

## IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

**The President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd**

**CCT 20/04**

**Decided on 13 May 2005**

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### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

This is an application by the President of the Republic of South Africa together with the Minister of Agriculture (the state) for leave to appeal against the decision of the Supreme Court of Appeal (SCA). The respondent is Modderklip Boerdery (Pty) Ltd (Modderklip), a private company whose farm was occupied unlawfully.

During the 1990s the occupiers, who were evicted from the adjoining strip of land, moved onto a portion of Modderklip's farm. The Benoni City Council gave Modderklip notice to institute eviction proceedings against the occupiers. Modderklip's response was that it was the Council's responsibility to do so and that Modderklip would do whatever was necessary to assist the Council should it proceed with eviction proceedings. The Council did not take any steps in this respect. Modderklip then laid charges of trespass against the occupiers. Those convicted were given warnings by the court and released, but they simply went back to the farm and resumed their occupation. Modderklip then sought to remove the occupiers from its farm with the help of police and other organs of the state, including the Council, but received no co operation. It also offered to sell the affected portion of the farm to the Council at a negotiable price, but nothing came of it.

Modderklip instituted proceedings in the Johannesburg High Court for an eviction order. The court granted the eviction order and authorised the sheriff to enlist the assistance of the police in carrying out the evictions. The order was never complied with because the sheriff, who had to engage a security company to help her implement the order, required a deposit of R1,8 million which Modderklip was not in a position to pay. The amount was more than the value of the property. About 50 hectares of Modderklip's property are now under unlawful occupation, with a population of about 40 000. The police refused the request to enforce the eviction order because it regarded the matter as a private civil dispute between Modderklip and the occupiers. Moreover, they did not know where the occupiers could go without unlawfully occupying land elsewhere.

Finding itself with an eviction order that it could not enforce, Modderklip then approached the Pretoria High Court. The court imposed a structural interdict requiring the state to present a comprehensive plan to the court and to the other parties indicating the steps it would take to implement the court order. The state appealed to the SCA, which substantially upheld the judgment of the Pretoria High Court, but altered the order against the state. It no longer required the state to show how it would evict the occupiers, but instead required it pay compensation to Modderklip for the loss occasioned by the unlawful occupation. The compensation was to be computed in terms of the Expropriation Act.

Before this Court, the state argued that because Modderklip's property rights had been infringed by private individuals, the state had not breached any of Modderklip's rights. It also argued that Modderklip was not entitled to the relief it claimed because it had neglected to apply for an eviction order timeously.

Langa ACJ, for a unanimous Court, holds that the obligation on the state goes further than the mere provision of mechanisms and institutions with which to enforce rights. It is also obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law; and that it is unreasonable for a private entity to be forced to bear the burden which should be borne by the state of providing the occupiers with accommodation. The Court finds that in the circumstances of this case, it was unreasonable of the state to stand by and do nothing when it was impossible for Modderklip to evict the occupiers because of the sheer magnitude of the invasion and the particular circumstances of the occupiers. Land invasions of this scale threaten far more than the private rights of a single owner and have the capacity to be socially inflammatory and the potential to have serious implications for stability and public peace. They should always be discouraged. Failure by the state to act appropriately in such circumstances means that Modderklip, and others similarly placed, could not look upon the state and its organs to protect them from such invasions. This would be a recipe for anarchy. The obligation resting on the state was to take reasonable steps to ensure that Modderklip was provided with effective relief. The state could have expropriated the property in question or provided other land, a course that would have relieved Modderklip from continuing to be forced to provide the occupiers with accommodation. The state failed to do anything and accordingly breached Modderklip's constitutional rights to an effective remedy as required by the rule of law and the Constitution. This Court also agrees with the SCA that Modderklip cannot be blamed for any delay in instituting eviction proceedings and for the failure to consummate the eviction order. It had been prudent in its actions and had acted reasonably.

As the SCA had done, the Court holds that the state should compensate Modderklip for the unlawful occupation of its property in violation of its rights. The compensation also ensures that the occupiers will continue to have accommodation until suitable alternatives are found and it relieves the state of the task of having to immediately find such alternatives.