



## **RIGHTS OF LONG TERM LESSEES UNDER THE (LAND) RESTITUTION ACT**

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### **Introduction**

Land expropriation and restitution without compensation are presently some of the most pressing concerns on many South African landowners' minds. Despite some of these concerns being allayed in light of the seemingly reasonable approach the State has suggested to land expropriation and restitution, the practical implementation of this approach will keep citizens on their toes for the foreseeable future. It is thus a very wise idea for landowners to familiarize themselves with their rights as contained in the Restitution of Land Rights Act 22 of 1994 ("the Restitution Act"), which act regulates the procedure of land restitution in South Africa.

An ancillary concern arising from land restitution which many may overlook, but which could have equally important repercussions, is the fate of your long term lease agreement if land restitution occurs. It is a well-established principle of our common law, referred to as *huur gaat voor koop*, that in normal circumstances and by the operation of law, thus without necessitating the conclusion of a further agreement, the new owner of leased property is bound by all existing lease agreements on that property. However, this principle was created to bind the purchaser of land to existing lease agreements and did not take into account transfer by means of restitution by the State to a third party. In a very recent judgment of *Eastern Produce Estates SA (Pty) Ltd v Wales Communal Property Association and others* (2018) 3 All SA 123 (LCC) the Land Claims Court was challenged on the constitutionality of the principle under the Restitution Act.

### **Eastern Produce Estates SA (Pty) Ltd v Wales Communal Property Association**

In this case Eastern Produce Estates ("the Applicant") lodged an application to protect their rights as a long term lessee, in light thereof that the Wales Communal Property Association ("the Respondent") failed to recognise their right to continue occupying the property and had

threatened to evict them from the property. The Respondent obtained ownership rights to half of the property that the Applicant was leasing in terms of Section 42D of the Restitution Act and a supporting settlement agreement concluded in 2013. The terms of the agreement read that on registration of the property in the Respondent's name, they would receive possession and occupation of the property.

The Applicant had not been aware of this settlement agreement until receiving the threat of eviction. In an attempt to protect their rights and in light of the threatened eviction, they approached the Court for three forms of relief, namely to review and set aside the transfer of the property to the Respondent as it adversely affected and/or cancelled their rights, an interdict to prevent the Respondent from lodging an application for evicting them and to declare that the Lease Agreement be recognised as valid and binding on the Respondent. The Respondent objected to all three forms of relief sought and presented three counter-arguments to the Court, as described hereafter. The Court's findings on these arguments confirmed some very important aspects of the South African legal position.

### **1. The lease agreement was invalid and unenforceable**

The Respondent argued that the lease agreement was invalid as it was concluded in terms of the Development Trust and Land Act 18 of 1936 ("the Trust Act"). The Trust Act determines that the relevant property must be used "for the exclusive use and benefit of black people". As the lessee was a company controlled by a white majority, the lease agreement cannot be enforced. The Court rejected this argument as the Act does not prohibit *leasing* the property to non-black citizens. The benefit of the rental amount being paid was for the exclusive benefit of the black owners of the property and therefore the lease agreement is valid.

### **2. *Huur gaat voor koop* does not apply to unregistered long term leases**

The Respondent's second argument was that the Respondent is not bound to the long term lease as it was not registered at the Deed's Office. Again the Court rejected this argument in light of the fact that the Respondent at all times were aware of the lease agreement even as early as 2013. The doctrine of knowledge is an exception to the rule that long term leases must be registered and therefore the Respondent is bound to the lease agreement.

### **3. *Haar gaat voor koop* cannot apply to land allocated under the Restitution Act**

The Respondent's final argument was that applying the principle of *huur gaat voor koop* to land restitution is unconstitutional. The argument continued that the mischief that the Restitution Act aims to address, i.e. restoring land to owners previously deprived thereof, would be ignored by a

failure to restore them to encumbered possession and occupation of the land. Again the Court rejected this argument, stating that nothing in the Restitution Act prevents either the State or alternatively the Court, from overriding the principle of *huur gaat voor koop* if it is just and equitable to do so. As an example an agreement may be reached whereby the lessee is compensated for the remainder of his lease term but must vacate the property immediately.

### **Relief granted to Applicant**

The Court accordingly acknowledged that the lease agreement is valid and binding on the Respondent and granted the Applicant's relief on this point. However, the Court found no reason to cancel the transfer as the lessee would not be prejudiced any further now that the lease agreement is declared valid and binding. The Court also found no reason to grant an interdict as the mere threat of instituting legal action for an eviction, which the Applicant may oppose, did not warrant it.

### **Conclusion**

The above findings by the Court is good news for long term lessees who face the possibility of their landlord being subjected to land restitution. It confirms the protection of their rights even where land is re-allocated under the Restitution Act. However, it is important to take note that this decision was made without considerations of the recent developments in land reform. An interesting question that will inevitably come before our Courts in the future is whether compensation will still be paid to lessees that are legitimately deprived of the remainder of their lease rights (if the State or Courts believes it is just and equitable to do so), after a decision was made to redistribute the land without paying compensation to its owner. However, for the time being the rights of long term lessees are protected.

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