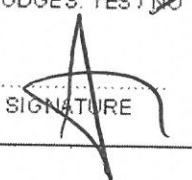


IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: 177/2014

Heard on: 04.02.2015 and 16.03.2015
Delivered on: 19.03.2015

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
19.3.15	
DATE	SIGNATURE

In the matter between:

EDWARD LEBEKO

First Applicant

ANDRIES MONCHO

Second Applicant

MESHACK MOETAESI

Third Applicant

PETRUS MOLEFE

Fourth Applicant

and

MR CPJ STRYDOM

First Respondent

**SHERIFF OF THE HIGH COURT
DISTRICT VENTERSDORP**

Second Respondent

JUDGEMENT

INTRODUCTION

1. This is an application on urgent basis. In this application the relief sought is restoration of electricity and water to the respective houses of the applicants, access to the road leading to the houses and declaratory order that applicants were occupiers as envisaged in section 1(x), the Extension of Security of Tenure Act 62 of 1997 (“ESTA”).

BACKGROUND

2. The applicants are occupiers residing on portion 5 of Rietfontein farm situated in the North-West Province. Herein referred to as (“the property”) of the first respondent.
3. It is alleged by applicants that first respondent has cut off the electricity and water supply they had enjoyed previously during their stay on the property. Further that respondent has closed, or discontinued use of the road leading to applicants’ houses.

ISSUES TO BE DETERMINED

4. Whether access to water is a constitutional right of the applicants?
If the answer to 4 is in the affirmative, whether respondent has deprived applicants of their constitutional right to water?
5. Whether access to supply of electricity is a constitutional right?
If answer to 5 is in the affirmative, whether respondent has deprived applicants of their constitutional right to electricity?

6. Whether respondent has deprived applicants of any right by denying applicants access or use of the road they had been accustomed to?

ISSUE NOT IN DISPUTE

7. That applicants are occupiers as contemplated in section 1(x) of ESTA.
8. That first respondent is the lawful owner of Portion 5 of the farm Rietfontein in the North-West province (“the property”).
9. That first respondent has removed the water tank that used to supply water to the residence on the property.
10. That supply of electricity has since being discontinued.
11. That the access to the road leading to applicants’ residences has been discontinued.

FURTHER PLEADINGS

12. In addition to opposition on the merits, first respondent filed an application to strike out certain portions of applicants’ founding and replying affidavits.
13. A plea of non-joinder is also raised. I shall deal first with non-joinder application and thereafter striking out.

NON JOINDER

14. First respondent submits that ESCOM HOLDINGS LIMITED as the body responsible for the supply of electricity should have been joined to these proceedings.
15. It is trite law that for a party to be joined, the party to be joined must have a direct and substantial interest not only in the subject matter of the litigation, but also in the outcome of it.¹
16. The court must determine first the substantial interest and whether its judgement will not be prejudicial to the party to be joined.² I do not have before me any evidence substantiating the presence of substantial interest nor any submission regarding prejudice to be suffered by Escom as a result of the order or judgement of this Court. In my mind, I find no interest whatsoever on the part of Escom in these proceedings, neither do I find any pointer to any prejudice to be suffered by Escom. I find no substance in this point in *limine* and it is accordingly dismissed.

APPLICATION TO STRIKE OUT

17. The Court will allow striking-out application if satisfied that the averments to be impugned are scandalous, vexatious or irrelevant. The Court may not grant the application unless satisfied that applicant will suffer prejudice if the averments challenged are not struck-out.³
18. The law of striking-out is clearly explained in a well-known case of *Vaatz v Law Society of Namibia*.⁴

¹ Herbstein & Van Winsen, Civil Practice of the High Courts of South Africa Vol 1 at page 218

² Morgan v Salisbury Municipality 1935 AD 167

³ Rule 6(15) of Uniform Rules of Court

⁴ 1991 (3) S. A. 563 (NM) at page 566

19. Mr Ackerman, Counsel for first respondent submits that certain portions of the applicants' affidavits are to be struck-out for being irrelevant, scandalous and vexatious. Counsel referred the Court to the relevant portions as found in his Heads of Argument.⁵
20. In assessing the averments I could only ascertain vexatious and irrelevant averments,⁶ but the same do not have the potential of prejudicing respondent in his defence.
21. I have read all the challenged averments. I am of the opinion that first respondent will not be prejudiced in conducting his defence. I consequently dismiss the application.
22. I now deal with the merits of the application.

RIGHT TO ELECTRICITY

23. Applicants submit that first respondent has deprived them of their right to electricity. That first respondent informed the electricity supplier Escom to disconnect electricity supply to their houses. That they were paying for the said electricity.⁷
24. The defence of first respondent is that of denial save alerting Escom of the illegal unsafe electrical connections.

⁵ First Respondent's Supp. New Heads of Argument in respect of application to strike-out page 1 – 29

⁶ See pages 9, 12, 21, 22, 23, 24 and 25

⁷ Founding Affidavit pp. 16 par 22

25. It transpired during viva-voce argument that only first and third applicants are affected by the alleged deprivation of electricity. This was not spelled out in the founding affidavit.
26. In addition to this, the second and fourth applicants filed confirmatory affidavits confirming the electricity deprivation. It is startling that all applicants save the first refer to themselves as the fourth applicants in the confirmatory affidavits. This may have been the result of cut and pasting and lack of settling of papers by the legal representative.
27. It is important to determine the applicants' alleged right to electricity.
28. Counsel for the applicants argued viva-voce that applicants' right to electricity is derived from the provisions of section 6(1) of ESTA. The section reads:

"Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly."
29. The important part of section 6(1) is:

"... and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly."
30. There is no evidence whatsoever by applicants that the electricity supply was a service provided by the first respondent, neither is there evidence that first respondent had agreed to the supply of electricity.
31. The uncontested evidence of first respondent is that, he, first respondent, had nothing to do with the supply of electricity to the

applicants, further that, if there was any such agreement, it may have been with Mr. Ingwersen who was the lessee of first respondent's property.

32. The applicants were employees of Mr. Ingwersen, the lessee. Mr. Ingwersen had entered into a lease agreement with the first respondent. The salient provisions of the lease agreement was that Mr. Ingwersen will be responsible for the electrical connection on the property and be responsible for payment thereof, further that Mr. Ingwersen will also be responsible for accommodation of the applicants. Mr. Ingwersen indeed carried out his obligations inter-alia he caused electricity to be installed at his expense. He was responsible for payment and the account was issued in his name.
33. Mr. Ingwersen fell in arrears with electricity payments to the tune of R 11 000.00 (eleven thousand rand) and Escom disconnected the same on the 18.11.2013.
34. I find no obligation on the first respondent to provide electricity to the applicants.
35. In *Darries v City of Johannesburg*⁸, it was held that:

"There is no absolute right of access to electricity, let alone a right to an uninterrupted supply of electricity where the municipal provider is not being paid and where the consumers are not indigent persons."
36. The Court held an inspection in loco on the 14.03.2015.

⁸ 2009 (5) S. A. 284 (GSJ)

37. The Court observed electrical connections to the houses of first and third applicants. Upon enquiry, Mr Lebeko, one of the applicants informed the Court that the electrical connections to the houses were done by a private person and not officials of Escom. It was clear to the eye that the said connections were illegal.
38. I find it absurd that applicants claim a right emanating from an act of illegality. There is no evidence or proof that applicants were paying for the said electricity as alleged in founding affidavit.

ACCESS TO WATER

39. It is the applicants' case that there is no water on the property.⁹
40. In answering, first respondent contends that applicants have access to water as provided to them by water taps installed at their residences after removal of the water tank that previously provided water to the applicants. The presence of water taps was never mentioned by the applicants at all.
41. In reply¹⁰ applicants had a change of heart from total absence of water to controlled and interrupted flow of water. It is important to quote paragraph 7.2 of the replying affidavit:

"We wish to make it clear that, it has never been the applicants' case that there are no taps, nor that these taps are unable to provide water. The presence of taps does not translate to availability of water, and the case before the above Court is control of water by respondent, by stopping the flow

⁹ Founding Affidavit pp. 14 par. 8, pp. 16 par. 25, pp. 18 par. 36

¹⁰ Replying Affidavit paragraphs 7.2, 8.7.1 - 2

of water after removing the water-tanks that supplied water to the applicants.”

8.7.1 “Our right to water is right that is also part of ESTA. The respondent has from August 2013 persistently and intermittently taken away our right to access to water. This started with the removal of the two hoisted tanks that supplied water continuously. The conduct of stopping water became frequent towards the end of 2014 as respondent intensified his conduct of making our stay impossible”.

42. It is blatantly false that the case before this Court is “control of water by respondent, by stopping the flow of water after removing the water tanks”. This untrue averment taints the credibility of the deponent and is to be frowned upon.
43. The case of the applicants has always been total absence of water on the property.
44. The inspection in loco revealed that the two (2) water taps on the premises of Mr. Lebeko and a water tap outside the premises but attached to the unused wind-mill were dry. First respondent voiced his surprise stating that there has always been water flowing from these taps.
45. However, there is only one water tap with strong running water a distance away from the residences. Applicants through Mr. Lebeko confirmed that it is from this tap that they obtain water.
46. The first respondent was encouraged by this Court to ensure provision of water through the water taps located inside the premises of first and

third applicants. However there can be no substance in the allegation that there is no supply of water on the property.

ACCESS TO THE ROAD

47. Applicants' case is that they, applicants have no access to the main road. I consider it essential to quote from the founding affidavit¹¹:

"We do not have access to the public road and this has serious repercussions as it means even an ambulance would not be able to access our homes in the event of emergency."

48. The inspection in loco revealed the following:

48.1 A road connecting the main road. This road leads into the premises of the first respondent and provides access to the applicants' houses. This road is as depicted on annexure "S44" on pp. 178 of the record. This road is referred to as the "new road".

48.2 A closed and unused road as per annexure "S42" and "S43" on pp. 176. This is the road alleged by applicants as having been closed by the first respondent. Inspection of the road demonstrates that the road is not usable as the same has the tendency of draining or holding water during rainy days and the soil is of clay.

48.3 A road not so far from the closed unusable road. This road leads to the residences of the applicants. It connects easily onto the main road.

¹¹ Founding Affidavit pp. 16 par. 24

- 48.4 Another clearly usable road connecting the residences to the main road. This road has a concrete pipe across. The pipe is to prevent water in rainy days from logging on the road. The water is channelled through this pipe into a wide furrow away from the road. This road is as depicted on annexure "S33" and "S34" pp. 167 and 168. This is the alternative road created by the first respondent for use by the applicants.
49. The presence of the three separate roads allowing applicants access to the main road creates a serious indictment on the truthfulness of the allegations in the founding affidavit. I cannot come to any other conclusion but that applicants deliberately lied in the founding affidavit. This does not speak well of Mr. Ramphele, their attorney who consulted with the applicants on the farm and ought to have seen these roads when preparing the application.

COSTS

50. This Court does not as a rule award costs against a party given the nature of litigation. It may, however, award costs if there are special circumstances inviting the same. I am of the opinion that costs against the applicants will be appropriate. I indicated in this judgement that there are traces of dishonesty on the part of the applicants. Applicants alleged that there is no access to the main road whilst knowing fully well that the allegation was blatantly false.

Applicants allege that they had lawful supply of electricity whilst aware that the allegation in the affidavit was false.

The round-about turn of the applicants in the replying affidavit regarding presence or otherwise of water on the property is very unsavoury.

The application has a total number of four applicants. Evidence reveals that only two applicants are affected by the allegations and that there is totally no connection of the second and fourth applicants to the entire application. To date I have no explanation as to why applicants 1 and 3 were joined to this application.

The whole application is a clear abuse of the Court process and should be frowned upon by an appropriate costs order.

51. I consequently order as follows:

(a) Interim order dated 15 December 2014 is discharged.

(b) Application is dismissed.

(c) Applicants to pay costs on an attorney and client scale, the one paying the other to be absolved. The costs include wasted costs of 22 January 2015



~~J. M. Mpshe (AJ)~~

Land Claims Court of South Africa

Appearances:

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