. The occupants have lived on the farm for many years. Members of their families are buried there. They graze livestock on the farm. When Normandien instituted proceedings in December 2013 the occupants had 285 head of cattle, 133 goats and ten horses. The number of cattle had increased to 360 by February 2015.

[4] In March 2013 the occupants instituted an action in the LCC alleging that they were labour tenants as defined in the Land Reform (Labour Tenants) Act 3 of 1996 (LTA) and that they had duly submitted applications to the Director-General of the Department of Rural Development and Land Reform (Land Department) for the

acquisition of land as contemplated in s 16 of the LTA. As against Normandien they sought orders declaring in terms of s 33(2A) that they were labour tenants and awarding a part of the farm to them. As against the Director-General they sought an order that moneys be made available to compensate Normandien for the part of the farm to be awarded to them.

[5] In December 2013, while the action was pending, Normandien launched the application giving rise to the present appeals (the removal application). Normandien sought orders that the livestock be removed from the farm and that the Land and Agriculture Ministers and/or the Regional Commissioner facilitate their removal to alternative land. This relief was claimed on the basis that the farm had been severely overgrazed and that the continued presence of the livestock on the farm contravened the Conservation of Agricultural Resources Act 43 of 1983 (CARA).

[6] The occupants' action served before Sardiwalla AJ on 14 March 2014. Normandien's version as to what transpired has not materially been placed in issue. In the days preceding 14 March 2014 the attorneys agreed that the matter was not ready for trial. This was communicated to the judge in chambers. He was not willing to postpone the case. The occupant's counsel indicated that he would then have to withdraw but eventually the parties embarked upon settlement discussions.

[7] According to Normandien, the essence of the settlement reached was that Normandien would concede that the occupants were labour tenants if they would agree to accept alternative land or compensation in lieu of a claim to part of Albany. The essence of the agreement was communicated to the judge in open court. On this basis, he made an ex tempore order, the transcribed version of which reads:

'I grant an order in terms of para 1 declaring in terms of s 33(2A) of the Act that the plaintiffs are labour tenants.

I further order that the second defendant [the Director-General] will commence forthwith with negotiations between the community and property owners and canvas the possibility of alternate properties for accommodation and the process shall continue and be completed within 12 months from the date of this order.

The second defendant shall provide a report – a comprehensive report – on the following aspects within six months of this order:

- Firstly, the election that the plaintiffs have made in so far as their acquisition of land and/or compensation;
- Two, the progress in acquiring such land and the status of such acquisition;
- Three, the anticipated timeframes for the completion of the process of resettlement and allocation of land to the plaintiffs.

The costs of the application reserved.

The matter is postponed sine die.'

[8] On 14 March 2014 the registrar of the LCC issued a written order purporting to give effect to the ex tempore order. The written order mistakenly referred to a non-existent s 23(2)*(a)* instead of s 33(2A). This was corrected, uncontroversially, on 2 April 2014. The first and third bullet points became paras 4(a) and (c) of the written order, reading thus:

'4. That the 2nd Defendant shall provide a comprehensive report on the following aspects within 6 months of the date of this order:

(a) The election that the Plaintiffs have made in so far as their acquisition of alternative land and/or compensation.

. . .

(c) The anticipated time frames for the completion of the process of allocation of land and resettlement of the Plaintiffs.'

[9] On 24 March 2014 the occupants' attorneys wrote to the registrar, with copies to Normandien's attorneys and the State Attorney, asking that 'some material typographical errors' in the written order be corrected. The one was the incorrect section reference. The other was para 4(a), which – so it was said – should read: 'The election that the Plaintiffs have made in so far as their acquisition of land and/or alternative land'. This was a substantial change and was in conflict with the settlement, because it foreshadowed the possibility that the occupants might elect to acquire a part of Albany. Normandien's attorney says that he accepted in good faith that the letter merely sought to correct typographical errors and overlooked the substantial change proposed to para 4(a).

[10] On 2 April 2014 the registrar issued an amended order. Apart from correcting the statutory reference, paras 4(a) and (c) were amended to read as follows (I have underlined the changes):

'(a) The election that the Plaintiffs have made in so far as their acquisition of the land or alternative land or compensation.

. . .

(c) The anticipated time frames for the completion of the process of allocation of land and/or resettlement of the Plaintiffs.'

There is a dispute in the present appeal as to whether the amended order is binding.

[11] In the removal application, the Ministers and the Regional Commissioner filed their answering papers in February 2014 but there was silence from the occupants. In October 2014 Normandien requested a pre-trial conference to move things along. This conference, presided over by Sardiwalla AJ, took place on 2 December 2014. The occupants' counsel said that his clients had elected to acquire a part of Albany. Normandien's counsel disputed their right to do so. The State Attorney made reference to a report by the Director-General which had not been seen by anyone else. The judge gave directions for the circulation of the report and said that there should be compliance with para 4 of his order.

[12] The Director-General's report of September 2014, if it existed, is not in the appeal record. In a report filed a year later by a legal adviser in the Land Department, it was stated that the occupants had elected to remain on Albany; that the Department had offered to buy Albany for R8,53 million; that this offer was rejected and a counter-offer made to sell Albany for R400 million; and that this counter-offer had subsequently being withdrawn. (The counter-offer in fact related to the larger estate of which Albany forms part.)

[13] The parties held a further conference during January 2015 but remained at odds about the terms of the order in the action and regarding the further conduct of the removal application. Normandien delivered a supplementary affidavit on 16 February 2015, alleging that the situation on the land had deteriorated and that the number of cattle had increased. Normandien said that there were four farms in close proximity which the Land Department had acquired and which would be suitable for the temporary relocation of the occupants' livestock.

[14] On 26 February 2015 the occupants filed their 'preliminary' answering papers. They said that they could not meaningfully address the allegations of over-grazing without funds to engage their own expert. They were awaiting a response to their funding request. At a further pre-trial conference on 14 April 2015, by which time the funding request had been granted, Sardiwalla AJ gave directions for the filing of the occupants' expert report and a meeting of experts.

[15] The experts engaged by Normandien and the occupants met on 1 June 2015 and reached agreement on a number of matters, including that there had been serious degradation of vegetation and soil erosion as a result of uncontrolled overgrazing and that it was imperative for all livestock to be removed with immediate effect. On 22 June 2015 a further meeting took place between these experts and two in-house experts of the KZN Department of Agriculture and Rural Development where it was agreed (i) that overgrazing and overstocking were the cause of the degradation; (ii) that the occupants had failed to act responsibly by reducing animal numbers; (iii) that all livestock should be removed before 31 August 2015 and should be excluded for a five-year period; (iv) and that a strict resource management plan should be drafted by October 2015 and thereafter implemented with annual audits.

[16] On 23 June 2015, and in accordance with a request by the parties, the Land Department issued a report regarding alternative land. This report identified the beneficiaries to whom the farms put forward by Normandien had been allocated. Two of the farms had been allocated to the Twala family who had 25 head of cattle, 21 pigs, three goats and three horses. The other two farms were allocated to Ms NJ Mazibuko who had five head of cattle. It was noted that large parts of these farms comprised mountainous land not suitable for grazing.

[17] On 12 September 2015 the occupants delivered a counter-application in the removal application by which they sought the following substantive relief:

'1. That the Court issue a further order to its order of 2 April 2014 under case No LCC31/2013, including an order:

1.1 declaring that [the occupants] have made their election in terms of paragraph 2 and 4(a) of the Court order to acquire the property held by [Normandien] and occupied by [the occupants], known as…;

1.2 that the affected land and/or right in the affected land held by [Normandien] be awarded to [the occupants];

1.3 that [Normandien] be paid just and equitable compensation for the affected land, as prescribed by the Constitution of the Republic of South Africa…for the acquisition by [the occupants] of the land;

1.4 that the amount of compensation payable to [Normandien] be determined by the Court;

1.5 that the said amount of compensation be paid by the [Land Minister and Director-General of the Land Department] on behalf of [the occupants], in such manner and within such period as the Court may determine as being just and equitable.

2. Declaring that the application by [Normandien] under case number 196/2013 [ie the removal application] is subversive of the Court order of 2 April 2014 and [the occupants'] rights or entitlement emanating from such Court order.'

[18] Answering and replying papers in the counter-application were delivered. In its answering papers Normandien accused the occupants' attorneys of having acted improperly in seeking amendments to the order and said that the amended order was a fraud. The occupants delivered an application to strike out these accusations.

[19] A further pre-trial conference was held on 17 September 2015, with Meer AJP presiding. (It appears that at some stage the occupants successfully applied for the recusal of Sardiwalla AJ.) Meer AJP directed the parties to hold a conference on 7 October 2015 to resolve various issues, including whether – in view of the shared opinion of all the experts – there was any obstacle to the parties' agreeing to the relief sought in para 1 of the notice of motion (ie the removal of the livestock) and whether the Land Department was able to be of assistance in providing alternative land.

[20] At the conference on 7 October 2015 the parties' representatives agreed that para 1 of Normandien's notice of motion was 'in order' and that the joint minute by the experts was accepted, but the occupants' and Land Minister's agreement to this

effect was expressed to be 'subject to the outcome of the counter-application'. The Land Department maintained that it did not have alternative land because the farms in question had been allocated to other beneficiaries. The Land Department contended that it did not have a mandate to look for alternative grazing land and did not have programmes or policies for providing alternative land for grazing use. The occupants asserted that, by virtue of the amended order of 2 April 2014, the LCC did not have jurisdiction to entertain the removal application.

[21] A final pre-trial conference before Meer AJP was held on 15 October 2015. One of the questions raised with reference to the order in the action was whether the occupants had applied for an award of land prior to 31 March 2001 in accordance with ss 16 and 17 of the LTA. Meer AJP directed the Director-General to file a report as to whether the occupants had done so and to annex documentary proof. The report was delivered on 20 October 2015. In the report Ms Pillay, a legal advisor, said that she had been told by the Department's Newcastle office that the 'original Section 16 Notice cannot be located' and that 'the Section 16 have been misplaced over the years'. The Department was 'undergoing a process' of locating the notices which had started in August 2015 and was 'ongoing'. She reported that the occupants' names were on a database created at the time from the original s 16 notices.

[22] The removal application and counter-application were heard by Meer AJP over the period 20-23 October 2015. No oral evidence was adduced. She delivered judgment on 5 November 2015 and made the following order:

'1. The [occupants] are ordered to remove all their livestock (including, inter alia, all their cattle, goats, horses and donkeys) presently in their possession or under their control from the farm Albany, more fully described as… by 15 January 2016.

2. The [occupants] are interdicted and restrained from returning any of their livestock as contemplated in paragraph 1 above, or any other livestock on to the farm for a period of 5 years from the date of removal contemplated in paragraph 1 above.

3. The [Land Minister] is ordered and directed to make alternative land in close proximity to the farm and preferably [the four farms identified by Normandien] available to [the occupants] for the livestock to be relocated to, by 15 January 2016. The [Land Minister]

shall further take all steps necessary to comply with this order and to make available all resources to do so.

4. In the event of the Respondents failing to comply with the orders contemplated in paragraphs 1, 2 and 3 above, and in the event of the [Land Minister] failing to make available such alternative land for the grazing of the livestock aforementioned by 15 January 2016, then, in that event an order is hereby issued that the Sheriff of Newcastle with the assistance of the South African Police Service, alternatively any other registered private security company that the Sheriff is granted leave to appoint at [Normandien's] expense, shall remove all such livestock contemplated in prayer 1 above, which [the occupants] have failed to remove from the farm, and to take such livestock to such other place indicated or made available by the [Land Minister]. In the absence of the aforesaid Respondents indicating such other place or location, the Sheriff is ordered to remove such livestock to the pound in Dundee, Utrecht, Ladysmith, or Newcastle or such other pound in Northern Natal able to accommodate the livestock, for the pound master to deal with in terms of the applicable legislation dealing with pounds.

5. The [occupants, the Agriculture Minister and the Land Minister], jointly and severally, the one paying the other to be absolved, are ordered to pay [Normandien's] costs of this application taxed on the scale as between attorney and client, such costs to include, inter alia, the amounts referred to in subparagraphs 5.1 to 5.9 below …'

[23] The Land Minister and occupants applied for leave to appeal which the LCC refused on 16 February 2016. On 13 May 2016 and 15 June 2016 this court granted the Land Minister and the occupants respectively leave to appeal. The occupants' notice of appeal was not duly filed, as a result of which they delivered an application for condonation and reinstatement on 6 September 2016. This was not opposed. On 11 October 2016 this court directed that the appeals in the present matter be heard simultaneously with the appeal in a similar matter, *Adendorffs Boerderye (Pty) Ltd v Shabalala & others* Case 997/2015 (*Adendorffs*), and that the Land Minister file the appeal record in the present case within one month. The appellants were directed to deliver their heads of argument within one month of the filing of the record and the respondent one month later. In *Adendorffs*, where the judgment of the LCC had been delivered by Sardiwalla AJ, the Shabalalas were represented on appeal by the same attorneys and senior counsel as the occupants in the present case.

[24] The record was duly delivered on 8 November 2016. The Land Minister's heads of argument were filed on 7 December 2016 and Normandien's on 22 December 2016. The occupants failed to file their heads of argument. The present case and *Adendorffs* were enrolled for hearing on 28 February 2017. On 16 February 2017 the registrar notified the parties that the occupants' appeal had lapsed in terms of rule 10(2A)*(a)* because of their failure to file heads. In *Adendorffs* the Shabalalas' heads were filed on 26 February 2017, two days before the hearing. The *Adendorffs* appeal went ahead but the appeals in the present case were postponed to afford the occupants an opportunity to seek condonation and reinstatement. On 30 March 2017 the occupants delivered their application for condonation and reinstatement. Their heads were delivered during the first half of April 2017.

[25] This court delivered judgment in *Adendorffs* on 29 March 2017.[1] The land owner was successful. An application by the Shabalalas for leave to appeal was dismissed by the Constitutional Court on 6 September 2017. In the meanwhile, the present appeals and the reinstatement application were enrolled for hearing on 12 September 2017 but could not proceed on that date because the occupants objected to the participation of three of the five judges on the basis that they had sat in *Adendorffs*. Eventually the appeals and reinstatement application were heard on 7 November 2017.

**The contempt application**

[26] On 12 October 2017 the occupants' attorneys served on Normandien's attorneys an application for orders that Normandien, through its representative Mr Hoatson, show cause why it should not be declared in contempt; that Mr Hoatson be committed to prison for contempt, alternatively that a fine be imposed on Normandien; barring Normandien from participating in the appeal and in the occupants' application for condonation and reinstatement; and that such appeal and application be postponed sine die pending the outcome of certain petition proceedings in the Constitutional Court. This application was only served on the

[1] *Adendorffs Boerderye (Pty) Ltd v Shabalala & others* (997/15) [2017] ZASCA 37.

State Attorney (ie the Land Minister's attorneys) and filed at this court on 31 October 2017. On 30 October 2017 Normandien and Mr Hoatson delivered opposing papers.

[27] The contempt application has its origins in events which occurred in early March 2017. On 3 March 2017 Normandien caused the occupants' livestock to be removed to an animal pound in accordance with para 4 of the court a quo's order. Mr Hoatson says that Normandien did so in the belief that, with the lapsing of the occupants' appeal, Normandien was entitled to implement para 1 of the court a quo's order. In response to the removal, the occupants obtained an urgent ex parte interdict from the LCC (per Ncube AJ). Despite opposition, the LCC (again per Ncube AJ) confirmed the urgent order on 24 March 2017. On 18 April 2017 the LCC dismissed Normandien's application for leave to appeal. A petition to this court was dismissed on 20 June 2017. On 11 July 2017 Normandien applied to the Constitutional Court for leave to appeal. That application, which is still pending, is the petition referred to in the relief claimed in the contempt application.

[28] On 31 July 2017 the occupants delivered an application in the LCC for leave to execute the order of 24 March 2017 pending the final determination of Normandien's proposed appeal. Normandien opposed the application which was heard on 30 October 2017. We were informed from the bar that the occupants' livestock remain under the control of the pound master on grazing land he has leased for the purpose and that they are in good condition. There may be a dispute as to who must bear the costs of the pound master. Subsequent to the hearing of the appeal, we were notified that the LCC, by a judgment dated 20 November 2017, granted the occupants leave to execute.

[29] For several reasons the contempt application must fail and is an abuse of this court's process. The allegation of contempt is that Normandien's conduct in causing the cattle to be removed on 3 March 2017 showed disrespect to the pending appeal process against the LCC's judgment of 5 November 2015. If that allegation were well founded, the occupants should have delivered their contempt application shortly after 3 March 2017. There was no justification for holding back until 12 October 2017. The relief claimed in the contempt application would affect not only Normandien but also the Land Minister, because a postponement of the appeal was

requested. As I have mentioned, the contempt application was only served on the State Attorney on 31 October 2017. The late delivery of the contempt application also inconvenienced the court.

[30] The assertion of contempt is in any event hopeless. The occupants need to establish Normandien's contempt beyond reasonable doubt, including the element of wilfulness, since the contempt relief they seek is punitive.[2] Normandien's evidence is that it caused the livestock to be removed in the genuine belief that the lapsing of the occupants' appeal entitled it to give effect to para 1 of the LCC's order of 5 November 2015 through the mechanism contained in para 4. It is necessary to emphasise that the Land Minister's appeal is confined to paras 3, 4 and 5 of the LCC's order, so his pending appeal did not suspend the operation of para 1.

[31] In regard to para 4, the Land Minister's appeal would at most have suspended para 4 insofar as it concerned the Land Minister. I agree with the submission made by Normandien's counsel that para 4 of the court a quo's order contemplated a factual state of affairs: if the animals were not removed by 15 January 2016 and if the Land Minister did not make land available to the occupants by 15 January 2016, Normandien could require the Sheriff of Newcastle to remove the animals in accordance with para 4. The fact that the Land Minister had not made alternative land available because he was pursuing an appeal did not alter the simple fact that the animals were still on the farm on 15 January 2016. Given the dire situation on the land as agreed by all the experts, the court a quo could not have envisaged that the removal of the animals would be kept in abeyance for many months just because the Land Minister, for whatever reason, did not make alternative land available.

[32] Normandien's view of the legal position which prevailed as at 3 March 2017 may well thus have been correct but it is unnecessary to express a definite opinion; it suffices that Normandien's view cannot be said to have been one which no reasonable person could genuinely have entertained. For the rest, Normandien's

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[2] *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 42; *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC) paras 34-37; *Matjhabeng Local Municipality v Eskom Holdings Ltd & others* [2017] ZACC 35 para 67.

conduct in relation to the LCC's order of 3 March 2017 as confirmed on 24 March 2017 consists of the exercise of its legal right to invoke the appellate processes of the law. It may well be that Normandien was somewhat heavy-handed in the way it acted on 3 March 2017. However, we cannot lose sight of the fact that Normandien must have been intensely frustrated by the delays which had beset the case, largely because of the occupants' conduct. By March 2017, 16 months had elapsed since the court a quo made its order, in circumstances where all the experts agreed that the animals could not be allowed to remain on the farm.

[33] The occupants' counsel repeatedly contended that this court's order of 20 June 2017, dismissing Normandien's application for leave to appeal against Ncube AJ's decision, established that paras 1 - 4 of the court a quo's orders were inextricably connected and that the suspension brought about by the Land Minister's appeal effectively suspended paras 1 - 4 in their entirety. That is a misguided contention which places unwarranted weight on the order of 20 June 2017. The order, as is usual in such cases, was made without reasons. One does not know whether the judges in question thought that Ncube AJ was right on the merits or whether they thought his order was not appealable because it was interim in nature. The order has no authority as precedent.

[34] There is no basis for the occupants' claim that the present appeals should be postponed sine die pending the determination of Normandien's petition to the Constitutional Court. The decision of the Constitutional Court on the petition, and any decision which might follow if Normandien were granted leave to appeal, will have no bearing on the determination of the appeals before us. On the contrary, it is a determination of the present appeals which may render moot Normandien's petition to the Constitutional Court and the occupants' application in the LCC for leave to execute. The occupants' counsel advanced the startling contention that the proper course was for the parties to agree, in terms of rule 37(6)(c) of the Uniform Rules of Court, to refer the applications and appeals in the present matter to the Constitutional Court for adjudication together with the pending petition. Apart from the fact that Normandien's counsel said that his client would not agree to such a course, there is no way in which litigants by agreement can compel the Constitutional Court to hear a case, far less a case where one of the issues is

whether an appeal in this court has lapsed and should be reinstated. Towards the end of his submissions, the occupants' lead counsel accepted that the sensible course was for the court to hear submissions on all the matters before the court and to deal with all such matters in its judgment.

[35] When regard is had to the occupants' other conduct and to the merits of the case, as discussed more fully below, one is driven to conclude that the contempt application was a stratagem to delay the finalisation of the appeal so as to buy time. The application must be dismissed. I shall deal later with the costs occasioned by the application.

[36] Finally, on this aspect, I should mention that it emerged, towards the end of the occupants' lead counsel's submissions in support of the contempt application, that he was unaware of the answering papers which Normandien had delivered on 30 October 2017 and of the supplementary heads of argument which Normandien filed on 31 October 27 in connection with the contempt application. These documents were duly served on the occupants' Bloemfontein attorneys. It is remarkable that the occupants' legal representatives took no steps to ascertain whether Normandien was opposing the contempt application; they could hardly have thought that Normandien would allow it to go by default. We also received no explanation as to how it was that the documents did not come to counsel's attention. Be that as it may, the occupants' counsel did not seek time to consider Normandien's answering papers. And they would have had opportunity, before replying later in the day, to read these papers and make further submissions.

**Condonation and reinstatement**

[37] The occupants heads of argument should have been filed within one month of 8 November 2016, ie by 8 December 2016, whereas they were only served on Normandien's Bloemfontein attorneys on 6 April 2017. The occupants advanced an ingenious argument in an attempt to reduce this period of delay. They claimed that the record was only served on their Durban attorneys on 16 November 2016 and that this is when time began to run. Time had not finished running when the so-

called *dies non* (16 December 2016 to 15 January 2017) took effect.[3] This conclusion was reached via a contention that the period of a month should be computed with reference to court days. By this circuitous reasoning they arrived at the remarkable conclusion that their heads of argument only needed to be filed by 6 February 2017. Even if that were true, the occupants' heads were not filed by that date nor with a filed before the scheduled date for the appeal on 28 February 2017.

[38] In any event, the occupants' argument is spurious. The period of one month began to run from the date on which the complete record was served on the occupants' Bloemfontein attorneys, 8 November 2016. The meaning of the word 'month' is unambiguous. One cannot say that a 'month' means 30 or 31 court days and therefore, say, 40 calendar days. The one-month period, reckoned from 8 November 2016, expired at the latest on 8 December 2016, so it is unnecessary to consider whether the *dies non* would have applied to the one-month direction.

[39] The occupants' legal representatives, who also acted for the Shabalalas in *Adendorffs*, knew that the appeals were meant to be heard together on 28 February 2016 and that the late filing of their heads would cause inconvenience. In the event they only filed their heads in *Adendorffs* two days before the hearing and failed altogether to file heads in the present matter, the result being that the present matter was postponed despite Normandien's stance that the situation on the land needed to be addressed urgently.

[40] In its judgment in *Adendorffs*, this court deplored the conduct of the Shabalalas' legal representatives. Counsel were briefed late and then decided to take an early Christmas break on 9 December 2016 and only resume work on 23 January 2017. This conduct was said to be 'unreasonable', 'slack' and demonstrating 'discourteous conduct to the court and their opponents'. The attorney had been guilty of 'wanton disregard' of the rules. Although this court granted condonation in the interests of justice, the attorney was ordered personally to pay the costs of the postponement and condonation application.

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[3] In terms of rule 1(2)*(b)* of this court's rules, the period between 16 December and 15 January (both dates inclusive) shall not be taken into account in the calculation of any period 'in terms of these rules'.

[41] The lackadaisical conduct of the occupants' legal representatives in the present case is worse. In *Adendorffs* new counsel were engaged for the appeal and were only briefed during November 2016. By contrast, the occupants' present senior counsel came on brief for the occupants during October 2015. The occupants have throughout been represented by the same attorneys. The occupants' legal representatives had all the papers and could have started preparing heads of argument even before the appeal record was delivered on 8 November 2016. For all practical purposes the appeal record was complete by 9 September 2016 – all that was missing at that stage was the occupants' notice of appeal.

[42] As in *Adendorffs*, we have decided to grant condonation and reinstatement in the interests of justice. In doing so, we have taken into account that the Land Minister's appeal was properly before us and required us in any event to deal with some of the issues raised by the occupants; that the prospects of success were fully debated in the context of condonation; and that the occupants are indigent people and that it is undesirable that they should not have this court's decision on the merits. But for these circumstances, the case may well have been one where the non-compliance was, in the context in which it occurred, sufficiently egregious to warrant refusal of condonation even if there were good prospects on the merits. I shall, however, return to the conduct of the occupants' legal representatives when discussing costs.

**Locus standi**

[43] The Land Minister and the occupants submitted that Normandien lacked standing to seek relief for non-compliance with CARA, contending that the power to do so vested solely in the Agriculture Minister. A similar argument was advanced and rejected in *Adendorffs*, also an overgrazing case. An application for leave to appeal to the Constitutional Court failed. In the present case the court a quo rejected the attack on Normandien's standing on substantially the same grounds as were endorsed by this court in *Adendorffs.* It follows that the attack on Normandien's standing must fail.

**The counter-application**

[44] It is convenient to deal, next, with the occupants' appeal against the dismissal of their counter-application. The counter-application focused on the amended order of 2 April 2014. In essence, the occupants contended that in terms of that order they had the right to elect to be awarded the affected part of Albany; that they had elected to do so; and that the granting of the removal application was incompatible with their rights flowing from their election.

[45] The relief sought in para 1 of the counter-application is directed at affirming that the occupants have the right to elect to acquire the affected part of Albany in terms of Sardiwalla AJ's order of 2 April 2014 and that they have so elected. Para 2 builds on para 1 by contending that the removal application is 'subversive of' the right the occupants acquired pursuant to Sardiwalla AJ's order of 2 April 2014.

[46] Even if the occupants were entitled to the relief sought in para 1 of the counter-application, the relief sought in para 2 is a non sequitur. The fact that the occupants might have the right to acquire the affected part of Albany does not mean that they are exempt from the provisions of CARA. Normandien, which was and still is the registered owner of Albany, has standing to enforce its provisions.

[47] However, para 1 constitutes self-standing relief and it is thus necessary to consider whether the occupants have the rights which that paragraph asserts. In dismissing the counter-application, the court a quo reasoned thus. There was no proof that the occupants lodged a timeous s 16(1) application for the award of the affected land. The LCC only has the power to make an award of land in terms of s 22 of the LTA if the labour tenant has timeously lodged a s 16 application. Section 33 does not confer an independent power to award land. The order of 14 March 2014 and the amended order of 2 April 2014 could not clothe the LCC with jurisdiction to make an award of land or determine equitable compensation.

[48] Sardiwalla AJ's order declaring the occupants to be labour tenants was a permissible order in terms of s 33(2A) of the LTA. Such a declaration may be made whether or not the labour tenant has lodged an application in terms of s 16. For the rest, the original and amended orders purportedly granted by Sardiwalla AJ are

most unsatisfactory. In terms of s 22 of the LTA, the LCC may order that 'affected land' or other land be awarded to the labour tenant. The 'affected land' is land which the labour tenant is entitled to occupy and in respect of which he has made a timeous s 16 application. The other land is land held by another person (including the State) who is willing to have such land or right therein awarded to the tenant. An award of other land may be made in addition to, or instead of, an award of the affected land. I agree with the court a quo that a timeous s 16 application is a jurisdictional pre-requisite for the awarding of affected or other land to a labour tenant and that s 33 is not an independent source of power to award land.

[49] There is nothing to show that Sardiwalla AJ took any steps to satisfy himself that the occupants had lodged timeous s 16 applications. In its plea Normandien denied that they had done so and denied that the Director-General had issued and served on Normandien the notice contemplated in s 17(2)*(a)* and *(b)* of the LTA. Normandien says that it was willing, for purposes of settlement, to accept an order which presupposed compliance with s 16. Even so, Sardiwalla AJ should have insisted on proof of compliance. An award of land or compensation typically gives rise to a financial burden for the State by virtue of the labour tenant's right to apply for an advance or subsidy in terms of ss 26 and 27 of the LTA.

[50] Apart from this difficulty, the form of the order does not accord with the LTA. An order in terms of s 22 of the LTA must identify the land awarded to the tenant. If the land is the affected land, the LCC's order would need to delineate its extent. (The affected land is not the whole of Albany.) If the land is other land, the LCC's order would need to identify such other land. And the LCC could not make an award of such other land unless the relevant owner were willing to have it awarded to the tenant. In the present case, Sardiwalla AJ's order envisaged a process of negotiation between the Director-General, the occupants and unidentified landowners, the making of an election by the occupants, and the furnishing of a report in due course by the Director-General. This does not accord with any procedure laid down in the LTA. At any rate, Sardiwalla AJ did not make an award of land – at most he gave directions which might in the future have resulted in an award of land.

[51] I thus do not think that Sardiwalla AJ's order (in any of its forms) constituted a final determination of the occupants' entitlement to an award of land or compensation. If it emerged that the occupants failed to lodge a timeous s 16 application, Sardiwalla AJ would have been bound to refrain from making an award. His order did not render *res judicata* the question whether there had been compliance with s 16. Normandien, which was a respondent in the counter-application, disputed that there had been compliance. The Director-General was unable to provide documentary proof that there had been compliance. If there had been due compliance, one might have expected the application to have been referred to the LCC by the Director-General in terms of s 17(6) of the LTA years before the occupants eventually instituted their action in March 2013. Given the appalling state of the Land Department's Newcastle administration, as reflected in the report of 20 October 2015, I do not think the presence of the occupants' names on a database carries much weight. Applying the well-known rules relating to disputes of fact in opposed motion proceedings, the occupants failed to establish their entitlement to an award of land.

[52] In any event, the occupants could only succeed in the relief sought in para 1 if they established that the amended order of 2 April 2014 was valid and binding. Although the court a quo left this question open, I think it should be decided adversely to the occupants. First, after pronouncing his order of 14 March 2014 Sardiwalla J AJ was functus officio, save to the extent that his order contemplated further decisions by the court. In terms of rule 64(1) of the rules regulating LCC proceedings, the LCC may vary an order 'which contains an ambiguity or a patent error or omission' in order to 'clarify the ambiguity or to rectify the patent error or omission'. This may be done by the LCC of its own accord or upon application by a party.[4] In the present case, Sardiwalla AJ did not act of his own accord and there was no application by the occupants. There was an informal request by letter.

[4] Section 35(11) of the Restitution of Land Rights Act 22 of 1994 (Restitution Act) sets out the grounds on which the LCC may rescind or vary orders made in terms of that Act. However, s 35 of the Restitution Act is not among the provisions made applicable to the LCC when functioning in terms of the LTA (see s 30(1) of the LTA which sets out the provisions of the Restitution Act which apply to the performance of the LCC's functions in terms of the LTA.

[53] The second of the two variations sought by the occupants' attorneys was an alteration of substance. It did not clarify an ambiguity or correct a patent error or omission. The alteration was one which purported to confer on the occupants a right to elect an award of the affected part of Albany. On Normandien's version, this was directly at odds with the settlement. Rule 64(1) did not empower Sardiwalla AJ to make the alterations in question. Because he was functus officio, he lacked jurisdiction. The amended order of 2 April 2013, insofar as it changed the wording of para 4, was thus a nullity.[5] It thus fell within that relatively narrow class of case where a purported order can be disregarded without taking steps to have it formally set aside. It would have been preferable for Normandien to have this clarified by way of a timeous application, as was indeed contemplated at one stage during the pre-trial conferences, but this cannot affect the legal conclusion that the amended order was a nullity.

[54] The occupants' counsel submitted that Normandien agreed to the amendment. That is incorrect. There is no evidence that Normandien communicated to the LCC that it was content for the amendments to be made. The high watermark of the evidence is that, having been copied on a letter addressed to the registrar, Normandien's attorneys did not react, the reason being that they failed to appreciate that the occupants were seeking an alteration of substance.

[55] The other reason why the occupants' reliance on the order of 2 April 2014 cannot succeed is that it is inconsistent with the settlement reached on 14 March 2014. Even if, technically, the order of 2 April 2014 stands until set aside, it by no means follows that the occupants are entitled to rely on it in a manner inconsistent with the agreement reached on 14 March 2014.

[56] I thus conclude that the court a quo was correct to dismiss the counter-application.

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[5] *Tödt v Ipser* 1993 (3) SA 577 (A) at 589C-D; *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA) para 14; *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) para 14.

**Was the removal application an eviction?**

[57] The dismissal of the occupants' counter-application should be the end of the case insofar as the removal of the livestock is concerned, since at the pre-trial conference on 7 October 2015 the legal representatives for the occupants and Land Minister accepted that para 1 of Normandien's notice of motion should be granted, subject only to the counter-application. In this court, however, counsel for the Land Minister and for the occupants argued, in their written submissions, that the removal application should have been refused because it amounted to an 'eviction'.[6] The LTA defines 'eviction' as including 'the deprivation of a right of occupation or use of land'. This would include use for grazing.

[58] By way of the order of 14 March 2014 the occupants were declared to be labour tenants. They were thus entitled to the protection against eviction contained in the LTA. This means that they could only be evicted if it was just and equitable and if one or other of the circumstances specified in s 7(2) was present, namely if the occupants had refused or failed to provide labour to Normandien contrary to any agreement between them or if they had committed such a material breach of the relationship between themselves and Normandien that it was not practically possible to remedy it in a way which could reasonably restore the relationship.

[59] In my view Normandien was not seeking to 'evict' the occupants within the meaning of the LTA. The term 'eviction' in the LTA connotes a deprivation of the right of occupation or use of land as a result of the purported termination or repudiation of that right by the person in control of the land, whether the owner or lessee. This is apparent from the circumstances which must be present in order to justify an eviction, as specified in s 7(2), and from the fact that, in terms of s 6, proceedings for eviction can only be instituted by the owner or by someone else (eg the lessee) with the owner's sworn support.

[60] In the present case Normandien did not purport to terminate or repudiate the relationship between itself and the occupants as labour tenants. Normandien did not

[6] This argument had no place in the Land Minister's heads of argument because it did not relate to the orders against which the Land Minister had leave to appeal. In fairness to the Land Minister's counsel, I should add that they did not make oral submissions on this part of the case.

contend that the occupants no longer had the right to reside on the farm. Normandien did not contend that the occupants' right, as between themselves and Normandien, to graze their livestock on the farm as an incident of their occupation was at an end. Normandien asserted that the continued presence of the livestock on the farm contravened CARA and that this was damaging Normandien's land and causing Normandien to be in violation of its obligations under CARA. If the Agriculture Minister had brought proceedings to enforce CARA through the removal of the livestock, it could hardly have been contended that he was applying for the occupants' 'eviction' for purposes of the LTA. Such a contention would imply that the Agriculture Minister would be powerless to act without the owner's sworn support, which would be untenable. The position is no different where a private party with locus standi seeks to enforce CARA.

[61] The court a quo was criticised for having supposedly failed to take into account the rights enjoyed by the occupants as labour tenants and the cultural importance to them of keeping livestock. I do not think this criticism has merit. The LTA does not exempt labour tenants from other laws which limit the way in which land can be used. The only exception is s 40 which provides that if land or a right in land has been awarded to a labour tenant, the land in question shall not be subject to any law regulating the subdivision of land. Labour tenants, like everyone else, are subject to CARA. I understood the occupants' counsel to concede this.

[62] It is convenient here to mention a contention which the occupants' counsel made in their written heads and which they pressed in oral argument. They argued that in its founding affidavit Normandien had said that it 'defer[red] to the guidance of the KwaZulu-Natal Department of Agricultural and Environmental Affairs (KZN Department) and the expertise of their scientists referred to in correspondence dealt with hereunder'. The occupants' counsel said that the said 'guidance' was contained in a report by the said department dated 11 September 2012 which was annexed to the founding affidavit.

[63] The contention is misconceived. First, Normandien did not say that it deferred exclusively to the guidance of the scientists of the KZN Department; the passage from the founding affidavit which I have quoted continued 'and the experts appointed

by [Normandien] at substantial costs', ie Normandien also 'deferred to', ie relied on, the view of its own experts. The evidence of Normandien's experts, as contained in the founding affidavit, was that the livestock should be removed from the farm for five years. Their report was issued in December 2013, just before Normandien issued its application. The report by the KZN Department, issued 15 months earlier, constituted additional evidence broadly in support of Normandien's contention – the report stated that the area was heavily overstocked as a result of which both the pasturage and the animals were in poor condition. The KZN Department thought that the grazing lands could carry 45 head of cattle, well short of the 285 head of cattle then on the land. The KZN Department's assessment may have been right at the time it was made but Normandien also relied on the more current information contained in the report of its own experts.

[64] In any event, the information available as at December 2013 was superseded by the more current information which emerged when all the experts, including the expert engaged for the occupants, met during 2015 in accordance with the pre-trial directions of the court a quo. That was the information on which the court a quo was required to act.

**The relief granted against Land Minister**

[65] The court a quo ordered the Land Minister to make alternative land available for the relocation of the occupants' livestock. The Land Minister argues that this was impermissible as he neither has the power nor the duty to make alternative land available to labour tenants for grazing use.

[66] The court a quo did not base its decision directly on the LTA. The LCC has yet to determine whether the occupants, as labour tenants, are entitled to an award of land and if so what land and for what compensation. The occupants are thus not in a position to apply to the Land Minister for an advance or subsidy in terms of s 27 of the LTA.

[67] The court a quo relied, instead, on the Land Minister's duties in terms of the Land Reform: Provision of Land and Assistance Act 126 of 1993 (Reform Act). Section 1A of the Reform Act states that its objects are inter alia to give effect to the

land and related reform obligations of the State in terms of s 25 of the Constitution and to promote economic growth and the empowerment of historically disadvantaged persons. Section 25(5) of the Constitution requires the State to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. Section 25(6) provides that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

[68] Section 10(1) of the Reform Act empowers the Land Minister, from money appropriated by Parliament, to acquire property and, inter alia, to make State land available which he or she considers suitable for the achievement of the objects of the Reform Act, whether in general or in specific cases. The court a quo found that s 10, when read together with the objects of the Reform Act and the provisions of s 25 of the Constitution, imposed on the Land Minister a duty in the present case to make alternative grazing land available to the occupants.

[69] I can understand why the court a quo was anxious to reach a finding that the Land Minister was obliged to do so. If the Land Minister is not obliged to make alternative land available, the occupants will not be relieved of the obligation to remove their livestock from Albany. Unless they could find alternative land by their own endeavours, they would have to sell their livestock. Nevertheless, I consider that the court a quo erred in making the orders it did against the Land Minister.

[70] In the first place, in order for land to be made available in terms of the Reform Act, it must be designated by the Land Minister in terms of s 2 of the Act. In terms of that section, the designation must be ‘for the purposes of settlement’. The word ‘settlement’ is defined in s 1 as meaning ‘the settlement of persons on designated land…’. Section 10 of the Act, on which the court a quo relied, appears to me to be the mechanism by which land is brought within the purview of the Act. Land may be acquired by the Land Minister, or existing State land may be made available by the Land Minister, if he or she considers the land suitable for the achievement of the objects of the Act, in general or in specific cases. Once land has been made

available for purposes of the Act in accordance with s 10, it must still be designated in terms of s 2 and the further procedures set out in ss 3-9 must still be followed.

[71] It follows that it would not be within the power of the Land Minister to make grazing land available to the occupants unless the designation of land for that purpose would be a designation 'for the purposes of settlement'. Since 'settlement' means the 'settlement of persons', a conclusion adverse to the Land Minister would require us to find that people may be settled on land even though their occupation of the land in question does not include residence and is confined to being on the land for purposes of looking after their livestock. That appears to me to be a somewhat strained interpretation.

[72] However, and even if the Reform Act were capable of an interpretation adverse to the Land Minister (a question on which I prefer not to express a final conclusion), it by no means follows that he was obliged to exercise his powers under the Reform Act to make grazing land available to the occupants for five years. His powers under the Act are permissive and it is for him, not the court, to determine whether those powers should be exercised in a given instance. The court's role is confined to testing the lawfulness of his decisions.

[73] The procedure followed in the present case was not a review in terms of rule 53. If the review procedure had been followed, it is probable that fuller information would have been placed before the court concerning the other farms and the beneficiaries who have been settled there. Even in successful review proceedings, the court would ordinarily remit the matter to the decision-maker. Only in exceptional circumstances can the court give a substituted decision. I do not consider that the court a quo was entitled in the present case to order the Land Minister to exercise his supposed powers under the Reform Act to make grazing land available to the occupants. If he misconceived his powers by giving a wrong interpretation to the Reform Act, the correct relief would have been to require him to reconsider the matter.

[74] In the present case, however, it is unnecessary to remit anything to the Land Minister. We have not decided that the Land Minister has the power to make grazing

land available to the occupants in terms of the Reform Act. Normandien's interests are sufficiently met by the orders granted against the occupants. If the occupants consider that the Land Minister has a statutory duty to assist them, they will be free to approach the Land Department. I should add that the occupants' counsel did not advance any submissions against the Land Minister's appeal.

[75] We asked the Land Minister's counsel whether there was any other way in which her client could come to the occupants' assistance for the period during which their livestock must be removed from Albany. She said that the Land Department could assist the occupants if they were willing to accept alternative land as contemplated in Sardiwalla AJ's order and forego their claim to Albany, because then they, together with their livestock, could be settled on alternative land. This was permissible in terms of the Reform Act. However, and for as long as the occupants insist on asserting a claim to the affected portion of Albany, the Land Department cannot assist them with alternative land solely for purposes of grazing.

**Costs and conclusion**

[76] The court a quo ordered the Ministers and occupants, jointly and severally, to pay Normandien's costs on the attorney and client scale. In view of our decision to uphold the Land Minister's appeal, the costs order against him must be reconsidered. In the court a quo the Land Minister resisted all the relief claimed by Normandien. On the other hand, it is unlikely that the Land Minister would have entered the lists if no relief had been sought against him. In claiming relief against the Land Minister, Normandien was seeking to ameliorate the hardship which the occupants would inevitably suffer pursuant to the granting of paras 1 and 2 of the order. The case against the Land Minister had a strong constitutional dimension. The occupants are a previously disadvantaged community. The LTA, under which the occupants have been declared to be labour tenants, is a statute giving effect to s 25 of the Constitution. In order to safeguard the occupants' labour tenancy in the face of CARA, they needed alternative grazing land unless they were to sell their livestock. There was an argument to be made that the Reform Act, which is another statute giving effect to s 25 of the Constitution, could be invoked.

[77] Normandien argued, in my view correctly, that in these circumstances the *Biowatch* principle[7] should be followed in regard to costs. The Land Minister's counsel did not resist this contention though she did not have formal instructions to concede it. Recent decisions of the Constitutional Court have been critical of lower courts' failure to embrace *Biowatch* and have admonished all courts to apply *Biowatch* in constitutional litigation between private parties and the State unless the proceedings are vexatious or frivolous or characterised by conduct worthy of censure.[8] Accordingly, Normandien and the Land Minister should bear their own costs in relation to the relief sought in the court a quo against the Land Minister.

[78] In this court, these parties should likewise bear their own costs in respect of the Land Minister's appeal. The Land Minister's success on appeal will require us to set aside para 3 of the court a quo's order and to exclude the Land Minister from the ambit of the costs order contained in para 5. The Land Minister did not appeal against the separate cost order made in para 7 (this related to a postponement application). Although para 4 of the court a quo's order mentions the Land Minister, it does not impose any obligation on him. As a fact, the Land Minister did not make alternative land available by 15 January 2016. It is unnecessary in the circumstances to alter para 4.

[79] *Biowatch* does not apply as between Normandien and the occupants since both sides are private litigants. In ordering costs against the occupants on a punitive scale, the court a quo regarded as apt Normandien's characterisation of the counter-application as frivolous and vexatious, particularly in the light of the unanimous opinion of the experts that serious overgrazing had occurred and that livestock should be removed from the land for five years. The court a quo also took into account that the occupants had been guilty of unacceptable dilatoriness in the conduct of the proceedings. We can only interfere if the court a quo acted on a wrong principle or materially misdirected itself. I am unable so to find.

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[7] *Biowatch Trust v Registrar, Genetic Resources, & others* [2009] ZACC 14; 2009 (6) SA 232 (CC).
[8] See *Hotz & others v University of Cape Town* [2017] ZACC 10; 2017 (7) BCLR 815 (CC) paras 34-37; *Harrielall v University of KwaZulu-Natal* (CCT100/17) [2017] ZACC 38 para 11; *Ferguson & others v Rhodes University* (CCT187/17) [2017] ZACC 39 paras 24-26.

[80] In respect of the occupants' unsuccessful appeal in this court, the occupants must pay Normandien's costs, including the costs of two counsel. Normandien did not ask for a punitive costs order in respect of the appeal.

[81] The condonation and contempt applications stand on a different footing. Normandien seeks punitive costs orders against the occupants' attorneys personally. For similar reasons to those given in *Adendorffs*, such an order is plainly warranted insofar as the condonation and reinstatement application is concerned. A similar order is justified in relation to the contempt application. It was a stratagem, without substantive merit, to delay the hearing of the present appeal. The fact that it was brought cannot be attributed to the occupants. Their chief deponent described himself as having no formal education. Their attorneys needed to explain the papers to him. The conclusion is irresistible that the contempt application was a strategy devised by the occupiers' legal representatives.

[82] The occupants' counsel submitted that in contempt proceedings the applicant is simply an informant who places information before the court which then determines whether the respondent should be punished. There should thus be no costs order against an informant if the contempt application fails. In support of the submission he cited some very old authorities and the slightly less ancient case of *Naude en 'n ander v Searle* 1970 (1) SA 388 (O). The latter decision holds that if an applicant seeks no more than the respondent's punishment for contempt, he is an informant and cannot claim costs if the court punishes the respondent. Even if this decision is good law, it is distinguishable because the occupants' contempt application has failed and because the occupants did not merely seek Normandien's punishment – they sought orders that Normandien be precluded from participating in the condonation application and the appeal and that all of these matters be postponed sine die. I should add, though, that the occupants' submission does not accord with modern practice, where costs are usually awarded against parties who unsuccessfully seek contempt orders, as recent decisions of this court show.[9]

[9] For cases where unsuccessful applicants for contempt were ordered to pay costs, see, eg, *Jeebhai & others v Minister of Home Affairs & another* [2009] ZASCA 35; 2009 (5) SA 54 (SCA) paras 55 and 67; *Cathay Pacific Airways Ltd & another v Lin & another* [2017] ZASCA 35; [2017] 2 All SA 722 (SCA) paras 47-48; *Mashamaite & others v Mogalakwena Local Municipality & others; Member of the Executive Council for Coghsta, Limpopo & another v Kekana & others* (523/2016; 548/2016) [2017]

[83] I do not think it is right that only the occupants' attorneys should feel the consequences of what were joint failings by the legal team. As a mark of disapproval, I consider that the occupants' attorneys and counsel should be precluded from recovering any fees from the occupants in respect of the condonation and contempt applications.

[84] Finally, it is necessary to say something about the interlocutory papers in the present matters. There were two condonation applications and the contempt application. Over the period March 2017 to early November 2017, affidavits in the main condonation application and in the contempt application were filed with no attempt at indexing and paginating the papers. This made the court's preparation for the hearing difficult and would have made argument impossible but for the fact that, shortly before the hearing, the presiding judge directed that the papers be indexed and paginated. I am authorised by the presiding judge, who has discussed the matter with the President of this court, to say that in future practitioners should ensure that opposed interlocutory in this court are paginated and indexed. The founding papers in an interlocutory application should, when served, already be paginated and be accompanied by a preliminary index; further affidavits in the application should continue the pagination and should already be so paginated when served, and should be accompanied by an updated index. In so far as needs be, the attorneys for the litigants should liaise with each other to ensure that the system of pagination and updated indexing is implemented without confusion.

[85] I accordingly make the following order:

(a) In Case 512/2016 (the appeal by the Minister of Rural Development and Land Reform):

(i) The appeal succeeds.

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ZASCA 43; [2017] ZASCA 43; [2017] 2 All SA 740 (SCA) para 54; *Lourens v Premier of the Free State Province & another* (566/2016) [2017] ZASCA 60 paras 10-16.

(ii) The order of the court a quo is amended by deleting para 3 and by altering para 5 so that it commences thus: 'The First to Thirteenth Respondents, jointly and severally…'.

(iii) The parties shall bear their own costs of the appeal.

(b) In Case 370/2017 (the appeal by Mandla Nkosi Joseph Mathimbane and eleven others):

(i) The appellants' applications for condonation and for the reinstatement of the appeal are granted.

(ii) The appellants' Durban attorneys, MC Ntshalintshali Attorneys, shall personally pay the respondent's costs of opposing the said applications on the attorney and client scale, including the costs of two counsel.

(iii) The appellants' contempt and postponement application dated 11 October 2017 is dismissed.

(iv) The appellants' Durban attorneys, MC Ntshalintshali Attorneys, shall personally pay the respondent's costs of opposing the said contempt and postponement application on the attorney and client scale, including the costs of two counsel.

(v) The appellants' counsel and Durban attorneys, MC Ntshalintshali Attorneys, shall not be entitled to recover any fees from the occupants in respect of the applications mentioned above.

(vi) The appeal is dismissed with costs, including the costs of two counsel.

**OL Rogers**

**Acting Judge of Appeal**

APPEARANCES

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| For Appellant in Case 512 and for 3rd Respondent in Case 370/2017 | TV Norman SC (with her ZP Mhlongo<br><br>Instructed by<br>State Attorney, Durban c/o State Attorney, Bloemfontein |
| For 1st Respondent in Cases 512/2016 and 370/2017 | MG Roberts SC (with him C Hattingh)<br><br>Instructed by<br>Vinnicombe & Associates, Thornville c/o Symington & De Kok, Bloemfontein |
| For Appellants in Case 370/2017 and for 2nd to 13th Respondents in Case 512/2016 | G Shakoane SC (with him MC Ntshangase)<br><br>Instructed by<br>MC Ntshalintshali Attorneys, Durban c/o Molefi Thoabala Inc, Bloemfontein |