

SOUTH AFRICA / JUDGMENT

Droomer NO and Another v Snyders and Others (A336/2019) [2020] ZAWCHC 72 (4 August 2020) [2020] ZAWCHC 72

COURT

Western Cape High Court, Cape Town

BEFORE

Binns-Ward, Cloete, Slingers

CASE / FILE NUMBER

A336/2019

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case number: A336/2019

Before: The Hon. Mr Justice Binns-Ward

The Hon. Ms Justice Cloete

The Hon. Ms Justice Slingers

Hearing: 31 July 2020

Judgment:

4 August 2020

In the matter between:

HENRI DROOMER N.O. First Appellant

WILLEM JACOBUS VAN WYK N.O. Second Appellant

(In their capacity as trustees of the R45 Trust)

and

DENVER SNYDERS AND 24 OTHERS Respondents

JUDGMENT (delivered by email and release to Saflii)

BINNS-WARD J (CLOETE and SLINGERS JJ concurring):

- [1] This is an appeal from the judgment of Saldanha J upholding the respondents' objection[1] to the jurisdiction of the High Court to adjudicate motion proceedings instituted by the appellants for the eviction of the respondents from certain immovable property near Pniel in the municipality of Stellenbosch. The appeal to the Full Court is brought with the leave of the learned judge at first instance.
- [2] The Municipality, which was cited as the 25th respondent in the proceedings at first instance, has not played an active role in the litigation. Any reference to 'the respondents' in this judgment accordingly denotes only those of them who were cited as persons allegedly in unlawful occupation of the land concerned.[2]
- [3] The court a quo acceded to a request by the parties to decide the issue of jurisdiction as a separate and preliminary point. It must be inferred from this that the court and the parties considered that the respondents' objection to the court's jurisdiction was a matter that might conveniently be determined discretely from the merits of the claim. Regrettably, the judge's attention was not directed to binding appeal court authority that deftly disposed of the point; see *Agrico Masjinerie (Edms) Bpk v Swiers* [2007] ZASCA 84 (1 June 2007); 2005 (5) SA 305 (SCA); 2007 (10) BCLR 1111. The unfortunate consequence was that, inconsistently with that authority, the court upheld the respondents' objection to its jurisdiction to entertain the matter and dismissed the application. In the result it was clear that the appeal had consequently to be upheld, and Mr Papier for the respondent quite correctly accepted as much.
- [4] Reversing the dismissal of the application requires us to consider how its further adjudication should proceed on the merits, and for that purpose it is necessary to go into what happened in the first instance hearing in some detail.
- [5] The eviction proceedings were instituted in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act). According to s 2 of that Act its provisions apply in 'in respect of all land throughout the Republic'. Section 29(2), as amended, of the Extension of Security of Tenure Act 62 of 1997 (ESTA) provides, however, that '[t]he provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998, shall not apply to an occupier in respect of land which he or she is entitled to occupy or use in terms of this Act.' (Underlining for emphasis.)
- [6] The respondents contended that they are 'occupiers' within the meaning of ESTA, and that the proceedings for their eviction in terms of the PIE Act were consequently incompetent.

They alleged that the court a quo lacked jurisdiction because proceedings for the eviction of ‘occupiers’ who are entitled to the protection of ESTA can take place in the High Court only with the consent of all the parties.[3] Absent such consent, so contended the respondents, the relevant eviction proceedings could competently be instituted only in a magistrate’s court or the Land Claims Court.[4]

[7] Despite the provisions of s 29(2) of ESTA quoted above, the judge considered it unnecessary for the court ‘to express its view whether the [respondents] qualified as [occupiers] under ESTA’. It would appear that having rejected the appellants’ contention that the affected land was not amenable to ESTA by reason of the exclusions provided in s 2(1) of that Act, the judge considered that his determination on that point afforded sufficient basis, on its own, to decide the preliminary point against the appellants and dismiss the application. The essence of the court a quo’s approach was expressed as follows in para 17 of the judgment:

During the course of argument counsel for the applicants sought to invite the court to express its view as to whether the [respondents] qualified as occupants [it is clear that by ‘occupants’ the court meant ‘occupiers’] under ESTA was a matter for this court to determine when considering the jurisdictional issue. Counsel for the respondents initially claimed that the respondents qualified as occupants under ESTA and that strengthened their claim for the application of ESTA in these proceedings. I am of the view that it is not necessary for this court to make such a determination in these proceedings as I am of the view that the applicant has not satisfied the court that the application for the eviction falls to be determined under PIE and that the application for an eviction of the applicants stands to be determined in accordance with the provisions of ESTA.[5]

[8] The court a quo’s view of the case did not take into account that the protection of ESTA is available only to persons who are ‘occupiers’ as defined in that Act. It follows that if the respondents are not such ‘occupiers’, the proceedings for their eviction were correctly instituted under the PIE Act; aliter, only if they are ‘occupiers’.

[9] Whilst, for the reason that I shall explain presently, it would not have been dispositive of the jurisdiction issue that had been reserved for preliminary determination, the characterisation of the respondents as ‘occupiers’ is a key question in the case. The judgment of the court a quo addressed it only in part. As the order we shall make will remit the application to the court a quo for determination on its merits, it will therefore be useful, I think, to dwell in some detail on the characterisation question in general and, in particular, in regard to the respect in which it has already been dealt with in part in the judgment a quo.

[10] The term ‘occupier’ is defined as follows in s 1 of ESTA:

“occupier” means 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, but excluding-

(a) [deleted];

- (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and
- (c) a person who has an income in excess of the prescribed amount.

Section 2 of ESTA excludes certain land from the aegis of the statute.

[11] It is therefore evident that the combined incidence of three elements is necessary to qualify a person as an 'occupier' within the meaning of ESTA. He or she must be (i) residing on the land of another to which the Act pertains, (ii) with consent (in place as at 4 February 1997 or obtained thereafter) or by virtue of another right in law to do so, and (iii) must not be in receipt of an income in excess of the prescribed amount. The judgment of the court a quo treated only of the first element and gave no attention to the other requirements of the concept.

[12] With regard to the first of the aforementioned elements of the definition of 'occupier', s 2 of ESTA qualifies the character of the land that is subject to ESTA. Thus, land that is in a township or encircled by a township or townships is generally not subject to ESTA. If the land in question was not subject to ESTA, the respondents could not qualify as 'occupiers' under the Act even if their occupation of it had been with consent and their income was below the prescribed amount. Section 2 of ESTA therefore afforded an appropriate (though not necessarily in all cases the most appropriate) starting point for the enquiry. It provides as follows in relevant part:

- (1) Subject to the provisions of section 4 [which find no application on the facts of the current matter], this Act shall apply to all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships. but including -
 - (a) any land within such a township which has been designated for agricultural purposes in terms of any law; and
 - (b) any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition.
- (2) Land in issue in any civil proceedings in terms of this Act shall be presumed to fall within the scope of the Act unless the contrary is proved.
- (3) ...

[13] It follows from s 2(2) of the Act that the court a quo was obliged to accept that the land in issue fell within the scope of ESTA unless the appellants proved the contrary.

[14] The essence of the appellants' case in this respect was that the land was in a township or encircled by a township and that it was not designated for agricultural purposes in terms of any law.

[15] The word 'township' is not defined in ESTA, but the context in which it is used in s 2 makes it clear that something more than just a developed area is required.[6] A 'township' for the purpose of the Act means a development or approved subdivision that has been formally recognised

as such in terms of a law.[7] That is the effect of the words 'established, approved, proclaimed or otherwise recognised as such in terms of any law'. There was no evidence before the court a quo that the land in question or that which surrounded it qualified as a township by virtue of formal legal recognition as such.

[16] The fact that it has been earmarked in terms of the Stellenbosch Municipality's 2017 spatial development framework as an area for future development does not make the land a township, as the appellants' counsel tried to contend. A spatial development framework is a conceptual guide that sets out a local authority's land use and development aspirations. It forms part of a municipality's integrated development plan; see s 26(e) of the Local Government: Municipal Systems Act 32 of 2000. It does not confer land use rights, and although it might identify land for township development, it is not the medium whereby a township is established, approved, proclaimed or otherwise recognised as such in terms of any law.

[17] The evidence did establish, however, that the land was zoned for agricultural use in terms of the applicable land use scheme. There was no evidence as to precisely what the implications of that zoning were under the scheme. In my judgment, however, the court a quo was entitled to infer from its zoning that the land was 'designated for agricultural purposes'. That is, after all, what zoning as 'agricultural' ordinarily connotes. Zoning schemes (or 'land use schemes' as they are called under the current nomenclature) used to have legal effect in this Province by virtue of the

provisions of the Land Use Planning Ordinance 15 of 1985, and have continued to do so latterly in terms of s 26 of the Spatial Planning and Land Use Management Act 16 of 2013. There is no doubt that they count as 'law' within the meaning defined in s 2 of the Interpretation Act 33 of 1957.

[18] So, even if it were assumed, against the weight of the evidence, that it is in a township or encircled by a township, the land would nevertheless be subject to ESTA. It does not matter that by virtue of its character – it is small, divided by a railway line, and of an awkward shape – it is not practically suitable for agricultural use. Nor is it relevant that it has never been used for agricultural purposes. The determinant criterion is its designation for agricultural purposes in terms of a law. The submission by the appellant's counsel that the land had to be in actual use for agricultural purposes was misconceived. The word 'designate' in the relevant sense means to 'officially

give a specified status'; zoning is a commonly encountered means of giving land an officially specified purpose for land use objectives. The evidence that the previous owner ran a shop on the land did not take the matter further. A shop on agricultural land is in any event by no means an unfamiliar phenomenon, and I would therefore not be surprised to discover that

running a shop is a permitted use on land designated for agricultural purposes in terms of any land use scheme.[8]

- [19] In all the circumstances the court a quo cannot be faulted for concluding that the land in issue was amenable to ESTA. On any approach the appellants did not rebut the presumption in terms of s 2(2) of the Act.
- [20] As I have stressed, however, that conclusion was not determinative of the question whether the respondents were 'occupiers'. It remained to be determined whether the circumstances of the respondents' occupation of the land satisfied the second and third elements of the concept.
- [21] The respondents did not qualify as 'occupiers' unless their occupation of the land had been with the consent of the owner of the land or the person in charge of it. It is in this regard that ESTA falls to be distinguished from the PIE Act. A person who occupies land that is not in a township or encircled by township land nor designated for agricultural purposes, and initially took occupation with the consent of the owner, can only be evicted from it subject to ESTA if he or she satisfies the other requirements to be an 'occupier'. A person, who is not an 'occupier' as defined in ESTA, and who occupies any land without the consent of the owner and remains there unlawfully falls to be evicted in proceedings instituted in terms of the PIE Act.[9] If the respondents had consent to occupy the land, and also satisfied the prescribed income requirement, the consent could be withdrawn or terminated lawfully only in accordance with s 8 of ESTA. [10] Section 9 of ESTA provides that an 'occupier' may be evicted only in terms of an order of court issued under the Act, and that such an order may be made only if the 'occupier's' right of residence has been terminated in terms of s 8.
- [22] In the current matter the appellants alleged that the respondents never had consent to occupy the land. On the allegations made in the founding papers, it therefore appeared that the claim for eviction had been competently brought under the PIE Act, and that the court a quo was possessed of the requisite jurisdiction to grant the relief sought by the applicants. In the circumstances it is not clear why it was thought that the jurisdictional question lent itself to convenient determination separately from the merits of the case. An allegation by a respondent in eviction proceedings under the PIE Act that he or she is an 'occupier' in terms of ESTA makes out a defence in such proceedings. Raising the defence does not oust the court's jurisdiction to determine it as part of the PIE Act proceedings. On the contrary, an inherent part of the court's task in that situation is to decide on the validity of the defence. Doing so does not entail discharging any function reserved to the Land Claims Court by ESTA. That much was confirmed in comparable circumstances in the binding appeal court authority to which reference was made at the outset of this judgment; see *Agrico Masjinerie*

(Edms) Bpk v Swiers supra, at para. 19-22.

- [23] Were the position otherwise, a respondent would be able to defeat a claim for eviction under the PIE Act simply by making the allegation that he or she was an ‘occupier’ within the meaning of ESTA irrespective of the truth or correctness of the assertion. If that were permissible it would give rise to an untenable catch-22 situation as to which court had jurisdiction. Would the appellants then have to institute proceedings in the Land Claims Court despite their contention that the respondents were in point of fact not ‘occupiers’ under ESTA? Obviously not, because if they did so and it were established that the respondents, notwithstanding their claim to the contrary, were indeed not ‘occupiers’, the appellants would be told that they had sued in the wrong court and under the wrong statute. On the other hand, if the appellants instituted a claim in terms of ESTA in the Land Claims Court for the eviction of a person alleged not to be an ‘occupier’, their claim would be excipiable if it were brought by action proceedings, and liable to dismissal on a preliminary point of law if it were sought on motion. It is clear therefore that in matters in which an eviction is sought against anyone alleged to be an ‘unlawful occupier’ as defined in s 1 of the PIE Act, proceedings fall to be brought in under that Act in a court with jurisdiction to determine such claims, and not under ESTA. Therefore, on the basis of their case as set forth in the founding papers, the applicants instituted the proceedings for the relief that they sought in the appropriate forum.
- [24] As pointed out by Heher JA in *Agrico Masjinerie*,^[11] ‘... the proper approach to the ‘exclusive jurisdiction’ for which s 20(2) [of ESTA] provides is defined by the terms of s 20(1), ie if a party whether as applicant or respondent claims performance of any of the functions of a court in terms of ESTA’.^[12] The proceedings in the court a quo did not involve a claim for eviction in terms of s 9 of ESTA, nor did it call upon that court to perform any of the functions that might attend the making of an eviction order under s 9. The fact that the respondents’ defence to the application in terms of the PIE Act required of the court a quo to consider and interpret the relevant provisions of ESTA did not exclude the court’s jurisdiction to adjudicate the application before it; cf. *Joubert and Others v Van Rensburg and Others* 2001 (1) SA 753 (W) at para 29.3. Put differently, the respondents’ contention that ESTA applied did not afford a valid basis to uphold the respondents’ contention that the court lacked jurisdiction; on the contrary it required of the court, in the exercise of its jurisdiction, to deal with the application before it to determine on the facts whether the application of the PIE Act was excluded by virtue of s 29(2) of ESTA.
- [25] It would have been plain if regard were had to the point explained in *Agrico Masjinerie* that the framing of the question for separate determination as one of ‘jurisdiction’ was misdirected. If any question lent itself to separate determination, about which I am doubtful, [13] it was rather whether the respondents are ‘occupiers’ in terms of ESTA, and a determination of that question fell squarely within the court’s jurisdiction in the context of the defence raised by the respondents in proceedings instituted under the PIE Act.

- [26] The court a quo in point of fact did exercise jurisdiction by dismissing the application on the basis that provisions of ESTA were applicable. Its error lay in not appreciating that, in order to sustain that determination, it had to find, against the appellants' allegation to the contrary, that the respondents were 'occupiers' in terms of ESTA.
- [27] The learned judge dismissed the application by reason of his perception that he lacked jurisdiction to determine it because occupation of the land was susceptible to protection under ESTA. Right as he was on the susceptibility aspect, he nevertheless should not have decided the application without making a determination one way or the other whether the respondents are 'occupiers' in terms of ESTA. As already explained, that would necessarily include making a finding on the incidence of the other elements of the concept, including a determination whether the respondents resided on the land with consent.
- [28] The question of consent having been a contentious issue on the papers, whether the disputes concerning it should be the subject of oral evidence or cross-examination of any of the deponents in terms of rule 6(5)(g) merited consideration on both sides. The indications are that, because of the manner in which they framed the preliminary question, the parties did not give consideration to those matters. That is good reason by itself to remit the matter to the court a quo to hear and determine the outstanding questions. It is not desirable in the circumstances that we, sitting in an appellate role, should endeavour to decide the merits of application as if we were sitting at first instance. Counsel on both sides accepted this.
- [29] It does seem fair, however, as both parties were to blame in prevailing upon the court a quo to embark on the hearing on a wrongly framed issue, that paragraph 2 of the order of the court a quo to the effect that they should each bear their own costs should stand. Mr Montzinger, for the appellants, conceded as much. He also pointed out that the appellants did not seek a costs order in their favour in the appeal.
- [30] In the result the following order is made:

1. The appeal is upheld.
2. Paragraph 1 of the order of the court a quo is set aside and substituted with an order in the following terms: 'The respondents' objection to this court's jurisdiction to entertain the application is disallowed'.
3. The application is remitted to the court a quo for determination on the merits of the case.

A.G. BINNS-WARD

Judge of the High Court

J.I. CLOETE

H. SLINGERS

Judge of the High Court

APPEARANCES

Appellants' counsel: A. Montzinger

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Respondents' counsel: G. Papier

Respondents' attorneys: Rahman Incorporated

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- [1] In paragraphs 7 and 8 of the principal answering affidavit deposed to by the 13th respondent in the court a quo.
- [2] The judgment of the court a quo records that one of the respondents was deceased (the 1st respondent) and two others (the 5th and 9th respondents) were in prison. The evidence suggests that the persons cited as the 3rd and 4th respondent were in fact one person, who was also deceased.
- [3] Section 17(2) of ESTA, under the subheading 'Choice of court', provides: 'If all the parties to proceedings consent thereto, proceedings may be instituted in any division of the High Court within whose area of jurisdiction the land in question is situate.'
- [4] Sections 17(1) and 20 of ESTA. Section 17(1) provides: 'A party may, subject to the provisions of sections 19 and 20, institute proceedings in the magistrate's court within whose area of jurisdiction the land in question is situate, or the Land Claims Court'. Sub-secs. 20(1) and (2) of the Act provide: '(1) The Land Claims Court shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power—
- (a) to decide any constitutional matter in relation to this Act;(b) to grant interlocutory orders, declaratory orders and interdicts;(c) to review an act, omission or decision of any functionary acting or purporting to act in terms of this Act; and
- (d) to review an arbitration award in terms of the Arbitration Act, 1965 (Act No. 42 of 1965), in so far as it deals with any matter that may be heard by a court in terms of this Act.
- (2) Subject to the provisions of section 17(2), the Land Claims Court shall have the powers set out in subsection (1) to the exclusion of any court contemplated in section 166(c), (d) or (e) of the Constitution.'

- [4] Sections 17(1) and 20 of ESTA. Section 17(1) provides: 'A party may, subject to the provisions of sections 19 and 20, institute proceedings in the magistrate's court within whose area of jurisdiction the land in question is situate, or the Land Claims Court'.

Sub-secs. 20(1) and (2) of the Act provide:

'(1) The Land Claims Court shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power—

- (a) to decide any constitutional matter in relation to this Act;(b) to grant interlocutory orders, declaratory orders and interdicts;(c) to review an act, omission or decision of any functionary acting or purporting to act in terms of this Act; and
 - (d) to review an arbitration award in terms of the Arbitration Act, 1965 (Act No. 42 of 1965), in so far as it deals with any matter that may be heard by a court in terms of this Act.
- (2) Subject to the provisions of section 17(2), the Land Claims Court shall have the powers set out in subsection (1) to the exclusion of any court contemplated in section 166(c), (d) or (e) of the Constitution.'

- [5] Paragraph 17 of the judgment of the court a quo.

- [6] The most pertinent definition of the word in the Oxford Dictionary of English, Version 2.3.0 (239.5) © 2005–2019 Apple Inc., is 'South African a new area being developed for residential or industrial use by speculators'.

- [7] This much is borne out, for example, by the definition of the word in the Spatial Planning and Land Use Management Act 16 of 2013 as 'an area of land divided into erven, and may include public places and roads indicated as such on a general plan'. (A general plan is a plan formally approved by the Surveyor-General in terms of the Land Survey Act, 1997.) That is the commonly used meaning of 'township' in South African statutory parlance; cf. the excursus in *Ngwenya and others v Grannersberger* [1999] ZALCC 28 (22 June 1999); 1999 (4) SA 62 (LCC) at para. 9-12.

- [8] The apparent incongruity that arises from land that is plainly not suitable for agricultural use being amenable to ESTA, which is directed primarily at the protection of 'occupiers' of agricultural or rural land (cf. *Klaase v Van der Merwe and others* [2016] ZACC 17 (14 July 2016); 2016 (9) BCLR 1187 (CC); 2016 (6) SA 131, at para 2), might be regarded as an unintended consequence of the legislation, but it does not afford any basis to depart from the language of the enactment; cf. *Lebowa Platinum Mines Ltd v Viljoen* [2008] ZASCA 163; [2009] 2 All SA 231 (SCA); 2009 (3) SA 511, at para 13.

- [9] The definition of ‘unlawful occupier’ in s 1(xi) of the PIE Act is as follows insofar as relevant ‘a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding ... ’ (Underlining for emphasis.)
- [10] See s 3(1) of ESTA.
- [11] In para. 20.
- [12] See note 4 above for the relevant text of s 20.
- [13] The authorities suggest that courts should be circumspect about allowing a separation of issues in motion proceedings; see e.g. *Bader and Another v Weston and Another* 1967 (1) SA 134 (C), at 136E-137C and *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA), at para 49.

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