IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Date of hearing: 29 April 2016

Case number: 82075/2014

13/6/2016

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

6/6/2016
DATE

SIGNATURE

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY **Applicant**

and

SHAWN WARREN ROSENKRANTZ **Respondent**

JUDGMENT

BRENNER AJ

1. This case involves the application of the rule of law, and the doctrine of legality, to competing interests between a Municipality, on the one hand, and occupiers of agricultural property, on the other.

2. For convenience, the applicant in casu, the Ekurhuleni Metropolitan Municipality, is referred to as "the Municipality", and the respondent, Shawn Warren Rosenkrantz, is referred to as "Rosenkrantz".

3. In November 2014, the Municipality launched an application in this Court in which it applied for an interdict against Rosenkrantz to prohibit him from using his property for purposes other than those authorised under his title deed, namely, for purposes other than as a place of residence for one family, and/or for agricultural purposes. Secondly, the Municipality sought an order directing Rosenkrantz to demolish and remove unauthorised structures on the property. Rosenkrantz was the only respondent cited in the application. The application was opposed.

4. The property is a portion of a farm. Its title deed description is portion 127 (a portion of portion 54) of the farm T […] Province of Gauteng. It is currently held by Rosenkrantz under Deed of Transfer T92823/1997. It was previously described as Holding […] Agricultural Holdings. Same will be referred to below as "the property".

5. The gist of the Municipality's complaint is twofold: its complaint is that buildings, other than the main house, have been erected on the property for which no building plans were approved, and for which no permission was obtained from it. These buildings are being used to house several families who pay rent to Rosenkrantz's mother and step-father, who also reside on the property, in the main house. In the result, so it argues, the latter parties are conducting a rental enterprise on the property, contrary to the usage permitted under the title deed conditions.

6. It contends that Rosenkrantz has also contravened provisions of the National Building Regulations and Building Standards Act, 103 of 1977 ("the Building Regulations Act"), in regard to the unlawfully erected structures, and the Peri Urban Areas Town Planning Scheme of 1975 ("the Scheme"), in regard to the permitted use of the property.

7. It maintains that it is duty-bound, in terms of section 40(1) and 115(1) of the Town Planning and Township's Ordinance No. 15 of 1986 (Transvaal), ("the Ordinance"), to enforce and ensure compliance with provisions of the Scheme and conditions of title imposed under title deeds to properties within its area of jurisdiction.

8. In terms of section 4 (1) of the Building Regulations Act, no person shall, without the prior approval in writing of the local authority, erect any building in respect of which plans and specifications are to be drawn and submitted. In terms of section 4(4), any person who contravenes section 4 shall be guilty of an offence and liable on conviction to a fine not exceeding R100,00 for each day on which he is engaged in so erecting such building. Under section 12 of this Act, if the local authority is of the opinion that any building is dilapidated or in a state of disrepair, or is dangerous or shows signs of becoming so, it may order the owner of such building to demolish or alter same.

9. Photographs of the structures provided by the Municipality reveal the outbuildings on the property as the irregular and uncoordinated addition of one structure onto another, in a crude fashion, with plastering which is incomplete, windows of differing size and configuration, and sloped roofing of corrugated iron, held down by solid objects placed on the roofing to keep same intact. Some of the buildings are made of brick, while others are boarded up vertically and horizontally with corrugated iron. On the probabilities, these buildings would never have been approved by any building inspector. No proof to the contrary was produced by Rosenkrantz.

10. Rosenkrantz raises two points in limine. Firstly, he argues that the demolition order will cause the de facto eviction of the tenants on the property through the back door. The tenants have been permitted by him to occupy the property and therefore their rights are protected by the Extension of Security of Tenure Act, 62 of 1997 ("ESTA"), which came into operation on 28 November 1997. In terms of section 17(1) of ESTA, only the Magistrates' Court or Land Claims Court has jurisdiction to entertain the disputes in casu, and this being the case, the application should be dismissed. If he is correct, this point will be dispositive of the application in this Court, but not dispositive of the case on the merits.

11. Rosenkrantz argues further that the tenants have a direct and substantial interest in the subject-matter of this litigation, and ought to have been joined as co-respondents in the application. In the normal course, a defence of non-joinder is dilatory in nature, in the sense that the case may be suspended by the Court pending joinder of the relevant parties.

12. Rosenkrantz provides a list of most but not all of the tenants of the property. The list includes seventeen adults, with dependants listed as thirty children, one mother and seven wives. It is not clear whether all of the dependants are occupiers as well. Rosenkrantz omits to provide all necessary detail. He asserts that the tenants are indigent, and this is not denied.

13. He asserts that the Municipality ought to have joined his mother, Frederika Francina Goebel ("Mrs Goebel"), born on 9 October 1945, and his step- father, Heinz Gerhard Max Goebel ("Mr Goebel"), born on 11 January 1932. While the Goebels reside in the main residence and not the outbuildings, so that their right of occupation would not be threatened by an adverse order, they appear to be the parties who have entered into leases with the tenants and are arguably necessary parties to the case for this reason.

14. In motivating his argument that the Goebels should be joined, Rosenkrantz contends that the Goebels are "older persons" in need of care and protection

as envisaged in terms of section 25(5)(a) of the Older Persons' Act, 13 of 2006. This by virtue of the fact that if their rental income from the tenants on the property is forfeited, it will be *"against their will and they will suffer from irreparable economic abuse".*

15. Rosenkrantz denies that the structures were unlawfully erected and puts the Municipality to the proof thereof. He contends that the buildings in dispute were already erected when he acquired the property in 1997. He initially averred that the Municipality should be estopped from enforcing its statutory obligations as a result of its inaction in enforcing same, thereby creating the "reasonable apprehension/representation" to him and to the other occupiers that the structures were lawful. This defence was abandoned in argument before Court.

16. He was well advised to do so, in the light of the case of City of **Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd 2008 (3) SA 1 SCA,** in which the SCA, at par 16 page 6 said:

"It is settled law that a *state of affairs prohibited by Jaw in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel.* "

17. Rosenkrantz refers to the constitutional obligation on the Municipality to provide the tenants with temporary emergency accommodation if eviction is ordered. He refers to section 26(3) of the Constitution which, in the Bill of Rights Chapter, under housing, provides:

"No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

18. The undisputed facts concerning the provenance of the dispute, (elicited through the affidavits of Rosenkrantz and the former owner of the property, one Almari Visser, formerly Koekemoer, ("Visser"), and unchallenged by the Municipality), are as follows.

19. Visser acquired the property from her late father-in-law in 1995 or 1996, when the structures and outbuildings were already in situ. The outbuildings were used as storage facilities for a trucking company specialising in furniture removal. This business was formerly conducted by Visser's father- in-law.

20. When Rosenkrantz acquired the property, the outbuildings had already been altered and subdivided into rooms, which were occupied by Visser's and her father-in-law's previous employees. On 3 May 1997, Rosenkrantz bought the property from Visser for the price of R180 000,00. The transfer was registered on 10 September 1997, together with a mortgage bond for R130 000,00. A second bond was registered on 30 November 2001 for the sum of R37 180,00. These bonds were cancelled on 28 February 2008, when a new bond was registered for the sum of R740 000,00. There is no indication in the papers as to what this loan was used for.

21. Condition C of the title deed is germane to the issues and reads:

"Die eiendom is onderhewig aan die vo/gende voorwaardes opgele kragtens Skedule van Voorwaardes K

1 Tensy die skrifte/ike toestemming van die Administrateur vooraf daartoe verkry is, mag nie meer as een woonhuis, dit beteken 'n huis wat ontwerp is vir gebruik as 'n woning deur een gesin, tesame met sulke buite- geboue as wat gewoonlik in verband daarmee gebruik word, op die grond opgerig word nie.

2 Tensy die skriftelike toestemming van die Administrateur vooraf verkry is, mag die grond net vir woon-en- landboudoeleindes gebruik word".

22. The property was acquired by Rosenkrantz not as his primary residence, but as a home for occupation by his mother and step-father. Rosenkrantz states that he only spends week-ends on the property. His intention was for the Goebels to farm strawberries, but this enterprise lasted for only three years. Since then, Mr and Mrs Goebel had taken to renting out rooms in the

outbuildings to various tenants, thereby generating a monthly income of some R6 800,00.

23. Despite the fact that the rental business was conducted from about 2000, the Municipality first took steps against Rosenkrantz on 15 March 2012, following a site inspection on the same day by the Development Planning Inspector, Mariana Wright ("Wright"). In a letter addressed by Wright to "The Owner/Occupier", the complaint was articulated as the unlawful use of the property *"for the erection of illegal structures occupied by people who pay rental* as *well* as *the conducting of a shebeen causing a disturbance to the neighbourhood."* Rosenkrantz was afforded 14 days within which to cease the illegal use and to restore the property to its original purpose.

24. Rosenkrantz denies having received this demand. And yet, in the same affidavit, he mentions that he paid a visit to Wright's office subsequent to her letter of 15 March 2012. The purpose being to *"discuss the state of the impugned structure/buildings .... Including certain sanitation concerns that were brought to my stepfather's attention through the contents of the letter".* He asserts that Wright said that she was only concerned with *"the state of the structures including the sanitary needs of the occupants."*

25. He avers that, after the meeting, Mr Goebel *"improved the structures and sanitation in the buildings by doing essential repairs on the window frames.*" In so doing, he alleges that he was under the impression that the Municipality's concerns were dealt with. He proffers a theory for the Municipality's launch of the application as being the pressure brought to bear on it by a neighbour, one Johan Botha, who appears to have complained to the Municipality about the tenants on the property.

26. Nothing happened for over a year. Wright inspected the property again on 25 April 2013. She compiled a report on 6 May 2013, which reiterated the continued illegal use of the property. The Municipality's lawyers then addressed a letter of demand to Rosenkrantz on 4 November 2013. A

demand was made for written confirmation that the illegal use would immediately cease, failing which, interdictory relief would be sought. There was no response to this demand. Rosenkrantz denies that either he or Mr Goebels, (whose postal address was cited in the letter), had received this demand. A year later, on 10 November 2014, the Municipality launched this application. The hearing of this application occurred over four years after the Municipality was first alerted to the situation, and about sixteen years after the tenants began to occupy the property.

27. Rosenkrantz is flouting the law by permitting the unlawful use of his property as a rental operation, when it is currently restricted to use by one family as a residence and for agricultural purposes. He has made no effort to apply for the removal of restrictive conditions of title to expunge the conditions which he continues to offend. Neither is it his stated intention to do so. He denies that the structures were unlawfully erected, chasing rather to put the Municipality to the proof thereof. His denial is bare and unsubstantiated.

28. Generally, a respondent may not content himself with bare denials unless there is no alternative and nothing more can be expected of him. See Room **Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 T at 1163** and **Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 SCA at 375G.**

29. Enquiries could and should have been made by Rosenkrantz to establish whether building plans were ever approved. He does not produce any approved building plans, or the written consent of the Municipality to erect these buildings. He has taken no steps to make independent enquiries about the structural integrity of the buildings and to establish whether they comply with health and safety standards, whether in the interests of the tenants, or at all. He misconstrues the Municipality's letter of March 2012 as relating only to sanitation issues and asserts that he relied on his elderly stepfather to remedy same, with no proof that Mr Goebel had the requisite expertise to fix the problem.

30. Paradoxically, while being concerned about the potential homelessness of his indigent tenants, on the one hand, he shows a casual indifference towards the protection of their health and safety, on the other. Albeit that there is no evidence of any adverse incidents over the period of occupation by tenants, this fact simpliciter cannot excuse him from his duty to examine the concerns of the Municipality and the continuing illegality of his actions with a modicum of responsibility.

31. It appears that Rosenkrantz is invoking ESTA as a convenient mechanism for flouting his legal duty to respect the conditions of title to which he bound himself when he acquired the property, and to which he remains bound to date. This is an untenable state of affairs which no Court of law should countenance.

32. This does not mean, however, that the constitutional rights of the tenants on his property should be compromised as a result of his conduct. There is certainly no indication that the tenants are even aware of the fact that their tenancy on the property falls foul of its conditions of title.

33. The rental enterprise is unlawful, so it is inappropriate for Rosenkrantz to rely on the Older Persons' Act as a legitimate pretext for sanctioning his unlawful conduct. As an IT consultant employed at Mobile Web Design, Rosenkrantz is presumably earning a reasonable income which would enable him to contribute more substantially towards the support of the Goebels than the medical aid premiums currently paid by him. His income was certainly enough to justify his obtaining a mortgage bond in the sum of R740 000,00 in 2008. There is no evidence that his financial position has deteriorated since then.

34. The section relied upon by Rosenkrantz, being 25 (5) (a) of the Older Persons' Act, defines an older person who is in need of care and protection as one who *"has his or her income, assets or old age grant taken against his or her wishes or who suffers any other economic abuse."*

35. The reference to "income" can only mean income which is lawfully earned. The section can admit of no other interpretation, as otherwise, Rosenkrantz would be asking the Court to sanction the proceeds of unlawful activities, and to permit illegality to trump legality.

36. The need for this Court to respect the rule of law dictates that Rosenkrantz should not be permitted to hide behind the rights of the tenants and his mother and stepfather to avoid his duty to adhere to the conditions of title, the Scheme, and the Building Regulations Act.

37. The case of **United Technical Equipment Co v Johannesburg City Council 1987 (4) SA 343 TPD** is of relevance. In this case, the owner of property in Houghton had, without attempting to establish whether such use was lawful, proceeded to use the building thereon for office purposes when the property was zoned for residential use. In an application to interdict the continued unlawful use, the owner asserted that it intended to apply for the removal of restrictive conditions of title and that any interdict should be suspended pending such application. The Court refused this relief. At page 348H:

" The respondent has not only a *statutory duty but also* a *moral duty to uphold the law and to see to due compliance with its town planning scheme. It would in general be wrong to whittle away the obligation of the respondent* as a *public authority to uphold the law.* "

38. Given the factual matrix at hand in this case, however, the matter is not so simple. In its replying affidavit, which traverses the points in limine and other issues raised by Rosenkrantz, the Municipality makes the following sweeping statements:

"The facts and circumstances of the present matter clearly pertain to the principle of legality and the enforcement of the rule of law ..... the Applicant is legally obliged to enforce the rule of law. .... the Respondent seeks the above Honourable court to condone the continued illegal use of the property."

39. While taking cognisance of Rosenkrantz' disregard for his legal obligations vis a vis the Municipality, I am nevertheless constrained to take account of the legal rights of the tenants on his property. I cannot, as the Municipality expects, disabuse my mind of their constitutional rights. Pure common sense dictates that an order for the demolition and removal of the unauthorised structures on the property will necessitate the prior, or accompanying, eviction of these tenants. The Municipality argues that an adverse order against Rosenkrantz on his own would suffice because it would compel him to cancel the leases with the tenants. Yet, on the facts, the leases appear to have been concluded between the Goebels and the tenants, and the Goebels have not been cited as co-respondents. For this reason, it would be necessary to join them to the proceedings.

40. In **Motswagae and Others v Rustenburg Local Municipality and Another 2013 (2) SA 613 CC.** the Municipality had, without a court order, commenced construction work which involved excavation with a bulldozer. This took place near the wall of one of the applicant's homes, exposing its foundations. The Constitutional Court granted a prohibitory interdict against the Municipality, enforceable unless and until it obtained a court order or written consent from the landowner. At par 12, the Court said:

''The underlying point is *that an eviction does not have to consist solely in the expulsion of someone from their home. It can also consist in the attenuation or obliteration of the incidents of occupation."*

41. The tenants on Rosenkrantz's property plainly have a direct and substantial interest in the subject matter of the application, as their interests may be prejudicially affected by an adverse judgment of this Court. As such, they are necessary parties.

42. Tenants were considered as necessary parties in the case of **Rosebank Mall (Pty) Ltd and ano v Cradock Heights (Pty) Ltd 2004 (2) SA 353 WLD,** a decision of the full bench of the then WLD. In this case, the Court

accepted that the terms of a co-operation agreement had been breached. One of the parties had permitted the unlawful erection of structures in areas then occupied by several restaurants, contrary to the co-operation agreement, which contemplated that these areas would be made available for pedestrian use. The Court found that it was necessary to join the tenants in an application to demolish and remove the structures. It was found that the tenants, while not parties to the co-operation agreement, had acquired rights of possession, aliunde the agreement, from the owner and possessor of the areas leased. These rights would be *"adversely affected if the demolition order or the interdict were carried into effect."* (vide p373 par 38 H-1).

43. The joinder of SA Home Loans, the mortgagee of the property in casu, is another aspect to consider. This because it also has a substantial interest in the matter. It has real rights, the value of which may be affected by the demolition of the structures. Vide: **The Standard Bank of South Africa Ltd v Swartland Municipality and others 2011 (5) SA 257 A** in which the Court, while recognising the interest of the bondholder, nevertheless found that the bondholder's rights per se did not found a defence to an application arising from the unlawful erection of buildings. It may be necessary for SA Home Loans to address the question as to why it extended the loan facility to Rosenkrantz when, by the exercise of diligence, it could or should have known that certain of the buildings were not lawfully erected, this because it is the usual practice for a financial institution to inspect property which is offered as security for a loan before the loan is granted.

44. The rule of law and doctrine of legality apply as much to the rights of occupiers of land and buildings as to the duty to respect the permissible usage of land. As a result of our constitutional dispensation, a plethora of legislation has come into being to protect the rights of both lawful and unlawful occupants of land in South Africa, and those who were previously dispossessed of such rights. The Restitution of Land Rights Act, 22 of 1994,

which commenced on 2 December 1994, came into being to protect the rights in land to persons dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws. The Land Reform (Labour Tenants) Act 3 of 1996 was enacted to provide for security of tenure of labour tenants and those persons occupying through them. ESTA was designed to regulate the eviction of vulnerable and impecunious occupiers of rural and semi-rural land "in a fair manner." The PIE Act (The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998), is also designed to process the eviction of unlawful occupiers in a fair manner, and to provide alternative accommodation, insofar as is feasible, to those who become homeless as a result of their eviction.

45. The question arises as to whether the tenants in casu are unlawful or lawful occupiers. In this case, the consent of the owner is an established fact, and the issue of legality hinges on the consent of the owner. I am fortified in this stance by the definition of "occupier" in section 1 (1) of ESTA, which defines an "occupier" as

"a *person residing on land which belongs to another person. and who has or on 4 February 1997 or thereafter had consent or another right in law to do* so...." *(my emphasis)*

46. In the result, the provisions of ESTA would apply in casu. In terms of section 2(1) of ESTA, this Act applies to all land, other than land in a township, including any land within such a township which has been designated for agricultural purposes in terms of any law. The property in question falls within this definition. Section 11 covers the process required for orders for the eviction of persons who become occupiers after 4 February 1997. On the uncontradicted version of Rosenkrantz, the tenants started to take occupation circa 2000. Section 12 mentions the further requirements to be complied with so as to honour the precept of fair process. Under section 17 (1), legal proceedings may be brought in either a Magistrates' Court having jurisdiction, or in the Land Claims Court. In terms of section 17 (2), proceedings may be brought in the High Court provided that all the parties

consent thereto. Not all of the interested parties have consented to the jurisdiction of the High Court.

47. The provisions of ESTA were of consequence in the case of **Mkangeli and Others v Joubert and Others 2002 (4) SA 36 SCA.** The respondents on appeal, being landowners in the immediate vicinity, had applied for an order to remove the appellants and their dwellings on a neighbouring property in a semi-rural area northwest of Johannesburg. This because the land was being used contrary to the town-planning scheme and the respondents were an unlawful nuisance. The Court found that a non-owner has the locus standi to bring an eviction application in terms of ESTA, since ESTA contained no express prohibition against this.

48. The issue was whether a non-owner could succeed in an eviction if the owner refused to terminate the occupier's occupation. The SCA held that such a non-owner could seek an order to compel the owner to withdraw his consent and then to take the necessary steps under ESTA to secure the eviction. At paragraph 16 of the judgment, Brand, JA says:

"There is no suggestion that any of the parties to the present matter consented to the jurisdiction of the High Court. It follows that if the appellants are correct in their contention that the matter is governed by the provisions of ESTA, it must be accepted that the court a *quo had no jurisdiction to grant an order for the eviction of the appellants and for that reason alone the appeal must succeed."*

49. The SCA in **Mkangeli** at para 21 gave guidance as to how a non-owner of property (such as a neighbour, or, in casu, a Municipality) might succeed in causing the occupier's eviction under ESTA:

"On the assumption that the non-owner/applicant has the right to seek the eviction of the occupier, but he can only do so *with the cooperation of the owner, I can* see *no reason why he cannot join the owner in an eviction application under* ESTA *His relief sought against the owner will effectively be for an order compelling him to withdraw his consent - in accordance with*

the provisions of ESTA - and to take such steps as *he can under ESTA to cause the eviction of the occupiers from his land."*

50. My attention was drawn by the Municipality to the case of **Lester v Ndlambe Municipality 2013 JDR 1841 SCA** in which the demolition of an unlawfully erected home worth about RB million, at the behest of the local authority, was ordered. This is immediately distinguishable from the present case, because the home-owner and only occupier in **Lester** did not suggest that the demolition would render him homeless and destitute.

51. The **Lester** case implies, however, that the Court is indeed vested with a constitutional discretion where the rights of occupants who may be rendered homeless by the demolition are affected. At para 26, the following statements are of direct relevance to the issues in this case:

" Local government, like all other organs of state, has to exercise its powers within the bounds determined by the law and such powers are subject to constitutional scrutiny, including a *review for legality."*

52. The limitations on the exercise of powers by public bodies were enunciated in **Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC)** at para 40:

"These provisions (ie ss *174 (3) and 175 (4) of the Constitution) imply that* a *local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is* a *fundamental principle of the rule of law, recognised widely, that the exercise of public power* is *only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality* - is *generally understood to be* a *fundamental principle of constitutional law."*

53. The Municipality's Counsel proposed that I might grant an interdict yet suspend its operation for a short period to enable Rosenkrantz to cancel the leases. I was referred to **410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and others (2010) 4 All SA 414 WCC.** Here, an

interdict was granted to prevent the Department of Home Affairs from operating a refugee reception office, in contravention of the title deed conditions, unless and until the applicable land use restrictions were amended, so as to permit the lawful operation of the office at the premises. The building in question was not a residence for any occupants. It was an office. The rights of residential tenants did not come into the enquiry.

54. In any event, I align myself with the ratio in both **Peri-Urban Areas Health Board v Sandhurst Gardens (Pty) Ltd 1965 (11 SA 683 T and United Technical Equipment Co v Johannesburg City Council 1987 (4) SA 343 TPD,** in which the Court found that it had no general discretion to suspend the operation of an interdict against illegal land use where the wrong complained of amounted to a crime. Both of these cases were cited with approval in the **Lester** judgment.

55. The Municipality ought to have been aware of the constitutional imperatives attached to its claims against Rosenkrantz when Wright's inspection occurred in March 2012, and this was confirmed on delivery of Rosenkrantz' answering affidavit in this application. Yet it persisted in professing that it was not seeking the eviction of the tenants, when in fact it was. It had to be. No other inference may be drawn.

56. In argument before me, it insisted that to refuse to entertain its claim would amount to condonation of illegal conduct, and a disregard for the rule of law. Yet it has shown no concern for the rights of the numerous tenants who may be rendered homeless in the process of its demolition order being enforced. What it wants to do is to demolish the tenants' homes. It has made no tender for emergency alternative accommodation for them as against the enforcement of the order.

57. In the case of **Free State Province v Terra Graphics (Pty) Ltd 2016 (3) SA 130 SCA,** the Court had the following to say about the legality principle being invoked by a provincial government:

"Ironically, it (the Government) relied on the principle of legality to avoid honouring agreements that it had authorised. It hardly requires any imagination to consider what members of the public would make of such behaviour."

58. On the duty of the State, and, by necessary implication, this duty would apply equally to that of a municipality, the Constitutional Court made the apposite comment in **Mohamed and Another v President of the RSA and Others 2001 (31 SA 893 (CC) at par 68:**

"South Africa is a *young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the State lead by example. This principle cannot be put better than in the celebrated words of Justice Brandeis in Olmstead et al v United States:*

> *"In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously .....Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example.....If the government becomes the lawbreaker, it breeds contempt for the law; it invites every man to become a Jaw unto himself; it invites anarchy.* "

59. This is a case in which it may safely be argued that Rosenkrantz should share some responsibility for the relocation of the tenants if the Municipality is granted its order in due course, in a Court with jurisdiction to entertain the case.

60. Based on the applicability of ESTA to the facts in casu, this Court has no jurisdiction to hear an application which, if granted, will cause, as a concomitant and necessary incident, the eviction of tenants who are occupying agricultural land with the consent of the owner. On this ground simpliciter the application must fail.

61. Moreover, and albeit that the jurisdictional issue disposes of the case in this Court, so that the issue for present purposes is academic, it will be necessary in due course for the Municipality to join all tenants residing on

the property, and the Goebels, and possibly the bondholder, as interested parties to any such proceedings.

62. I turn to the question of costs. **A C Cilliers. The Law of Costs. Lexis Nexis, issue 32, September 2015, at par. 2.08. page 2-12** has this to say on the subject:

"The general principle regarding the award of costs is we/l-settled. It is entirely a *matter for the discretion of the court which is to be exercised judicially upon* a *consideration of the facts of each case and in essence it is* a *matter of fairness to both sides."*

63. In the exercise of its discretion, the Court is obliged to take cognisance of the general rule that a successful litigant is entitled to his/her costs. Its overriding discretion must be judicially exercised, having regard to the facts germane to the enquiry.

64. There is a well-founded basis for departing from this rule in this case. In equal measure, both parties have shown a level of impunity towards the application of the rule of law.

65. To award costs in favour of a successful party who is continuing to offend the law and has made no effort to address this conduct would be inappropriate. The defence raised by Rosenkrantz is substantially dilatory in nature as it remains open to the Municipality to pursue its case in the Magistrates' Court or the Land Claims Court. On the merits, he remains in breach of the law.

66. His attitude is more than adequately borne out by an absence of any tender to remedy the situation on a permanent basis, other than to protest a rather insincere concern for the tenants on his property, whose security of tenure continues to remain imperilled.

67. Despite the Municipality failing in this application, it would be inequitable to penalise it with an award of costs. Each party should bear its own costs of suit.

68. The following order is made:

a. the application is dismissed;

b. each party shall bear its/his own costs of suit.

T BRENNER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
6 June 2016

Appearances:

Counsel for the Applicant: Instructed by:	Advocate Botha Attorneys du Plessis de Heus and Van Wyk
Counsel for the Respondent:	Advocate W S Britz
Instructed by:	Manfred Jacobs Attorneys