SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 981/16

In the matter between:

JULY JOSEPH MAGUBANE **FIRST APPELLANT**

GWEJE KHUMALO **SECOND APPELLANT**

and

TWIN CITY DEVELOPERS
(PTY) LTD **FIRST RESPONDENT**

WETLANDS COUNTRY
RETREAT (PTY) LTD **SECOND RESPONDENT**

THE PIXLEY KA SEME
LOCAL MUNICIPALITY **THIRD RESPONDENT**

THE HEAD OF THE MPUMALANGA
PROVINCIAL OFFICE OF THE
DEPARTMENT OF RURAL
DEVELOPMENT AND

LAND REFORM **FOURTH RESPONDENT**

THE HEAD OF THE KWAZULU-NATAL PROVINCIAL OFFICE OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM **FIFTH RESPONDENT**

Neutral citation: *Magubane & another v Twin City Developers (Pty) Ltd & others* (981/16) [2017] ZASCA 65 (30 May 2017)

Coram: Ponnan, Mbha, Dambuza, and Van der Merwe JJA and Fourie AJA

Heard: 11 May 2017

Delivered: 30 May 2017

Summary: Extension of Security of Tenure Act 62 of 1997: Land Claims Court erred in failing to consider probation officer's report submitted in terms of s 9(3) of the Act prior to granting eviction order: considerations of convenience and interests of justice require that Supreme Court of Appeal considers the content of report and not remit matter to the Land Claims Court for reconsideration: content of the report not warranting interference with the eviction order.

ORDER

On appeal from: The Land Claims Court, Randburg (Mpshe AJ sitting as court of first instance):

1 The appeal is dismissed and no order as to costs is made.

2 The order granted by the Land Claims Court on 13 January 2016 is substituted with the following:

‘(a) The first and second respondents and all those occupying through them are to vacate the farm:

(i) Remaining Extent of Portion 1 of the farm Damascus 125, Registration Division HT, Province of Mpumalanga.

(ii) Portion 4 of the farm Damascus HT 125, Registration Division HT, Province of Mpumalanga.

(iii) The remaining Extent of the farm Damascus 125, Registration Division HT, Province of Mpumalanga.

(b) The respondents are to remove all the livestock belonging to them from the farm on the date of eviction.

(c) The applicants are to pay an amount of R100 000 to each of the respondents as follows:

(i) R200 000 to be paid on the day following the date of this order into the trust account of the applicants' instructing attorneys of record, for the purpose of:

(ii) Paying R50 000 to each of the respondents within seven days of the date of this order.

(iii) Paying R50 000 to each of the respondents within seven days of their having vacated the farm.

(d) The respondents and all those occupying through them are to vacate the farm on or before 1 September 2017.

(e) The Sheriff for the district is authorised to effect the eviction in the event of the respondents' failure to vacate the farm in accordance with this order.
(f) The applicants are to assist the respondents with the relocation of their moveable assets, livestock and building material, including building material salvaged from the dwellings which comprise their homesteads and to meet the transport costs incurred by such assistance.
(g) No order as to costs is made.'

JUDGMENT

Fourie AJA (Ponnan, Mbha, Dambuza and Van Der Merwe JJA concurring):

[1] The issue in this appeal is whether the Land Claims Court (the LCC) was precluded from ordering, at the instance of the first and second respondents, the appellants' eviction from farm land occupied by them. The appeal is with the leave of the LCC.

[2] The factual matrix providing the background to the application is largely common cause and may succinctly be summarized thus: The first respondent is the owner of certain farm land in the province of Mpumalanga, on which the second respondent conducts farming activities. (The first and second respondents are hereinafter referred to as 'the respondents'.) The appellants and their family members have resided on the farm since 1975 and 1980, respectively. At the time of the application for their eviction the appellants were not in the employ of the

respondents and their right of residence had been terminated by the respondents on 2 July 2013 in terms of the provisions of s 10 of the Extension of Security of Tenure Act 62 of 1997 (the Act). The appellants disputed the lawfulness of this termination, prompting the application for their eviction. I should add that the remaining respondents (the relevant local and provincial authorities) abided the decision of the court a quo and have not participated in this appeal.

[3] The appellants opposed the application and, in the event, it was heard by Mpshe AJ, who held that the appellants' right of residence had been lawfully terminated, particularly in view of their conduct in causing damage to the respondents' property, resulting in an irretrievable breakdown of the relationship between the parties. He accordingly ordered that:

a) The appellants and all those occupying through them were to vacate the farm on or before 29 February 2016 and the sheriff was authorised to effect the eviction on 7 March 2016 in the event of the appellants' failure to vacate.

b) The appellants were to remove all their livestock from the farm.

c) The respondents were to pay an amount of R30 000 to each of the appellants on the date of eviction.

In addition, no order as to costs was made.

[4] The purpose of the Act, as appears from its long title, is, inter alia, to facilitate the long-term security of land tenure by regulating the conditions on and circumstances under which the right of persons to reside on land may be terminated, as well as to regulate the conditions and circumstances under which such persons may be evicted from land. Section 10 of the Act prescribes the conditions and circumstances

pertaining to the eviction of persons who were the occupiers of property on 4 February 1997, while s 11 deals with persons who became occupiers after 4 February 1997. The appellants fall within the category of persons covered by s 10 of the Act.

[5] It is common cause that the only relevant issue on appeal relates to the probation officer's report prescribed by s 9(3) of the Act. It is not in dispute that the remaining requirements of the Act for the eviction of the appellants have been met - therefore an analysis of the provisions of s 9 (3) will suffice. In relevant part the subsection reads thus:

'For the purposes of subsection 2(c) [ie for the purposes of determining whether the conditions for an order for eviction in terms of ss 10 or 11 of the Act have been complied with], the court must request a probation officer . . . to submit a report within a reasonable period-

a) on the availability of suitable alternative accommodation to the occupier;
b) indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education;
c) pointing out any undue hardships which an eviction would cause the occupier and;
d) on any other matter as may be prescribed.'

[6] In this matter the probation officer's report was requested on 27 February 2015. The eviction application was subsequently set down for hearing, although the report had not yet been forthcoming. At the hearing of the matter on 20 November 2015, no report had yet been submitted to the LCC. This was brought to the attention of Mpshe AJ, who commented that, in his experience at the LCC, it was not unusual for such reports to only be submitted two years after being requested, or not at all. Mpshe AJ also noted that in terms of the jurisprudence of the LCC, it was entitled to proceed with an eviction application in the event of the report not being

filed within a reasonable period of time.[1] This is no doubt correct, particularly as s 9(3) requires the report to be submitted within a reasonable time. The LCC accordingly proceeded with the hearing and then reserved its judgment, which was delivered on 13 January 2016.

[7] However, unbeknown to Mpshe AJ, the report of the probation officer had been filed on 3 December 2015. In fact, the report forms part of the record of appeal. It is not clear why the report was not brought to the attention of Mpshe AJ before the delivery of judgment, but the fact of the matter is that it had been submitted as required in terms of s 9(3) of the Act (albeit nine months after it had been requested). What the appellants contended was that the failure of the LCC to consider the report before ordering the eviction of the appellants, constituted a material irregularity justifying the setting aside of the eviction order and the remittal of the matter to the LCC to reconsider its judgment and order in view of the s 9(3) report.

[8] The respondents, on the other hand, submitted that, in the event of this court finding that the LCC had erred in not having considered the report, the matter should not be remitted to the LCC, but this court should determine whether the content of the report justifies any interference with the order of the LCC. Counsel for the respondents further submitted that an appraisal of the content of the report showed that no interference with the eviction order granted by the LCC was justified.

[9] In my view, the failure of the LCC to consider the report before making its order, constituted a material misdirection entitling this court to

[1] See *Theewaterskloof Holdings (Edms) Bpk, Glaser Adeling v Jacobs en andere* 2002 (3) SA 401 (LCC) para 13; *Pannar Research Farms (Pty) Ltd v Magome & another* 2002 (5) SA 621 (LCC) para 17.

interfere. The report was filed and available since 3 December 2015, some six weeks before judgment was delivered. In view of the important purpose served by the report, as alluded to hereinafter, the eviction order ought not to have been issued without consideration of the report.

[10] What has to be decided is whether the matter should now be remitted to the LCC to reconsider its judgment and order in view of the content of the report, or whether this court itself should consider the report and determine whether it justifies interference with the order of the LCC. There does not appear to be a fixed principle determining whether this court should finalise the matter or remit it to the LCC. As stated by the authors D E van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* 2 ed vol 2 at A1–58, a court of appeal should in each case have regard to considerations of convenience. See also *Simaan v South African Pharmacy Board* 1982 (4) SA 62 (A) at 81A, where Viljoen JA stated: 'The balance of convenience requires, in my view, that the present litigation should end in this court'. It should also be borne in mind that s 19 of the Superior Courts Act 10 of 2013 endows this court with wide powers on the hearing of an appeal, including the power to 'confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require'.

[11] The probation officer's report is before us and this court is no doubt in as good a position as the LCC to determine whether the content thereof justifies any interference with the order of Mpshe AJ. This much was conceded by counsel for the appellants. He was further constrained to concede that the report is not deficient in any respect and that it complies with the requirements prescribed by s 9(3) of the Act. Moreover, it is common cause that a remittal of the matter to the LCC would cause

further unnecessary delay and wastage of costs. It has been dragging on for close to four years and it is evident that not only considerations of convenience, but also the interests of justice, require that the litigation should end sooner rather than later.

[12] In considering the content of the report, one has to bear in mind that the purpose of a s 9(3) report is, as Meer AJ stated in *Glen Elgin Trust v Titus & another* [2001] 2 All SA 86 (LCC) para 9, to ensure that the constitutional rights of the occupiers who stand to be evicted, are not overlooked. However, as emphasized by Meer AJ, the Act should not be construed to suggest that the constitutional rights of the occupiers (such as the right to housing and the right of children to basic shelter and education, enshrined in ss 26(1) and (2), 28(1)(c) and 29 (i)(b) of the Constitution, respectively) stand to be enforced against the landowner, as that would give rise to 'the situation… whereby landowners are expected to take over the State's responsibility to provide housing to occupiers and education to their children.' This notwithstanding, a court considering an eviction application under the Act must, as reiterated in *Glen Elgin Trust*, consider the constitutional rights of occupiers in an attempt to address the hardship and instability caused by evictions and to ensure that they are conducted with a measure of compassion, or even delayed with as little resultant disruption to constitutional rights as possible.

[13] As recorded earlier, counsel for the appellants accepted that the probation officer's report complied with the requirements of s 9(3) of the Act. A perusal of the report shows that this concession was rightly made, as it adequately addressed all the aspects which impact upon the constitutional rights of the appellants and their extended families, including the rights of the school-going children. Importantly, when

invited by this court to indicate whether any aspects dealt with by the probation officer in his report militate against the granting of the eviction order, counsel for the appellants submitted that he ‘cannot suggest anything that goes against the eviction of the appellants'. Furthermore, counsel conceded that, had the report been available at the hearing of the application in the LCC, he would not have been able to raise any aspect which ought to have been added to the report.

[14] Counsel for the appellants was unable, upon the further invitation of this court, to advance any reason why the content of the report justifies this court to interfere with the order of the LCC. In fact, he was constrained to rely on the mere denial of the right to address the LCC on the content of the report, as the ground upon which the eviction order was to be set aside. However, he conceded that he was unable to point to any prejudice suffered by the appellants as a consequence thereof, which effectively put paid to the appellants’ quest to have the eviction order set aside. It follows that the content of the report does not warrant interference with the order of the LCC. On the contrary, it illustrates that, on the facts of this matter, it was just and equitable to have ordered the eviction of the appellants.

[15] In the result the appeal falls to be dismissed. As recorded above, the LCC, in an attempt to ameliorate the adverse impact of the eviction order on the appellants, had extended the date of the eviction and ordered the respondents, in terms of an offer made by them, to financially compensate the appellants. At the hearing of the appeal, counsel for the respondents placed on record that their clients unconditionally tender to further extend the operation of the eviction order for a period of three months; to increase the financial compensation to be paid to the

appellants to an amount of R100 000 each and to assist the appellants with their relocation. Furthermore, it was recorded that the respondents do not seek a costs order in their favour. This magnanimity is laudable and the undertakings are reflected in the amended eviction order hereunder.

[16] In the result, the following order is made.

1 The appeal is dismissed and no order as to costs is made.

2 The order granted by the Land Claims Court on 13 January 2016 is substituted with the following:

‘(a) The first and second respondents and all those occupying through them are to vacate the farm:

(i) Remaining Extent of Portion 1 of the farm Damascus 125, Registration Division HT, Province of Mpumalanga.

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(d) The respondents and all those occupying through them are to vacate the farm on or before 1 September 2017.

(e) The Sheriff for the district is authorised to effect the eviction in the event of the respondents' failure to vacate the farm in accordance with this order.

(f) The applicants are to assist the respondents with the relocation of their moveable assets, livestock and building material, including building material salvaged from the dwellings which comprise their homesteads and to meet the transport costs incurred by such assistance.

(g) No order as to costs is made.'

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P B FOURIE

ACTING JUDGE OF APPEAL

APPEARANCES:

For the Appellants:	D Whittington
Instructed by:	A Y Bhayat Attorneys, Sandton
	Bezuidenhouts Inc, Bloemfontein
For the First and Second Respondent:	M Antrobus SC with I Oschman
Instructed by:	Loubser Van Der Walt Inc, Pretoria
	Pieter Moolman Attorneys, Randburg
	Symington & De Kok, Bloemfontein