THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 306/17

In the matter between:

THE DIRECTOR-GENERAL FOR THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM — **FIRST APPELLANT**

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM — **SECOND APPELLANT**

and

BHEKINDLELA MWELASE — **FIRST RESPONDENT**

JABU AGNESS MWELASE N.O. — **SECOND RESPONDENT**

MNDENI SIKHAKHANE — **THIRD RESPONDENT**

BAZIBILE GRETTA MNGOMA N.O. — **FOURTH RESPONDENT**

ASSOCIATION FOR RURAL ADVANCEMENT (AFRA) — **FIFTH RESPONDENT**

And in the matter between: Case No: 314/17

BHEKINDLELA MWELASE — **FIRST APPELLANT**

JABU AGNESS MWELASE N.O. — **SECOND APPELLANT**

MNDENI SIKHAKHANE **THIRD APPELLANT**
BAZIBILE GRETTA MNGOMA N.O. **FOURTH APPELLANT**

and

THE DIRECTOR-GENERAL FOR THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM **FIRST RESPONDENT**

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM **SECOND RESPONDENT**

Neutral citation: *DG: Department of Rural Development and Land Reform & another v Mwelase & others* and *Mwelase & others v DG: Department of Rural Development & Land Reform & another* (306/17 & 314/17) [2018] ZASCA 105 (17 August 2018)

Coram: Leach, Seriti, Willis, Mocumie and Schippers JJA

Heard: 13 March 2018

Delivered: 17 August 2018

Summary: Land Reform (Labour Tenants) Act 3 of 1996 – appointment of special master by Land Claims Court – performing duties of Director-General to prepare implementation plan for labour tenant claims, including the determination of skills, infrastructure and budget required – violation of separation of powers rule – contempt of court – alleged disobedience of order by Minister – non-compliance neither wilful nor mala fide.

ORDER

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

1 Paragraphs 2-10 of the order of the Land Claims Court (LCC) dated 8 December 2016 are set aside and replaced with the following order:

'2 Within 21 calendar days of the date of this order, the first respondent is ordered to deliver an implementation plan in relation to pending labour tenant claims under ss 16, 17 and 18 of the Land Reform (Labour Tenants) Act 3 of 1996 (the LTA). The implementation plan must set out the following:

2.1 The name/s and details of the senior manager/s responsible for managing the national implementation of the LTA, appointed by the first respondent;

2.2 The total number of labour tenant applications lodged to date and the number which have not yet been processed and finalised, in each of the 9 provinces;

2.3 The number of notices issued under s 17 of the LTA and the number still outstanding.

2.4 The number of applications of which the details have been published in the Government Gazette in terms of s 17 of the LTA.

2.5 The number of applications that have been referred to mediation, arbitration or to the LCC.

2.6 An assessment of the skill pool and other infrastructure required to process labour tenant claims, and to what extent such skill pool and

infrastructure is available within the Department of Rural Development and Land Reform (the Department);

2.7 Targets, on a year-to-year basis, for the resolution of pending labour tenant claims by: (a) agreement, and (b) referral of claims to the LCC;

2.8 A determination of the budget necessary during each financial year for carrying out the implementation plan, including both the Department's operating costs for processing claims and the amount required to fund awards made pursuant to applications in terms of s 16 of the LTA;

2.9 Plans for coordination with the LCC to ensure the rapid adjudication or arbitration of unresolved claims referred to the court in terms of s 18(7) read with ss 19 to 25 of the LTA;

2.10 Any other matter which the first respondent considers relevant regarding the implementation of labour tenant claims under the LTA.

3 The applicants shall be entitled to comment on the implementation plan within 10 calendar days of the date on which it has been delivered.

4 The LCC shall convene on a date and time to be determined by it, at which hearing the court shall:

4.1 consider the implementation plan delivered by the first respondent;

4.2 approve the implementation plan, with or without amendments, or otherwise deal with the plan as it may deem fit;

4.3 make such further orders as may be advisable, including orders relating to the fulfilment of the implementation plan and the processing of pending labour tenant claims.'

2 Save as aforesaid, the appeal under case number 306/2017 is dismissed with costs, including the costs of two counsel.

3 The appeal in case number 314/2017 is dismissed with costs, including the costs of two counsel.

JUDGMENT

Schippers JA (Leach, Seriti and Willis JJA concurring):

[1] There are two matters before us arising from proceedings which the respondents in case number 306/2017 instituted in the Land Claims Court (LCC) to compel the Director-General (DG) of the Department of Rural Development and Land Reform (the Department) to process claims or refer applications to the LCC under the Land Reform (Labour Tenants) Act 3 of 1996 (the LTA). The first is an appeal by the DG and the Minister of Rural Development and Land Reform (the Minister) against an order by the LCC on 8 December 2016, in terms of which it appointed a 'Special Master of Labour Tenants' to prepare, in collaboration with the DG, an implementation plan 'for the performance of the duties of the [DG] and the Department with supervision of the Special Master, in relation to pending labour tenant claims under ss 16, 17 and 18 of the Act.' The second matter (case number 314/2017) is an appeal by the appellants against the dismissal of their application that the Minister be held in contempt of an order issued by the LCC on 17 May 2016, directing him

to negotiate in good faith to conclude a memorandum of understanding. The appeals in both matters are with the leave of the LCC.

Background and litigation history

[2] In 2001 the first to fourth respondents applied to the DG to acquire land on a farm known as Hilton College in Kwa-Zulu Natal, in terms of s 16 of the LTA. The farm is owned by the Hiltonian Society. When negotiations conducted from 1998 to 2008 between the respondents, the DG and the owner did not result in settlement, the DG failed to refer the first to fourth respondents' claims to the LCC.

[3] In July 2013 the respondents applied to the LCC for an order directing the DG to refer the first to fourth respondents' claims to that court for determination, in terms of s 17(6) of the LTA (Part A of the notice of motion). In Part B the respondents sought systemic relief in the form of a declaratory order and a structural interdict. They sought an order declaring that the DG's failure to process or refer applications to the LCC was inconsistent with ss 9, 10, 25(6), 27(1)(b), 30, 31, 33, 34, 195 and 237 of the Constitution. They sought a structural interdict directing the DG to process or refer all outstanding applications to the LCC within one year; and an order directing the DG to file a report and plan concerning the status of the outstanding applications, within one month of the declaratory order. The report had to identify all applications filed in terms of s 16 of the LTA which had not been settled or referred to the LCC and indicate in each application, whether it was sent to the owner of the land in terms of s 17(2)(a), gazetted under s 17(2)(b) and whether it was subject to settlement negotiations under s 18. In the plan, the steps to be taken to process or refer all outstanding applications within one year had to be explained; and measurable, periodic deadlines for progress had to be set. Finally, the respondents asked the LCC, after considering the report and plan, to make an

order detailing the conditions for compliance with processing and referral of outstanding applications; and directing the DG to file monthly reports in relation to compliance with the LCC's order.

[4] The grounds for the relief sought, in summary, were these. The first to fourth respondents had repeatedly requested the DG to refer their claims to the LCC, after negotiations with the Hiltonian Society broke down in 2008. The founding affidavit stated that referral under s 17(6) of the LTA was 'a simple clerical act' and the primary basis for the relief sought. Alternatively, the respondents alleged that the DG's failure to refer the claims to the LCC constituted 'administrative action' as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA), more particularly, a failure to take a decision as contemplated in section 6(2)(g). As such, the DG's failure to refer the first to fourth respondents' claims to the LCC was reviewable, both in terms of s 6(2)(g) of PAJA on the ground of unreasonable delay in failing to refer the claims; and because it contravened the law and was not authorised by the empowering provision under s 6(2)(f)(i).[1]

[5] As regards the systemic relief, the respondents asserted that the DG breached his obligation to respect, protect, promote and fulfil rights in the Bill of Rights, namely the right to legally secure tenure (s 25(6)), equality (s 9), dignity (s 10), culture (ss 30 and 31), access to food (s 27(1)(b)) and access to court (s 34). Then it was alleged that the DG's failure to refer s 16 applications to the LCC was inconsistent with the principles of efficient, economic and effective use of resources, and the requirement that the needs of people must be

[1] Section 6(2) of PAJA reads:
'A court or tribunal has the power to judicially review and administrative action if-
. . .
(f) the action itself-
(i) contravenes a law or is not authorised by the empowering provision;
. . .
(g) the action concerned consists of a failure to take a decision . . .'

responded to, contained in s 195 of the Constitution. Finally, the respondents alleged that the DG failed to comply with the injunction in s 237 of the Constitution that constitutional obligations must be performed diligently and without delay. The grounds for the contention that the DG failed to fulfil his statutory duty to process s 16 applications under the LTA were essentially based on the experience of the first to fourth respondents, judgments of the LCC, the Minister's answer to a question in the National Assembly (in which he admitted that little progress had been achieved in the settlement of labour tenant claims) and the experience of the fifth respondent, the Association for Rural Advancement (AFRA).

[6] The DG and the Minister opposed the application, basically on the following grounds. They denied that there was 'an ongoing and persistent failure' to process labour tenant claims, or refer them to the LCC. Labour tenants had generally chosen not to refer matters to the LCC and normally preferred accommodation in other land reform projects which granted them larger and more viable portions of land. Statistics in relation to labour tenants had been reported as part of broader land reform processes and there were no separate statistics for labour tenant claims. However, since 2013 the Department began collating land reform information on a more differentiated basis and it was stated that by mid-2014 it would provide an accurate assessment of the status of all labour tenant claims. The supervisory order which the respondents sought was a violation of the doctrine of separation of powers, and would require a massive increase in the Department's budget and drastic reallocations between budget items.

[7] The DG stated that the following problems were experienced in the implementation of the LTA. The number of claims exceeded the Department's capacity to deal with them expeditiously, and involved far more logistics than

had been foreseen. Labour tenant claims typically involved the rights of extended families who lived on land for many generations. Membership of those families had to be verified and to that end the Department's officials conducted thousands of farm visits until 2006. The DG denied that the government had done nothing regarding labour tenant claims for more than 10 years. Many restitution claims overlapped and even conflicted with labour tenant claims, which had not been foreseen in the early stages of land reform legislation. In addition, in every case labour tenants were required to present expert evidence by professional valuers and be legally represented; and often needed the services of land surveyors. It appeared from the cases referred to the LCC that labour tenants were encamped in small, unsustainable areas of land. Land reform is a complex and very costly process. It was not a case of simply processing labour tenant claims mechanically and then referring them to the LCC.

[8] The Hiltonian Society opposed only the relief sought in Part A of the notice of motion. It denied that the first to fourth respondents were labour tenants as alleged. The parties agreed that the relief sought in Part A should be granted and when the application came before the LCC in November 2013, the DG referred the first to fourth respondents' claims to the court in terms of s 17(6) of the LTA. Those claims however have still not been finalised, apparently because the first to fourth respondents' attorneys took no further steps to advance the claims.

[9] On 19 September 2014 the LCC made the following order by agreement between the parties. The application was postponed to 12 May 2015. The DG undertook to deliver a report by 31 March 2015 containing statistics indicating the current status of all labour tenant applications lodged in terms of Chapter III

of the LTA; a schedule showing the status of each individual claim; and his plans for further processing all outstanding claims (the collation order).

[10] On 24 April 2015 the DG delivered a reporting affidavit in terms of the collation order. He explained that since the Department had focused on policy-based land reform programmes, Chapter III of the LTA had not been proactively managed. As a result of the litigation, the process of administering Chapter III was restarted, which required funding and human resources. The DG provided information concerning labour tenant claims in Mpumalanga and KwaZulu-Natal, and said that the process of collecting outstanding information could take between 12 to 24 months. The processing of applications in KwaZulu-Natal had not been successful and had to be redesigned. The DG said that he hoped to resolve the lack of human resources by additional budget allocations.

[11] In its response to the DG's report of 24 April 2015, AFRA argued that this was an appropriate case for the LCC to declare the Department's past conduct unlawful; that it should be directed to process and refer all outstanding labour tenant applications; that the LCC should maintain supervision of that process; and that it should appoint a special master inter alia, to engage with the parties, implement the order and report to the LCC on progress. AFRA suggested three years as an appropriate timeline to collect and process information, and refer labour tenant applications to the LCC.

[12] On 9 June 2015 the LCC made the following order by agreement (the supervision order):

'1. The First Respondent records the stated intention and undertaking of the Department of Rural Development and Land Reform to fully implement the Land Reform (Labour Tenants) Act 3 of 1996 (the Act) subject to any future amendments of the Act.

2. The parties agree that the aforesaid implementation will be subject to this court's supervision as set out herein and as may be amended from time to time.

3. The First and Second Respondents will file further reports, each containing an implementation plan, with this court on the progress being made with implementation of the Act on the following dates:

3.1 31 July 2015;

3.2 30 October 2015; and

3.3 12 February 2016.

4. The reports to be filed must deal with at least the following issues

4.1 The progress made with the collection of information in all the relevant districts relating to applications lodged in terms of chapter 3 of the Act.

4.2 the progress made with the processing of claims, more specifically:

4.2.1 the issuing of section 17 notices,

4.2.2 publication of applications in the Gazette,

4.2.3 settlement, abandonment or referral of applications to court.

5. The applicant shall be entitled to respond to the progress report within one month of the date on which they are served.

6. Any party may set down the matter at any time for hearing on one month's notice in the event that problems are experienced in the implementation of the order or if the Applicants are of the view that additional relief is justified on any basis, including whether the progress being made is not substantially in accordance with the projections in the implementation plans.

7. If not otherwise set down, the matter is postponed for hearing to 18 March 2016 to determine what further relief should be granted in this matter and how the court's supervisory jurisdiction should be exercised.

8. Costs for the proceedings to date will stand over for later adjudication.'

[13] On 4 August 2015 the DG delivered a reporting affidavit (made on 30 July 2015) and an action plan in compliance with the supervision order. He stated that the appointment of 21 senior project officers had been approved and that three project officers would be allocated to implement labour tenant applications in each of the seven districts previously reported on. The estimated budget for this was some R14 million for salaries and the operational budget was likely to be an amount in the same order. New staff would be trained in August 2015, after which the further collection of information and processing of applications would commence. The DG undertook to report on processing of applications by the end of October 2015 and stated that progress regarding the issuing of s 17 notices and publication in the Gazette would probably only show significant progress by early 2016. The Department anticipated that the collation of information would be completed by the end of August 2016; and that verification of the information would be finalised by the end of December 2016, and field visits and referrals by the end of June 2017.

[14] AFRA responded on 6 August 2015. It stated that the Department was required to provide the LCC with information regarding applications lodged by labour tenants in districts and provinces throughout the country, but it seemed to focus only on KwaZulu-Natal and Mpumalanga; and that the Department's statistics regarding the number of applications were inaccurate. AFRA said that the Department did not seem to have a plan for dealing with applications that had been misplaced by officials and that it had to stick to deadlines agreed to, as its failure to do so jeopardised trust. AFRA reiterated that the appointment of a special master would assist the LCC and the Department.

[15] The next report by the DG was due on 30 October 2015. By letter dated 28 October 2015, the State Attorney informed the respondents' attorneys, the

Legal Resources Centre (LRC) that the DG's report would not be filed, due to the volume of data and schedules sent from the Department's regional offices which had to be analysed. The LRC asked for an indication as to when the report and plan would be delivered and when there was no response, it set the matter down for hearing. The reporting affidavit was filed only on 19 January 2016 and the DG applied for condonation of its late filing. The DG stated that dedicated staff had been appointed to capture the relevant data in Mpumalanga and KwaZulu-Natal; that considerable progress had been made; and that the processes of notice and the referral under ss 17 and 18 of the LTA would follow. The expected progress in the processing of claims and the steps taken to establish the status of claims in Limpopo and the Free State were also set out in the affidavit.

[16] The case came before the LCC on 29 January 2016 and by agreement between the parties it was postponed. The DG delivered a reporting affidavit dated 12 February 2016. He said that Mr Jomo Ntuli had been transferred to KwaZulu-Natal to oversee the labour tenant project and that Ms Zanele Sihlangu, the Department's Chief Director in Mpumalanga, was responsible for the project in that province. He said that it had been established that none of the other provinces had any active files on labour tenant applications. The DG and the Minister were satisfied that sufficient progress had been made since the appointment of dedicated staff to the process and said that the respondents' renewed attempts for the appointment of a special master were, in the circumstances, unjustified.

[17] In its response dated 2 March 2016 to the DG's affidavits of 19 January and 12 February 2016, AFRA stated that the Department should have updated applications, sent notices to landowners and published applications in the Gazette, verified information by field visits and drafted referral reports. It also

stated that the Department had not complied with the timeframes in its action plans and that 'while non-compliance may be excusable', it had not been explained; that the DG and the Minister 'largely failed' to address the respondents' concerns; that there was no plan to deal with lost applications; and that the appointment of a special master was warranted. AFRA accepted that it was difficult to estimate how long the process would take and that considerable resources had been devoted to the project which was 'a welcome step', but denied that appointing a special master would be wasteful or lead to further delays.

[18] The Minister delivered a further reporting affidavit made on 14 April 2016, in which he described the steps taken by the Department regarding labour tenant claims. He said that the claims by the first to fourth respondents initially formed part of a labour tenant claim by 125 families. Pursuant to negotiations 121 families agreed to be relocated to other land. The claims of the remaining families were referred to the LCC for adjudication. Regarding the structural interdict, the Minister stated that in giving effect to rural development and land reform, the Department did not discriminate between labour tenants and other claimants. Thus, persons who qualified as labour tenants had their claims dealt with under other land reform programmes. AFRA had been awarded a contract to assist the Department in that regard. Some labour tenants qualified for restitution under the Restitution of Land Rights Act 22 of 1994 (the Restitution Act), others applied to lease farms and where none were available, the Department purchased farms and provided grants to lessees (mainly labour tenants, farm dwellers, persons with disabilities, youth, women, agricultural graduates and military veterans) to work the land.

[19] The Minister provided schedules showing progress made in respect of the restitution beneficiaries, which included labour tenants in virtually all provinces

and beneficiaries in prioritised categories of land reform. The Minister said that in addition to the resources made available to the labour tenant process, he had also deployed 145 graduates to do a physical verification of all files of land reform projects delivered; that he would directly supervise compliance with the orders of the LCC; and that a special master was therefore unnecessary.

[20] AFRA responded on 22 April 2016 that the Minister's affidavit was 'entirely irrelevant' and added nothing to the debate as to the appointment of a special master; that the DG in effect had argued that the Department was entitled to take a policy decision not to process labour tenant claims under the LTA; and that the supervision order was 'almost exactly the relief the Applicants initially sought'. AFRA renewed its call for a special master.

[21] The case was set down for hearing on 12 May 2016 but was postponed to 17 May 2016, to allow for further negotiation between the parties. On 17 May 2016 they agreed to the following order (the negotiation order):

'1. The parties shall negotiate in good faith to conclude a Memorandum of Understanding (MOU) with the following basic features:

1.1 The Department of Rural Development and Land Reform (Department) will appoint within its organisational establishment, a senior Manager responsible for managing the national implementation of the Land Reform (Labour Tenants) Act (LTA), and in particular the requirements of ss 16-18; and, section 4 of the Extension of Security of Tenure Act (ESTA). The project will do so within the broader program aimed at land acquisition for farm dwellers (labour tenants and occupiers in terms of ESTA).

1.2 The manner in which the forum referred to in 1.4 below will interact, if at all, with the two district land reform structures established by the Department which involve organs of civil society, namely District Land Reform Committees (DLRCs) and District Agri-Parks Management Councils (DAMCs)

1.3 Farm dwellers (labour tenants and occupiers) will nominate two representatives to serve in each of the two structures referred to in 1.2 above.

1.4 A National Forum of Non-Governmental Organisations (NGOs) that a deal with farm dwellers (labour tenants and occupiers) in the country will be established by the end of July 2016.

1.5 The Forum, working together with the Department, will be responsible, *inter alia*, for policy formulation, development of a national programme for implementation and monitoring and evaluation of progress.

1.6 The Department will facilitate the establishment of such a Forum and shall ensure appropriate provincial representation.

1.7 The senior Manager, referred to in 1.1, will provide secretariat support to the Forum.

1.8 The senior Manager referred to in 1.1 above, will monitor the implementation of the provisions of the LTA and the ESTA, as required by the MOU.

2. The senior Manager will file quarterly report of the legal representatives of the parties for a period of 24 months, whereafter the parties will assess the need for further reporting. The content of these reports will be the same as previously agreed between the parties, or as negotiated in the MOU. The first report will be filed on 31 July 2016.

3. If the parties are able to conclude the MOU the parties will file a copy of the MOU with the court, for record purposes.

4. If the parties are unable to conclude the MOU by 30 June 2016, any party may set down the matter for hearing.

5. There is no order as to costs for the hearings of 12 and 17 May 2016.' (vol 5 p 947)

[22] On 16 August 2016 the DG filed another reporting affidavit. In summary, he said the following. The project had progressed to the point where a significant number of applications would be published in the Gazette. Save for publication, most of the important timeframes in the initial action plan had been met. The processing of outstanding labour tenant claims had started in other provinces, except for the Western Cape which had no such claims. A communications drive with a budget of some R2.8 million had been completed. It was inherent in the project that processes might be delayed, adapted or

completely reassessed, but overall the DG was satisfied with progress. The Department's plan had been extended by six months until the end of 2017. The DG also provided information concerning the settlement of labour tenant claims through policy based land reform in the various provinces and suggested that further quarterly reports be filed at the end of February, May, August and November 2017.

[23] The negotiation order was a broad framework for the establishment of a national forum to deal with labour tenants and occupiers. Unfortunately, the agreement forming the basis of that order came to an abrupt end when the appellants in case number 314/2017 launched an application for an order that the Minister be held in contempt of the negotiation order. AFRA alleged that the Minister failed to negotiate in good faith; that he acted unilaterally, wilfully and in bad faith; and that AFRA was deliberately excluded from a meeting of NGOs on 29 July 2016 to establish the forum. AFRA further alleged that the Department's claim that the forum was established pursuant to the negotiation order was 'a deliberate deceit'; and that the Minister was 'attempting to abuse the Order to pursue his own agenda'.

[24] The allegation that AFRA had been excluded from the initial meeting of the forum had no basis. In his answering affidavit the DG stated that a representative of AFRA had addressed the forum; that the forum was a broad platform; that its terms of reference had not been finalised; and that a special chamber thereof could be created to deal with labour tenants. The DG went on to say that he was not present at the meeting; that the NGOs invited to the forum were those dealing with farm dwellers (labour tenants and occupiers); and that it was open to AFRA to suggest to the forum that the litigation and the implementation of the LTA should take precedence over all other matters. The Minister denied that he had breached the order or pursued a personal agenda. He

was of the view that the MOU could not be concluded unless a national forum of NGOs had been established. He stated that he was merely facilitating the establishment of the forum to ensure appropriate provincial representation, that AFRA had been informed of his intention to do so and had learnt about the forum before other NGOs.

[25] In the meantime, on 28 September 2016 the DG filed another reporting affidavit in the LCC. He denied that he and the Minister did not comply with numerous court orders or that they failed to process labour tenant applications. He said that considerable progress had been made in processing applications and a series of reports had been filed with the court.

[26] After oral argument at the hearing of the appeal, the parties requested the Court to hold the judgment in abeyance for one month, pending settlement negotiations to resolve the matters amicably. The request was granted. In the light of the urgency, and the nature and extent of the task of implementing the LTA, the DG was requested to continue with implementation and to deliver reporting affidavits, pending determination of the appeal. Subsequently, the Registrar of this Court was informed that the negotiations were unsuccessful.

[27] In the interim the Acting DG, Ms Leona C Archary, filed an affidavit made on 27 March 2018 in which she reported on progress regarding the implementation of the LTA since 15 August 2017, more particularly in relation to human and financial resources, stakeholder management, data and statistics of applications, targets for the resolution of applications and coordination with the LCC regarding the adjudication of unresolved applications.

[28] In her response, Ms Oettel of AFRA disputed the correctness of the facts stated in the affidavit of Ms Archary which, it was alleged, was ‘employed by

the appellants as an opportunity to advance further facts and argument for the motivation of the relief sought on appeal.' Given the factual disputes between the parties arising from the latest affidavits, which obviously were not before the LCC, those affidavits have not been taken into account in this judgment.

The declaratory order

[29] The appellants have appealed against the whole of the judgment and order of the LCC, and asked that the appeal be upheld with costs. The LCC made an order declaring that the DG's failure to process or refer to the court applications brought under s 16 of the LTA, was inconsistent with ss 10, 25(6), 33, 195 and 237 of the Constitution.

[30] The DG's failure to process or refer applications to the LCC was plainly unlawful and constituted a failure to take a decision as contemplated in s 6(2)(g) of PAJA. As was said in *My Vote Counts*,[2] the Constitution is primary, but its influence is mostly indirect and perceived through its effect on legislation and the common law, to which one must look first. Cameron J went on to say:

'These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract the right he or she seeks to enforce without first relying on or attacking the constitutionality of, legislation enacted to give effect to that right. This is the form of constitutional subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the constitution plays only a subsidiary or supporting role.'[3]

[31] The fundamental rights in ss 25(6) and 33 of the Constitution have been given effect to in the LTA and PAJA, respectively. The DG, by his own admission, did not carry out his constitutional and statutory obligations in terms of the LTA. He stated that Chapter III of the LTA had not been proactively

[2] *My Vote Counts NPC v Speaker of the National Assembly & others* [2015] ZACC 31; 2016 (1) SA 132 (CC) para 52.
[3] *My Vote Counts* fn 2 para 53.

managed for a number of years, and that as a result of this litigation he decided to restart the process of administering Chapter III of the Act. This failure denied the respondents and other labour tenants legally secure tenure, perpetuated their tenuous position of being exposed to eviction from land on which their families lived for generations, and violated their right to dignity.

[32] Moreover, the DG's failure to administer the LTA was a violation of the principle of legality. As was held in *Khumalo*,[4]

'Section 237 of the Constitution acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.'

[33] For these reasons the declaratory order is unassailable.

The appointment of a special master

[34] The LCC recorded that AFRA had furnished it with a comprehensive draft order which in the view of the LCC contained more detail than necessary and 'may intrude onto the functions of the state respondents, in breach of the separation of powers principle'. The court stated that its order was 'less detailed and concentrates on steps to prepare an implementation plan.'

[35] On 8 December 2016 the LCC made the following order:

'1. The first respondent's failure to process or refer to the Court applications brought under Section 16 of the Land Reform Labour Tenants Act, No 3 of 1996 ("the Act"), is declared to be inconsistent with Sections 10, 25(6), 33, 195 and 237 of the Constitution of the Republic of South Africa, 1996.

2. A Special Master of Labour Tenants ("the Special Master") shall be appointed as set forth hereunder.

[4] *Khumalo & another v Member of the Executive Council for Education, KwaZulu - Natal* 2014 (5) SA 579 (CC); [2013] ZACC 49 para 46.

3. By not later than 30 January 2017, any party may deliver a nomination of a person to be appointed as the Special Master. The nomination must be in writing, accompanied by:

    3.1 A short *curriculum vitae* of the nominated person;

    3.2 Suggested terms of appointment and a remuneration structure acceptable to the nominee; and

    3.3 The nominated person's acceptance of the terms of appointment and the remuneration structure.

4. By not later than 28 February 2017, the First and Second Respondents/the Department may comment on all nominations submitted by the parties.

5. The Court will reconvene on Friday, 3 March 2017 at 10h00 at the Land Claims Court, Randburg, at which hearing the Court shall:

    5.1 Consider the candidates nominated for the position of Special Master;

    5.2 Appoint a Special Master, if there is a suitable candidate;

    5.3 Establish his or her terms of appointment and remuneration; and

    5.4 Give such further directions as it may deem appropriate.

6. The Special Master, once appointed, is hereby ordered to prepare, in collaboration with the First Respondent and/or his delegees, and to deliver by not later than 31 March 2017, a plan, ("the Implementation Plan"), for the performance of the duties of the First Respondent and the Department with supervision by the Special Master, in relation to pending labour tenant claims under sections 16, 17 and 18 of the Act. The Implementation Plan must set forth:

    6.1 The total number of claims lodged to date, and the number which have not yet been processed and finalised;

    6.2 An assessment of the skill pool and other infrastructure required for processing labour tenant claims, and to what extent such skill pool and infrastructure is available within the Department of Rural Development and Land Reform ("the Department")

6.3 Targets, on a year to year basis, for the resolution of pending labour tenant claims, either by agreement or by referring the claim to the Court;

6.4 A determination of the budget necessary during each financial year for the carrying out the Implementation Plan, including both the Department's operating costs for processing claims and the amounts required to fund awards made pursuant to applications in terms of section 16 of the Act;

6.5 Plans for coordination with the court to ensure the rapid adjudication or arbitration of unresolved claims referred to the court in terms of Section 18(7) read with Sections 19 to 25 of the Act; and

6.6 Any other matters which the Special Master may consider relevant.

7. The First and Second respondent shall co-operate, and cause the Department to co-operate with the Special Master in the preparation and execution of the Implementation Plan and shall ensure:

7.1 that the Special Master is provided with all documents (including archival documents) and records requested by him or her;

7.2 that all officials of the Department reasonably available to meet with the Special Master and provide him or her with such information as he may reasonably require; and

7.3 that all reasonable requests by the Special Master are timeously responded to.

8. By 15 April 2017 the First and Second Respondents/the Department shall file a report indicating which portions of the plan (if any) are objected to together with the grounds for objection and proposals for alternative provisions.

9. The Court shall reconvene on Wednesday, 19 April 2017 at 10h00 at the Land Claims Court, Randburg, at which hearing the Court shall:

9.1 Consider the Implementation Plan delivered by the Special Master together with the report filed by the First and Second Respondents/the Department;

9.2 Approve the Implementation Plan, with or without amendments, or otherwise deal with the Plan as it may deem fit; and

9.3 Make such further orders as may be advisable, including orders relating to the fulfilment of the Implementation Plan and the processing of pending labour tenant claims.

10. Any party may, on notice to the other parties and to the Special Master (when appointed), apply to the Court for a clarification or amendment of this order.

11. The First and Second Respondents, jointly and severally, the one paying the others to be absolved, must pay the Applicants' costs in these proceedings incurred up to the date of this Order, taxed as between party and party, and including the costs consequent upon the employment of two counsel.

12. There is no order as to costs in respect of the Third Respondent.'

[36] The LCC's reasons for the order appointing a special master, in summary, were these. Section 32(3)(b*)* of the Restitution Act allowed the court to conduct proceedings on an informal or inquisitorial basis. This was in line with the appointment of a special master to assist the court. Some 10 914 labour tenant applications had to be settled. If each took one day to settle, it would take about 24 years, including work on weekends; and 40 years without weekend work. A special master could assist the Department to develop a comprehensive strategy for the efficient processing and referral of claims, to deal with lost applications, to prevent potential overburdening of the LCC and to significantly ameliorate the disadvantage of insufficient judges at the court.

[37] The DG and the Minister failed to comply with deadlines. External expert input 'to improve seemingly failing line functions' should be welcomed and would not lead to further delays and additional costs. The 'process with inadequate reporting' had not been successful and the current approach of supervision would take many more years. Potential labour tenants would continue to approach the LCC which would be a drain on the court's time and resources. New remedies to effectively protect threatened constitutional rights

such as those of labour tenants had been acknowledged in *Fose*[5] and *Meadow Glen*.[6] The size and complexity of the task alone justified the appointment of a special master. The reporting and frequent returns to the court demonstrated that the court, the Department and the parties needed help in implementing the LTA. A special master would assist the process.

[38] These reasons however do not withstand scrutiny. First and foremost, the appointment of a special master – a private attorney, law professor or retired judge, appointed with or without the parties' consent to assist in the adjudicative process[7] – is a court adjunct in the United States. Wayne D Brazil outlined the needs that motivate the use special masters as follows:[8]

'Courts appoint special masters as a means of addressing three overlapping categories of problems: judicial limitations, shortcomings of the traditional adjudicatory system, and shortcomings of parties and counsel. Judicial limitations include time constraints; lack of expertise in esoteric or technologically sophisticated areas; lack of skill in certain roles, such as the facilitation of settlement negotiations; and limitations that stem from the properties of judicial conduct, at least for the judge who will try the case.'

[39] The appointment of special masters in the US is regulated by rule 53 of the Federal Rules of Civil Procedure. Scheindlin J summed up the regulation of special masters in terms of rule 53, as follows:[9]

'Rule 53 has been revised to codify the use of special masters on an as-needed basis with the parties' consent or, when exceptional conditions require, by court order. In addition, it encourages, if not requires, increased participation by the litigants. The Rule now (1) limits the use of special masters in most trials, particularly jury trials; (2) authorizes the use of

[5] *Fose v Minister of Safety and Security* 1997 (3) SA 786; [1997] ZACC 6.
[6] *Meadow Glen Home Owners Association & others v City of Tshwane Metropolitan Municipality & another* 2015 (2) SA 413 (SCA); [2014] ZASCA 209.
[7] W D Brazil 'Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication' (1986) 53 U. Chi. L. Rev. at 394, footnotes omitted.
[8] Brazil fn 7.
[9] S Schneidlin 'We need Help: The Increasing Use of Special Masters in Federal Court' (2009) 58 DePaul L. Rev. at 479.

masters when the parties consent; (3) authorizes the use of masters to assist with pre- and post- trial matters; (4) adopts specific procedures and standards for the appointment of masters; and (5) imposes standards for reviewing the masters' actions.'

[40] The institution of the special master has not been free from criticism, as noted by Scheindlin J:

'Critics have always worried that the role of the courts is diluted when adjudicative functions are delegated to court adjuncts who are not publicly accountable. Another criticism is that the appointment of masters creates a two-tiered justice system where only rich parties can afford the services of paid private court adjuncts while run of the mill cases must muddle along with the help of free public servants.'[10]

[41] Farrell[11] describes the commendation and criticism of special masters as follows:

'Those who favour the use of special masters believe such legal authority permits judges to develop and test innovative responses to the demands made on the civil justice system by the increasing number of large and complex cases filed in federal courts. Critics, however, claim that the use of masters produces inequities among litigants by fostering designer procedures that are tailored to the unique factors of individual cases, rather than the development of formal rules applicable to all disputes. Other commentators are concerned that utilizing such agents results in an abdication of judicial responsibilities. They find the use of masters offensive to the principles of Article III and favor adjudication by life-tenured, federal judges selected by Congress or United States magistrate judges supervised by article III judges.[12]

[42] It needs merely to be stated that the institution of the special master under US law is governed by federal rules, with its own distinctive features. There are no such rules, neither an equivalent of a special master in our law. In *Bernstein*,[13] Kriegler J cautioned against the 'blithe adoption of alien concepts

[10] Schneidlin fn 9 at 481.
[11] Margaret G Farrell 'The Function and Legitimacy of Special Masters' (1997) 2 Widener L. Symp. J. 235 at 247-248.
[12] Footnotes omitted.
[13] *Bernstein & others v Bester NO & others* 1996 (2) SA 751 (CC); [1996] ZACC 2 para 133.

or inapposite precedents'. Recently this Court repeated 'the warning against any too ready assumption that the approach in a foreign court can readily be transplanted to South African soil'.[14] In my view, this warning applies equally to foreign institutions such as the special master.

[43] Second, on the facts, some six months earlier the parties had agreed to negotiate and conclude a MOU, a basic feature of which was the appointment of a senior manager of the Department to administer the national implementation of the LTA. They were faced with the same situation and more – occupiers whose claims under ESTA had to be dealt with. The size and complexity of the task had increased. Despite this, the parties were of the view that a senior manager of the Department was capable of managing not only the implementation of the LTA, but also ESTA. In terms of the negotiation order, the forum and the Department were responsible for policy formulation, development of a national programme for implementation and monitoring, and evaluation of progress of both labour tenant and ESTA claims. The order further provided that the senior manager had to file quarterly reports for a period of 24 months, after which the parties would assess the need for further reporting. Not surprisingly, the parties did not even consider the appointment of a special master. In these circumstances, the appointment of a special master to prepare an 'implementation plan' for labour tenant claims, was inexplicable and unjustified; and the LCC's estimate of the time it would take to settle claims under the LTA rings hollow.

[44] Third, while it is correct that s 32(3)(b) of the Restitution Act (rendered applicable to the LTA by s 30(1) of the latter Act) authorises the LCC to conduct any part of any proceedings on an informal or inquisitorial basis, it is

[14] *Minister of Justice and Correctional Services & others v Estate Stransham-Ford* 2017 (3) SA 152 (SCA); [2016] ZASCA 197 para 58.

no authority for the appointment of a special master to effectively usurp the functions of the DG and officials of the Department, by preparing all aspects of a national implementation plan to settle the claims of labour tenants. I revert to this aspect below. Further, at no stage did the LCC inquire into or raise any question regarding a single report or plan submitted by the DG from the inception of the proceedings. So it is not clear upon what basis the court came to the conclusion that 'the process thus far with inadequate reporting has not been successful'.

[45] Neither did the LCC conduct any part of the proceedings on an informal or inquisitorial basis. As was said in *Mlifi*:[15]

'The inquisitorial system rejects the notion of a passive Judge. On the contrary, the Judge is expected actively to undertake a comprehensive investigation into the facts surrounding the dispute.'

One would have expected the LCC to inquire into the dispute as to why a senior manager of the Department could not administer the national implementation of the LTA, when the parties had agreed that that was feasible and resources had been set aside for that purpose. The court also did not enquire as to how the settlement of claims could be accelerated or improved. The court concluded that the Department's failure to accurately estimate future progress or to provide implementation plans seriously undermined the supervision process. Yet it launched no inquiry into these failures. For example, a simple and informal inquiry into the progress of claims in Mpumalanga and KwaZulu-Natal after the DG's reporting affidavit of 12 February 2016, would have revealed the status of those claims, precisely what needed to be done, and if it was necessary for the court to issue directions to expedite those claims. This, when the Minister stated that he would directly supervise compliance with the orders of the court. Indeed, counsel for the respondents could not point us to any meaningful inquiry or act

[15] *Mlifi v Klingenberg* 1999 (2) SA 674 (LCC) para 107.

of supervision by the LCC, apart from making the orders by consent, orders of the court.

[46] Fourth, how a special master would 'significantly ameliorate' the disadvantage of a new judge of the LCC assigned to an on-going case having 'to familiarise himself or herself with the history and detailed issues of the dispute between the parties', has not been explained. I do not think that insufficient judges at a court, could ever justify the appointment of a special master to devise an implementation plan 'for the performance of the duties of the First Respondent and the Department'.

[47] Fifth, the LCC's reliance on *Fose*[16] and *Meadow Glen*[17] was misplaced. In *Fose*, the Constitutional Court held that appropriate relief under s 38 of the Constitution, in essence would be relief required to protect and enforce the Constitution; and if necessary, courts may have to fashion new remedies to secure protection and enforcement of constitutional rights.[18] But that does not authorise a court to appoint a special master effectively to implement legislation – a function entrusted by the Constitution to the DG and the Department. The statement in *Meadow Glen* that courts may need to consider institutions such as the special master to supervise the implementation of court orders, was a hypothetical example and as such, obiter. It was made in the following context: contempt of court is a blunt instrument and courts should look to orders that the secure ongoing oversight of the implementation of the order. In this case there was no suggestion that the DG or the Minister were in contempt of any of the orders made by agreement between the parties. The allegation was that the Minister was in contempt of the negotiation order.

[16] *Fose* fn 5.
[17] *Meadow-Glen* fn 6.
[18] *Fose* fn 5 paras 19 and 69.

[48] But of far greater concern is the effect of the LCC's order. It directed a complete outsider – the special master – effectively to take over the functions and responsibilities of the DG and officials of the Department in relation to labour tenant claims. That much is clear from paragraphs 6 and 7 of the order. It does not mandate the DG or any official to prepare the implementation plan. Instead, the *special master* is required to prepare the implementation plan (in collaboration with the DG) regarding labour tenant claims, '*for the performance of the duties of the [DG] and the Department*'. The role of the DG is secondary. In other words, the *special master* is squarely responsible for, and determines the content of, the implementation plan, which must be carried out by the DG and the Department. The implementation plan – of which the *special master* is the author – must set out, inter alia: the skill pool and infrastructure required for processing labour tenant claims; annual targets for the resolution of claims; the budget necessary in each financial year for carrying out the implementation plan; plans to ensure the adjudication or arbitration of unresolved claims; and any other matter which he or she may consider relevant.[19] And in the exercise of these 'powers' by the special master, the Minister and the DG must ensure that he or she is provided with all documents requested; that all officials are available to meet with the special master; and that all requests by the special master are timeously responded to.

[49] The LCC's order directing the special master to prepare an implementation plan for the performance of the duties of the DG and the Department, cuts directly across the powers of the DG, conferred by a number of provisions of the LTA. Section 17(1) of the LTA provides that an application for the acquisition of land referred to in s 16 must be lodged with the DG. On receipt of an application in terms of s 17(1), the DG is required to give notice to the owner of the land in question (s 17(2)(a)). The DG must ensure that a notice

[19] Emphasis added.

of the application is published in the Gazette (s 17(2)(c)), and in writing call upon the owner of the land in question to furnish the names and addresses of the holders of all unregistered rights in the land, and to furnish documents or information in respect of such land (s 17(2)(d)). Section 18 of the LTA sets out the steps which the DG is required to take when owner of affected land admits that the applicant is a labour tenant. In terms of s 19, the DG is required to refer applications to the LCC.

[50] The Minister and the DG raised a legitimate concern that the appointment of a special master in the circumstances, would entangle him or her in the budget and operational issues of the Department. For example, what happens if the DG decides on the allocation of budgetary items to pressing needs that the Department is obliged to address, other than labour tenancy? AFRA contended that the special master would be a senior advocate or retired judge with experience in land related matters, and that the Department should be responsible for his or her fees. Given the nature and extent of the task of finalising labour tenancy claims across the country, one shudders at the costs that this might entail. Moreover, the appointment and remuneration of a special master would directly embroil the LCC in the budgetary allocations of the Department. And as regards operational issues, what if the DG or a senior project manager with extensive experience in land reform, differs from the special master on an issue that affects the implementation plan? On these aspects, it is undisputed that the DG is the accounting officer of the Department and the Minister is the executive accountable to Parliament.

[51] In my view, the appointment of a special master 'is a textbook case of judicial overreach'.[20] Unsurprisingly, none of the 'analogous statutory posts'

[20] *Economic Freedom Fighters & others v Speaker of the National Assembly & another* 2018 (2) SA 571 (CC); [2017] ZACC 47 para 223, per Mogoeng CJ.

nor the cases upon which AFRA relied for the appointment of a special master supports such a gross intrusion by a court into the domain of the executive.

[52] AFRA contended that the 'most analogous statutory post' is the referee referred to in s 38 of the Superior Courts Act 10 of 2013,[21] and in s 28C of the Restitution Act.[22] The referee is appointed with the consent of the parties to assist the court to determine any matter that the court refers to him or her, and has 'such powers and must conduct the enquiry in such manner as may be prescribed by a special order of the court'.[23] 'Properly understood', so it was contended, 'the Special Master is a variant of the referee. He or she has similar powers and performs a similar task.' However, the contention is unsound. It ignores the plain wording of the Superior Courts Act and the Restitution Act. Both these statutes expressly authorise the court to appoint a referee whose powers are strictly circumscribed, and then only with the consent of the parties.

[53] AFRA submitted that there are number of cases in which courts have appointed independent monitors to assist in supervising the implementation of complex constitutional remedies. However, in none of those cases did the courts

---

[21] Section 38(1) of the Superior Courts Act provides:

'1) The Constitutional Court and, in any civil proceedings, any Division may, with the consent of the parties, refer—

(a) any matter which requires extensive examination of documents or a scientific, technical or local investigation which in the opinion of the court cannot be conveniently conducted by it; or

(b) any matter which relates wholly or in part to accounts; or

(c) any other matter arising in such proceedings,

for enquiry and report to a referee appointed by the parties, and the court may adopt the report of any such referee, either wholly or in part, and either with or without modifications, or may remit such report for further enquiry or report or consideration by such referee, or make such other order in regard thereto as may be necessary or desirable'

[22] Section 28C of the Restitution Act reads:

'Reference of particular matters for investigation by referee

(1) In any proceedings the Court may, with the consent of the parties refer–

(d) any matter which requires extensive examination of documents or scientific, technical or local investigation which cannot be conveniently conducted by the Court;

(e) any matter which relate solely or in part to accounts; or

(f) any matter arising in such proceedings,

for enquiry and report to a referee, and the court may, after hearing such evidence or argument as may be adduced or presented by the parties–

(i) adopt the report of any such referee, either wholly or in part, and either with or without modifications;

(ii) remit such report for further enquiry or report or consideration by such a referee; or

(iii) make any order in regard thereto.'

[23] Section 38(1)*(c)* of the Superior Courts Act; s 28C(1)*(c)* of the Restitution Act.

authorise the independent monitors to usurp the functions of the relevant government department. Thus, in *Black Sash*,[24] the Constitutional Court made an order in terms of which the Auditor-General, legal practitioners and technical experts were authorised *to evaluate the implementation of payment of social grants* and the *steps envisaged or taken by the South African Social Security Agency* (SASSA) – not to carry out SASSA's statutory functions – in relation to bidding processes and SASSA itself administering and paying social grants in the future.[25]

[54] For these reasons, the order appointing a 'Special Master of Labour Tenants' cannot stand.

The contempt application

[55] Aside from an order that the Minister be held in contempt of the negotiation order, AFRA sought an interdict restraining the Minister from claiming that he had complied with negotiation order. In this regard AFRA sought an order directing the Minister to inform individuals and organisations that participated in the meeting of 29 July 2016 that he breached his obligation to negotiate in good faith; that the establishment of the forum was his own initiative, that the appellants returned to the LCC for the appointment of a special master; and that the Minister should pay costs in his personal capacity.

[56] The LCC dismissed the contempt application, holding that AFRA failed to prove 'an act of non-compliance wilfully, mala fide or otherwise' on the part of the Minister.

[24] *Black Sash Trust v Minister of Social Development & Others* 2017 (3) SA 335 (CC); [2017] ZACC 8.
[25] *Black Sash* fn 24 para 76, emphasis added.

[57] Respect for the role and authority of the courts is founded on the rule of law. The Constitutional Court, in *Pheko*,[26] explained it thus:

'The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court binds all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the court. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.'

[58] The requirements for finding a party in contempt of court are well settled: the order must exist; it must be duly served on or brought to the notice of the contemnor; there must be non-compliance with the order; and the non-compliance must be wilful or mala fide.[27]

[59] A court may grant a declaratory order that a party is in contempt and ancillary relief on the basis of a balance of probabilities.[28] This approach was endorsed in *Pheko*,[29] in which it was held that in the absence of malice, on balance, civil contempt remedies other than committal may still be granted. The Constitutional Court affirmed the approach most recently in *Matjhabeng*.[30] In this case the appellants sought a declaratory order together with ancillary relief. Neither committal nor a fine was sought. In these circumstances, the onus of proof operated as follows. AFRA was required to prove, on a balance of probabilities the existence of the order, notice of it and non-compliance with the order. If these requirements were proved, the onus then shifted to the Minister to prove that non-compliance with the order was not wilful or mala fide.

---

[26] *Pheko & others v Ekurhuleni City* 2015 (5) SA 600 (CC); [2015] ZACC 10 para 1.
[27] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA); [2006] ZASCA 52 para 12; *Pheko* fn 26 para 32.
[28] *Fakie* fn 27 paras 19, 41 and 42(e).
[29] *Pheko* fn 26 para 37.
[30] *Matjhabeng Local Municipality v Eskom Holdings Ltd & others* 2018 (1) SA 1 (CC) para 67.

[60] The existence and notice of the order are common cause. As to non-compliance, AFRA contended that the Minister did not negotiate in good faith to establish the forum; and that he admitted that he did so unilaterally. But that is not so. The founding affidavit in the contempt application stated that the DG 'appeared willing to negotiate in good faith' but that the Minister had no intention of doing so and 'insisted on imposing his own position without any attempt to find common ground'. The Minister denied this and said that he was always willing to negotiate but that AFRA was not willing to do so.

[61] As regards wilfulness and mala fides, the dictum in *Pheko*[31] bears repetition:

'While courts do not countenance disobedience of judicial authority, it needs to be stressed that contempt of court does not consist of mere disobedience of a court order, but of the contumacious disrespect for judicial authority. On whether this court should make a civil contempt order against the Municipality, it is necessary to consider whether, on a balance of probabilities, the Municipality's non-compliance was born of wilfulness and mala fides.'

[62] The Minister denied that he acted wilfully or mala fide, and stated the following. The order required the Department to facilitate the establishment of the forum and to ensure appropriate provincial representation. He was merely facilitating that process and acted openly. By inviting NGOs dealing with farm dwellers (labour tenants and occupiers) to the meeting establishing the forum, the Department acted within the terms of the order. AFRA was at liberty to suggest to the forum that the main litigation should be prioritised or that the implementation of the LTA should take precedence over all other matters, but AFRA could not limit the forum to its own interests. The Minister did not attend the consultative meeting and thus was unaware of what was conveyed to the meeting, and the Department was not authorised to decide which NGOs could

[31] *Pheko* fn 26 para 42.

form part of the forum. The meeting would decide, independently of the Minister, the terms of reference of the forum to be established. AFRA was invited to the meeting establishing the forum, knew about it before any of the other NGOs and its representative addressed the meeting.

[63] AFRA's allegations in relation to the alleged contempt of court were simply unsustainable on the evidence. These were that the forum was established to 'provide cover for [the Minister] to pursue his own agenda'; that the invitation to the meeting of the forum sent to the LRC (as opposed to the attorney dealing with the matter) was an 'attempt to exclude those who are in fact involved in the litigation from participating in the forum'; and that the Minister was 'attempting to undermine the legitimacy of AFRA, or to isolate AFRA within the NGO community'. In any event, the Minister denied these allegations.

[64] It is well established that in a case such as this, the decision must be based on the facts alleged by an applicant which are admitted by the respondent, together with the facts alleged by the respondent, unless the respondent's allegations or denials are so far-fetched or clearly untenable that they may be rejected out of hand.[32]

[65] The Minister's version essentially was that he was willing to negotiate; that he was merely facilitating the process to establish the forum in compliance with the negotiation order; that AFRA was invited to the relevant meeting and addressed those present; and that the forum itself would determine its terms of reference; In my view, this version cannot be said to be fictitious, so far-fetched

[32] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C; *Fakie* fn 27 para 55.

or clearly unworthy of credence that it can confidently be rejected on the papers alone.[33]

[66] It follows that the LCC rightly concluded that AFRA failed to establish that the Minister was in contempt of the negotiation order; and its appeal against that order must fail.

[67] What remains is the appropriate order. It is clear from the evidence that the Department has failed to properly process labour tenant claims as required by the LTA. In terms of the negotiation order, the parties agreed that the Department would appoint within its organisational establishment, a senior manager to administer the national implementation of both the LTA and ESTA. Thus, the DG should have no difficulty in appointing a senior manager of the Department to carry out that task.

[68] The DG in his affidavit deposed to on 12 February 2016, assured the LCC that the processing of claims in Mpumalanga was well on its way and that there was no need for external supervision of the project. Regarding claims in KwaZulu-Natal, the DG stated that the issuance of s 17 notices would commence by the end of March 2016, after which that project would 'probably follow the trajectory of the Mpumalanga project'. According to the DG, save for some applications in the Free State and Limpopo, which the Department was looking into, none of the other provinces had any active files on applications by labour tenants for the acquisition of land. The DG went on to say that both he and the Minister were satisfied that sufficient progress had been made since the appointment of dedicated staff for the processing of labour tenant claims, and that considerable resources had been made available for the project. So the DG should have no issue in complying with the order set out below.

[33] *Fakie* fn 27 para 56.

[69] The following order is made:

1 Paragraphs 2-10 of the order of the Land Claims Court (LCC) dated 8 December 2016 are set aside and replaced with the following order:

‘2 Within 21 calendar days of the date of this order, the first respondent is ordered to deliver an implementation plan in relation to pending labour tenant claims under ss 16, 17 and 18 of the Land Reform (Labour Tenants) Act 3 of 1996 (the LTA). The implementation plan must set out the following:

2.1 The name/s and details of the senior manager/s responsible for managing the national implementation of the LTA, appointed by the first respondent;

2.2 The total number of labour tenant applications lodged to date and the number which have not yet been processed and finalised, in each of the 9 provinces;

2.3 The number of notices issued under s 17 of the LTA and the number still outstanding.

2.4 The number of applications of which the details have been published in the Government Gazette in terms of s 17 of the LTA.

2.5 The number of applications that have been referred to mediation, arbitration or to the LCC.

2.6 An assessment of the skill pool and other infrastructure required to process labour tenant claims, and to what extent such skill pool and infrastructure is available within the Department of Rural Development and Land Reform (the Department);

2.7 Targets, on a year-to-year basis, for the resolution of pending labour tenant claims by: (a) agreement, and (b) referral of claims to the LCC;

2.8 A determination of the budget necessary during each financial year for carrying out the implementation plan, including both the Department’s operating costs for processing claims and the amount

required to fund awards made pursuant to applications in terms of s 16 of the LTA;

2.9 Plans for coordination with the LCC to ensure the rapid adjudication or arbitration of unresolved claims referred to the court in terms of s 18(7) read with ss 19 to 25 of the LTA;

2.10 Any other matter which the first respondent considers relevant regarding the implementation of labour tenant claims under the LTA.

3 The applicants shall be entitled to comment on the implementation plan within 10 calendar days of the date on which it has been delivered.

4 The LCC shall convene on a date and time to be determined by it, at which hearing the Court shall:

4.1 consider the implementation plan delivered by the first respondent;

4.2 approve the implementation plan, with or without amendments, or otherwise deal with the plan as it may deem fit;

4.3 make such further orders as may be advisable, including orders relating to the fulfilment of the implementation plan and the processing of pending labour tenant claims.'

2 Save as aforesaid, the appeal under case number 306/2017 is dismissed with costs, including the costs of two counsel.

2 The appeal in case number 314/2017 is dismissed with costs, including the costs of two counsel.

_____

A Schippers
Judge of Appeal

Mocumie JA dissenting:

[70] I have had the benefit of reading the judgment of Schippers JA (the first judgment). I agree with him that there are two appeals before us. The first, by the Minister of Rural Development and the Director General (the appointment of a special master) and the second, by the respondents in respect of the contempt of court proceedings. I further agree with his conclusion that the appeal on the contempt of proceedings should be dismissed. However, I do not agree with his conclusion that the appeal on the appointment of a special master should fail, hence this judgment.

[71] I also agree with my colleague for the reasons given by him that the declaratory order of the Land Claims Court (the LCC) that the failure of the Director General (the DG) to process or refer to the court applications under s 16 of the Land Reform (Labour Tenants) Act, No 3 of 1996 (the LTA), was inconsistent with ss 10, 25(6), 33, 195 and 237 of the Constitution of the Republic of South Africa, 1996 (the Constitution) is unassailable. I need not add anything on this score.

[72] The difference between his judgment and this one, therefore, lies solely in one significant area, namely, that concerning the appointment of a special master by the LCC and whether such a directive is the best way for remedying the clear constitutional infringement established in the first judgment. In this regard my colleague concludes that it is not justified for the LCC to have appointed a special master. The effect of his order, invalidating the appointment of a special master, is that the same Department of Rural Development and Land Reform (the department) that has failed labour tenants for over twenty two

years should still continue with the role of developing an implementation plan on the applications of labour tenants.

[73] My colleague raises two main points for his order. First, that in an attempt to remedy this constitutional infringement, the parties had for over six months appointed a senior manager of the department to file reports with the LCC under the Supervision Order. And they were content with the senior manager as the officer responsible for compiling and submitting the reports to the LCC. Secondly, and equally important, is his view on the effect of the order of the LCC in which 'it directed that a complete outsider – the special master – effectively take over the functions and responsibilities of the DG and officials of the department in relation to labour tenants claims.' In his view, this latter order would have the effect of putting the DG in a subordinate position to the special master and would effectively confer on the special master the authority to prepare an implementation plan instead of overseeing it. He thus concludes that such an order would amount to a takeover of the functions and responsibilities of the DG.

[74] I am of the view that these considerations do not tilt favourably on the scales to justice and equity. This matter concerns applications under the LTA which was enacted in an urgent response to the constitutional imperative in s 25(6) of the Constitution. In respect of such an imperative, Parliament enacted legislation for persons whose tenure of land was insecure as a result of past discriminatory laws and practices. In the environment of such discriminatory laws and in the wake of legislative instruments enacted to address the effects of such discriminatory laws, gross and continuous failure by bodies charged with the implementation of such corrective legislative measures effectively retains the status quo of the applicants in unjust historical positions. As the facts demonstrate, an explicit and continued violation of constitutional obligations

continues.[34] This goes against the purpose of the enactment. The Preamble to the LTA states that its purpose is 'to provide for security of tenure of labour tenants . . . to provide for acquisition of land and rights in land by labour tenants.' It also records that 'it is desirable to institute measures to assist labour tenants to obtain security of tenure and ownership of land'.

[75] Delays and failures to honour constitutional obligations in processing applications under the LTA, continue to plague the department. This cannot be countenanced in this day and era of democracy in South Africa. In a judgment of the full bench of the LCC, the court lamented:

'Delivery in terms of finalising these claims [restitution claims] has been and continues to be painfully slow. The inefficiency of the commission and its inability to meet the challenges of finalising what are highly emotive and emotional land claims have repeatedly been bewailed in this court, the Land Claims Court (this court). Twenty two years ago victims of apartheid legislation and forced removals were invited to lodge restitution claims, thereby exercising a constitutionally enshrined right to redress. Thousands of communities and individuals documented their claims to reclaim the soil their fathers and grandmothers had tilled and upon which their cattle had grazed. Just over two decades have passed, and still the commission has some 7419 claims, including several large community claims, the processing of which has yet to be finalised, if not to commence. Thousands of claimants have gone to their graves without having seen the fulfilment of the hope of the Constitution created by the establishment of the right of restitution. *The countless failures on the part of the commission to honour its constitutional obligations as a result of a combination of insufficient funding,*

[34] In her dissent in *Minister of Home Affairs and Another v Fourie and Another* [2003] ZACC 11; 2003 (5) SA 301 (CC); 2003 (10) BCLR 1092 (CC), former Justice of the Constitutional Court O'Regan J made the point that in instances of explicit violation of constitutional obligations, the court ought to courageously exercise their broad discretion to impose an order that provides applicants who are historical victims of unjust laws with effective relief that both remedied the injustice of their situation while not interfering with the functions of the body charged with rectifying and regulating the interests in question. In her response to the Majority judgment that ordered that Parliament be indulged with a period of a further 12 months to rectify a constitutional infringement, she opined that relief granted by the court, rectifying the established constitutional violation would not affect Parliament's regulatory powers nor the choices on how to do so in order to treat all marriages equally.

delay, procrastination and inefficiency are a blot on the country's democratic dispensation and a stark example of justice delayed causing justice to be denied…'[35] (Own emphasis.)

[76] As the Constitutional Court has remarked when dealing with matters under the LTA, it is important to remember the history of the LTA and its promise to end the cruelty and suffering of African people.[36] Importantly, in my view, it is necessary to address with pressing urgency the dispossession of thousands of labour tenants of their land rights and the precariousness of their never ending situation. The LTA promised labour tenants rights over the land they have worked on for generations and in most cases where they were exploited and subjected to subjudication by the land owners. The LTA sought to aid labour tenants by placing obligations on the DG to manage the application processes, and resolve disputes between labour tenants and landowners. Absent agreements, the DG was to refer the applications to the LCC for speedy adjudication. The failure by the DG is a step back in our democracy. These injustices continue due to the repeated failure by the DG to address them decisively.

[77] In this court the department (the Minister in particular) submitted that he has appointed additional staff to address the backlog and fast track the process. Counsel for the appellants was however constrained to concede that the department has not filed any report since 2015 to update the LCC on any progress made, if any. This, counsel for the respondents submitted, is a concern which inconceivably indicates the inability to deal with the labour tenants' plight with the speed it demands. It indicates that the department is in general oblivious to the seriousness of this breach of its constitutional obligation. It

[35] *In re Amaqamu Community Claim (Land Access Movement South Africa and Others as Amicus Curiae)* 2017(3) SA 409 (LCC). See also *Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and others* [2016] ZACC 22; 2016 (5) SA 635 (CC).
[36] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 at para 25.

further indicates that the department cannot cope at all taking into account the complexity of the issues around security of tenure of land of labour tenants vis-a-vis rights of owners of land which requires expertise in the area of land restitution and reform.

[78] If, as my colleague correctly concludes, 'the DG's failure to process or refer to the court applications brought under s 16 of the LTA was inconsistent with ss 10, 25 (6), 33, 195 and 237 of the Constitution – and plainly unlawful – and that the DG by his own admission, did not carry out his constitutional obligation and statutory obligations in terms of the LTA' given these serious breaches of constitutional obligations and legislative mandates, I am of the view that it would be highly ineffective to appoint another functionary (including a senior manager) in the same department. Taking into account that it is the same department that has persistently failed to compile a substantive plan for the implementation of the application in terms of the LTA.[37] This latter point is apparent from the admission by the DG that 'the present process of collecting outstanding information for the referral of Chapter III applications, may take anything between 12 to 24 months, *depending on the budget allocations that can be procured for the project*…' Kwazulu-Natal and Mpumalanga applications were labeled as successful were evidently based on inaccurate information and had to be commenced afresh.

[79] In my colleague's judgment, he relies on a great deal of foreign jurisprudence to show the inappropriateness of the appointment of a special master. Without belabouring the point, such exercise is not necessary because the social circumstances, historical reality of labour tenants, scope of powers of

[37] This is evident from the parlous and poor state of the reports that the department filed before the LCC. Not only did such indefensible records reflect inaccurate data, they also did not refer to other provinces which are well known to have filed applications as well; provinces such as the Northern Cape and the Free State to quote just a few.

the LCC, specificity of our judicial methods to interpret transforming legislations and our courts' ever available oversight powers would shape the institution of a special master in a way that makes it compatible, specific and appropriate this context [I do not understand what is meant by this sentence. Please revise.].[38] Thus this court need not even engage in the debate on the appointment of the special master in South Africa in general. Nor is a comparison with other jurisdictions necessary. That exercise was for that matter embarked upon in earlier judgments including *Meadow Glen Home Owners Association and Others v Tshwane City Metropolitan Municipality and Another*[39] where this court (?) indicated an unequivocal acceptance of such institution and similar institutions in appropriate circumstances. It follows therefore that, the appointment of a special master – a neutral and independent expert in the area of land restitution and reform agreed upon by all parties cannot be regarded as a foreign institution that needs to be frowned upon and rejected in these circumstances.

[80] The question therefore that this court actually has to answer is whether the appellants have made out a case that justifies interfering with the LCC's true discretion to grant appropriate remedies and to regulate its own process.

[81] In *Florence v Government of the Republic of South Africa*[40] the Constitutional Court explained:

'Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has

[38] *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* [2017] ZACC 8; 2017 (5) BCLR 543 (CC); 2017 (3) SA 335 (CC) and *Meadow Glen Homeowners Association and Others v City of Tshwane Metropolitan Municipality and Another* (767/2013) [2014] ZASCA 209; [2015] 1 All SA 299 (SCA); 2015 (2) SA 413 (SCA).
[39] *Meadow Glen Home Owners Association and Others v Tshwane City Metropolitan Municipality and Another* 2015 (2) SA 413 (SCA); [2014] ZASCA 2019; 2015 (1) ALL SA 299 (SCA) at para 35.
[40] *Florence v Government of the Republic of South Africa* (CCT 127/13) [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC).

preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere.'

[82] This Court, in *Minister of Rural Development and Land Reform and another v Phillips,*[41] endorsed and applied the findings as follows:

'...the power of an appellate court to interfere with the exercise of discretion by a land claims court is not without restraint but is limited by whether the discretion invested in that court had not been judicially exercised or had been influenced by wrong principles or a misdirection of the facts or was one that could not reasonably have been made.'

[83] In *King Sabata Dalindyebo Municipality and Others v Kwalindile Community and Others*[42], in the course of an appeal from the LCC, this court said:

'On appeal, the appellate tribunal is obliged to accord deference to the findings of the lower court, more especially where the latter court is a specialist court called upon to make value judgments.'

[84] Having said that, when one reads the judgment of the LCC, as a court that is primarily responsible for adjudicating and implementing the LTA and which possesses far better expertise and experience in such matters, it is clear that it understood its powers and responsibility very well when it considered this matter. It granted several postponements to accommodate the department when it had not filed reports at all or on time. It even granted the Minister a postponement when it ought not to have done so – to give him the opportunity to reflect on his position and that of his department on how to expedite the process. In the order to appoint a special master, it took into account the history of the LTA and its objective. It was conscious that after a year and a half during

[41] *Minister of Rural Development and Land Reform and another v Phillips* [2017] ZASCA 1; [2017] 2 All SA 33 SCA para 33.
[42] *King Sabata Dalindyebo Municipality and Others v Kwalindile Community and Others* [2012] ZASCA 96; [2012]3 All SA 479 (SCA) para 67.

which time the parties and the LCC had tried ordinary court supervision which had failed, there was a need for 'effective relief … for the many thousands of vulnerable labour tenants… [as] the department has thus far experienced grave difficulties in providing this…The size and complexity of the task alone supports the appointment of a special master to inter alia assist this court to meaningfully monitor implementation…'.

[85] It is further clear that it was very sensitive to the radical implication of its order and was also cognisant of its judicial scope and power to make an order which suited the prevailing circumstances and history of the matter. Applications under the LTA are no trivial matters to be dealt with by those with no expertise in the area of restitution and reform of land. It is impermissible to replace the decision of a specialised court without any compelling or extraordinary motivation to do so. It is not for this court to interfere in the functions of a specialised court simply because it is of the view that it could have come to a different conclusion and therefore replace the decision of the specialised court with its own – an exercise which amounts to a preference of strategy rather than whether the specialised court is right or wrong as a matter of principle in the exercise of its true discretion.

[86] I differ with the view that my colleague holds when he says that the LCC did not even hold an inquiry into the correctness of the reports before it prior to appointing a special master. There is sufficient and unrefuted evidence on record that show that the LCC came to the correct conclusion on the appointment of a special master. The department had not even processed applications in all the provinces including affected provinces such as the Northern Cape and the Free State. KwaZulu-Natal and Mpumalanga, which were flagships of the department, were assessed on inaccurate information and thus had to be started afresh. More profoundly, this was never the case of the

department on the papers or in this court. An enquiry into whether the appointment of a new staff component was within the budget provided, as the Minister contended, would not have made any difference. If the Minister wanted to make that case or argument, surely he would have done so. Logic dictates that any inquiry (after repeated futile postponements) would for certain have caused further delays and would result in unfairness and prejudice to the respondents than on the department.

[87] Twenty two years is more than enough time for labour tenants to wait for another twelve to twenty four months which the DG states it will take just to collate information – without any certainty or guarantees – but tentative estimates – with no reference to any strategic plan which will guide him and his department. A year and a half has gone by under the supervision of the LCC without results. The LCC in its prerogative deemed it fit not to go another day further without putting in more stringent measures in place to ensure that the department does comply with its constitutional obligation. This is an injustice and begs a court's most radical relief to ensure constitutional compliance based on a strategic plan with the highest likelihood of ensuring that the process does get under way and is finalised without any foreseeable delays. The rights at stake are of a class of litigants who have waited for more than twenty two years for the department to process their applications. The matter is of high importance and urgent.[43] If the LCC opined that it was the right moment to 'tighten the screws' so to speak, to ensure that labour tenants are attended to decisively; that finding should not be second-guessed by any other court.

[88] The LCC explained in precise language why it deemed such appointment necessary. It highlighted the problems it encountered through the department's

[43] The LTA came into effect on 22 March 1996 and all applications had to be lodged by 31 March 2001 in terms of s 16(1).

slow progress, and its failure to report to it within the time frames agreed upon. It explained the role the special master will play to ameliorate its own oversight responsibility. This court owes particular respect to the LCC's determination of what is best for its own processes. That is why, in *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and others*[44], the Constitutional Court refused to interfere with a decision of this court not to permit the filming of an argument before it. The Constitutional Court held:

'Even if this court might well have come to a different decision, no basis has been established for intervening in the exercise by the Supreme Court of Appeal of its discretion to regulate its own process and to ensure that the arrangements within its own court room do not interfere with the administration of justice.'

[89] From a proper reading of the judgment of the LCC, it is clear that it exercised its true discretion[45] bestowed upon it as a specialist court to employ extraordinary measures where and if necessary to carry out its responsibility. The fact that the respondents had gone along with the appointment of a senior manager during the interim arrangements in terms of the supervision order cannot be used to justify interference with its powers by this court. This can also never be equated to judicial overreach. The doctrine of separation of powers is an important one in our democracy, but it cannot be used to avoid the obligation of a court to provide appropriate relief that is just and equitable.[46] If there has been any hesitation on the appointment of a special master for various reasons in the past, the flouting of constitutional obligations in this matter demands the

---

[44] *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) para 67.See further *Van Breda v Media 24 Ltd* [2017] ZSCA 97; [2017] 3 All SA 622 SCA para 34.

[45] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (Trencon) at para 85: "A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is "true" in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible".

[46] *Minister of Home Affairs and Another v Fourie and another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC).

appointment of a special master. Authorities abound in South Africa on how this will work out in reality.

[90] The LCC has set out a clear process which all parties will participate in equally. The Minister's objection to the appointment of a special master is incongruent with its constitutional obligation towards the labour tenants. I strongly hold the view that the appointment of a special master will not relegate the Minister or the DG's powers to a level below anyone's at all. In actual fact, the Minister will now have the opportunity that he or she wanted as an alternative to the appointment of a special master 'to personally take responsibility in overseeing that the process is a success' which his department has failed to deliver in the past twenty two years. This will also strengthen his or her case when he or she approaches Parliament on a clearly articulated implementation plan and an estimated budget developed by an expert in restitution and reform matters to deal with all applications, old and new; within reasonable time frames.

[91] What the LCC has done by appointing a special master in these circumstances cannot qualify as a 'demonstrable blunder' which justifies interference by this court. It had the power in terms of s 38 of the Constitution to grant 'any order that is just and equitable. 'In addition it had the power in terms of s 22 (4) (*g*) of the LTA to make any order regarding any matter 'which in the opinion of …the court, needs to be regulated by an order …of the court'. Section 22 (5) requires the LCC to consider:

'(a) the desirability of assisting labour tenants to establish themselves on farms on a viable and sustainable basis;

(b) the achievement of the goals of this Act;

(c) the requirements of equity and justice.'

[92] I am undoubtedly led to conclude that the LCC acted within its powers to appoint a special master to assist it. I hold the view that without intervention such as taken by the LCC– the labour tenants would be back before it and this court in the next ten years still seeking the same relief they sought in the first instance: access to land and security of land tenure decades!

[93] In sum, it is important to appreciate what the LCC has ordered in clear and distinct phases:

1. The preparatory phase

The appointment of a special master who will be solely responsible for the preparation of the implementation plan in collaboration with the DG and the department. He or she will submit the implementation plan to the LCC only after the Minister and the DG would have had sight of it, made comments, submissions; raised objections and proposed alternatives where necessary. It is the LCC which will ultimately approve the plan based on submissions by all the parties.

2. The execution phase

The order does not at this stage delineate the specific roles or powers of the special master in the execution phase. The LCC will grant further orders relating to the fulfilment of the implementation plan and processing of labour tenants claims. It may even discontinue the use of a special master if all systems go well with full and diligent co-operation of all parties; particularly the department.

In this fashion, the LCC will be able to carry out its responsibility: supervise the s 17 process in a structured and effective environment and bring confidence into the whole process - restore the legitimacy of the department which has been seriously eroded over the twenty two years of its failure to comply with its constitutional obligations.

[94] On the issue of costs, as both parties were successful and for the conclusion that I reached, I would have ordinarily ordered that each party pay its own costs. However, as indicated earlier in this judgment, the respondents are men and women of straw, fighting for their constitutional rights to be respected, promoted and upheld by a government department that has failed them for decades. It is a constitutional matter that had to be brought before the courts to pronounce upon it decisively. The respondents did not drag the department to court unnecessarily. When the Minister pursued a process outside that established by the LCC, between the respondents and the department, they believed that he had done so to deliberately frustrate what was seemingly a genuine process set up by a constitutionally ordained institution, the LCC. Even if the respondents could not prove any malice on the part of the Minister in respect of the contempt of court proceedings, as this court holds; nonetheless, the process that was set to resolve the dispute effectively, was derailed and forced the respondents to go to court. For that reason, I would order that the department pay the costs of this appeal.

[94] In the result, I would agree with my colleague that the appeal in respect of the contempt of court proceedings be dismissed. But I would agree with the LCC in respect of the appointment of the special master. Therefore, I would order that the appeal (of the department) in respect of the appointment of the special master, is dismissed. The department to pay the costs of this appeal.

_____

C Mocumie

Judge of Appeal

Willis JA:

[95] I have had the benefit of reading the judgments, the first of which had been prepared by my brother Schippers JA and, thereafter, the response thereto by my sister Mocumie JA. I share the deep concerns of Mocumie JA and the LCC about the apparent ineptitude of the Department of Rural Development and Land Reform in fulfilling its mandate in this matter.

[96] This notwithstanding, I agree with the reasoning and order of Schippers JA. The fundamental reason for my doing so is that I consider the appointment of a special master in these circumstances to be a case of judicial overreach. I am mindful of the fact that pedantry on the part of the courts when it comes to the delicate issue of defining the appropriate parameters of power for the pillars of State must be avoided: the judiciary has a duty to ensure that all three of these pillars defer to the Constitution.

[97] No matter how much the courts may wish to advance the cause of social progress, especially, when it comes to the fulfilment of constitutional objectives, they must nevertheless be careful not to impose massive, potentially

crippling, financial burdens on the agencies of the State, in circumstances where these financial burdens have not been duly approved, consequent upon a request by the representatives of the electorate. The special master will need to be paid. He or she will need sturdy motor vehicles, replaced from time to time, to perform the task, computers, offices, staff and so on. All this will cost a lot of money. How much is appropriate for each item and in aggregate? All of this needs executive decision-making mandated by the electorate. What if the special master commits the State to huge unforeseen expenditure for which there has been no vote in Parliament? The constitutional implications of these questions, including most especially the 'outsourcing' of the functions of the executive and removing them from the vote of the legislature are staggering. All these points have been made in fine judgment of Schippers JA. I repeat them to underline their massive importance.

[98] Above all, in a constitutional democracy the courts are there to provide a shield much more than a sword. In a constitutional democracy, the generally appropriate remedy for those dissatisfied with the performance of the government is to vote it out of office. Of course, there may be exceptions when it is appropriate for a court to intervene with directives touching upon the powers of the executive and even the legislature. The record of the Constitutional Court is impressively replete with examples. Especial restraint is, however, imperative when, as here, the courts are called upon to do battle with a potentially hugely expensive sword rather than a shield.

_____

N P Willis

Judge of Appeal

APPEARANCES

For Appellants in case no. 306/17 & Respondents in case no. 314/17:

V S Notshe SC

L Rakgwale

M Kgariya

Instructed by:

State Attorney, Pretoria and Bloemfontein

For the Respondents in case no. 306/17 & Appellants in case no. 314/17:

A Dodson SC

M Bishop

S Kazee

Instructed by:

Legal Resources Centre, Durban

c/o Matsepes Inc, Bloemfontein