

IN THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)

Case Number: A5016/2011

DELETE WHICHEVER IS NOT APPLICABLE	
REPORTABLE: YES	
OF INTEREST TO OTHER JUDGES: YES/NO	
REVISED: Yes	
<u>10 February 2012</u>	
SIGNATURE	DATE

In the matter between:

WILLEM PETRUS PIETERSE Appellant

(Respondent *a quo*)

And

JOHANNES PETRUS ALBERTUS VENTER

1st Respondent
(1st Applicant *a quo*)

MARIA SUSANNA ELIZABETH VENTER 2nd Respondent

(2nd Applicant *a quo*)

JUDGMENT

C. J. CLAASSEN J:

INTRODUCTION

- [1] This is an appeal from the judgment handed down by Du Plessis AJ on 16 February 2011 in this court. The appellant was the respondent and the respondents were the applicants in the court *a quo*.

- [2] Appellant and his family lived in a home and various outbuildings¹ which were constructed on the property of the Respondents, which property is situate at Holding 140 Nelsonia Agricultural Holdings, situate within the Midvaal Local Municipality. In the court *a quo* the Respondents applied for an order evicting the Appellant from these structures. The court *a quo* granted an order evicting Appellant and all those holding through him from the aforesaid property by no later than 30 August 2011, i.e. granting Appellant a period of seven months to find alternative accommodation.² Appellant now appeals this eviction order.

THE FACTS

- [3] It is common cause that the Respondents, who are married in community of property, are joint owners of Holding 140. It is also common cause that the adjoining property, Holding 141, is registered in the name of Appellant. Neither of the parties favoured the court with the respective title deeds of these properties or any sketches indicating the layout of the adjoining properties and the positioning of the structures occupied by Appellant. As proof of the respective parties' ownership of the properties, WinDeed Deeds Office Searches were attached as annexures to the papers.³
- [4] The first respondent is an adult pensioner. He and his wife purchased three adjoining properties namely Holdings 138, 139 and 140 in Nelsonia Agricultural Holdings for investment purposes. They seldom visited the properties as these were merely vacant stands. The Respondents were also directors of a company named "Goue Lande

¹ See Annexures "JV5.1" and "JV5.2" attached to the Founding Affidavit

² See Record p 103

³ In respect of the Respondents' property, Holding 140, see Annexure "JV2" at p 12 of the Record and in respect of Appellant's property, Holding 141, see Annexure "JV4" at p 14 of the Record.

(Pty) Ltd”.⁴ This company originally bought Holding 140 during 1984⁵. Thereafter the property was bought by the Respondents from Goue Lande (Pty) Ltd on 21 November 2002 for an amount of R120 000.00.⁶ At that time the first respondent was sixty seven years and the second respondent was sixty five years of age. Currently they are seventy seven and seventy five years of age respectively.

[5] The Appellant bought the adjoining property, Holding 141 Nelsonia Agricultural Holdings, for an amount of R130 000.00 in 2007. He had been leasing the property from the previous owners, Mr and Mrs Scheepers since 2001. When Appellant first took occupation in 2001, the front gate to the building and structures had a sign board indicating the number “141”. Appellant was therefore under the impression that he had rented and subsequently bought Holding 141. Other than the structures he was occupying, Holding 141 is a vacant stand without other improvements, no electricity and no water. Scheepers erected the structures after he obtained approval to do so from the Local Government Affairs Council on 15 July 1992.⁷

[6] It is common cause that the Nelsonia Holdings fall within the jurisdiction of the Midvaal Local Municipality. On 11 May 2009 the Respondents were served with a notice from the Midvaal Local Municipality indicating that the buildings on Holding 140, Nelsonia, were illegal as they were erected “without written approval from Council”.⁸ It is common cause that both the Respondents and Appellant then for the first time realised that the structures were in fact erected on Holding 140 and not Holding 141. The Respondents’ attorneys of record addressed a letter dated 15 May 2009 to Appellant advising him of the

⁴ See Annexure “PWP1” at p 68 of the Record.

⁵ See Annexure “JV2” at p 12 of the Record.

⁶ See Annexure “JV2” at p 12 of the Record.

⁷ See Annexure “PWP2” at p 72 of the Record.

⁸ See Annexure “JV3” at p 13 of the Record.

notice received from the Midvaal Local Municipality and requested Appellant to immediately vacate the building and to “demolish the illegal buildings which you are occupying.”⁹ However, the Appellant did not vacate the property. As a result, the Respondents instituted motion proceedings against Appellant and all who occupied the property under and through him on 6 July 2010. It should be mentioned that the Respondents did not ask for an order “demolishing” the structures (although the letter of demand did so) but merely for the “eviction” of Appellant and his family. Eviction was sought in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“the PIE Act”) and not in terms of the Extension of Security of Tenure Act 62 of 1997 (“the ESTA Act”). The Respondents failed to join the Midvaal Local Municipality as a party although service of the application on it took place on 1 November 2010.¹⁰

- [7] Appellant filed a notice of intention to oppose and thereafter an answering affidavit. The answering affidavit was rather curt and supplied minimum information. A defence *in limine* was raised to the jurisdiction of the High Court in that the order sought by the Respondents “are governed in terms of section 2 of the Extension of Security of Tenure Act No 62 of 1997.” As Appellant did not consent to the jurisdiction of the court a quo, only the Magistrate’s Court or the Land Claims Court were vested with jurisdiction to hear matters in terms of the ESTA Act.¹¹ Appellant failed to state any information as to why the ESTA Act was applicable, but went on to state that in the event of a court finding that the ESTA Act was not applicable, then reliance was placed on an allegation that the Respondents failed to comply with all the terms of the PIE Act. I will return to this defence.

⁹ See Annexure “JV6” at p 20 of the Record

¹⁰ See Return of Service at p 54 of the Record.

¹¹ See Sections 17, 19 and 20 of the ESTA Act.

- [8] Appellant alleged that he was living in the structures on Holding 140 with his mother, his twenty three year old retarded son and his fiancée, Maria Anna Robert Theron. Of particular importance is the fact that he failed to state his own income and relied on inadmissible hearsay evidence in referring to the old age and disability pensions (R1080-00 per month each) allegedly received by his mother and his retarded son respectively. No confirmatory affidavit of either his mother or his fiancée or any medical proof of his son's alleged retardation, nor any copies of the alleged pensions were supplied. These dependants of Appellant were not joined as parties to the litigation and therefore their rights of occupation depend upon Appellant's right of occupation.¹² They themselves do not therefore independently claim to be occupiers of the premises. It has already been held, authoritatively, by the Land Claims Court that members of a family are lawful "occupiers" in terms of the Extension of Security of Tenure Act No 62 of 1997 ("ESTA"), if the head of the family is a lawful occupier. The family members are normally (as in the present case) not parties to any agreement which grants the head of the family the necessary consent to reside there. Nor will the family members be entitled to rely on "another right in law" contemplated in the definition of "occupier". The family's family law rights are dependent on the head of the family and not held as against the owner of the property.¹³ Therefore, the case has to be decided on the occupation rights of the Appellant.
- [9] Appellant further relies on inadmissible hearsay allegations with regard to what he was told at the Midvaal Municipality when he presented them with a copy of the notice declaring the structures illegal. No supporting affidavit confirming this alleged discussion was attached and therefore no further notice can be taken of this particular information.

¹² See **Kiepersol Poultry Farm (Pty) Ltd v Phasiya** 2010 (3) SA 152 (SCA) at 156B – C

¹³ See **Landbounavorsingsraad v Klaasen** 2005 (3) SA 410 (LCC), paras [24] [25] and [26] at pages 420 to 421

[10] In paragraph 3.6 of the answering affidavit, Appellant states the following:

“During 2010 the first applicant visited me at the property on several occasions and he ensured me that I need not be worried that he would have me and my family removed from the property. At a later stage I suggested to him that we exchange the plots namely Plot 140 for Plot 141 but he would not agree to this, as he said that he had purchased three plots next to each other namely Plots 138, 139 and 140.”

[11] In the replying affidavit the first respondent admits that he was not interested in exchanging Holding 140 for Holding 141. He denies, however, having given any undertaking regarding the non-removal of Appellant and his family from the property.

[12] It is common cause that the notice received from the Midvaal Local Municipality that the structures were illegal, precipitated an investigation regarding the positioning of the structures on Holding 140. This notice was issued on 11 May 2009. Such investigation resulted in the Respondents realising for the very first time these were constructed on their property. Within four days after the receipt of the notice, the first respondent's attorneys, on 15 May 2009 wrote the letter demanding that the buildings be immediately vacated. In light of this admitted conduct on the part of the Respondents, any alleged undertaking of non-removal appears simply to be nonsensical. If the first respondent intended not to evict the Appellant, then why ask his attorney to write the letter demanding the appellant to vacate “immediate(ly)” and why then thereafter launch the eviction application in the court *a quo*? In this regard I respectfully agree with the judgment of the court *a quo* where the following was stated in paragraph 13:

“It does not make any sense for the First Applicant to have given the alleged assurances and to thereafter launch an application in the same year for the Respondent's eviction from the property.”

In light of the admitted conduct of the first respondent, I respectfully agree that the alleged undertaking of non-removal is fanciful and untenable, justifying a conclusion that no real dispute of fact is raised.¹⁴

[13] When Appellant first occupied the buildings in 2001, it consisted of:

“ A three bedroom house with kitchen, dining room, bathroom, lounge and living room. Separate ‘Flat’ comprising two bedrooms, kitchen and bathroom with toilet. Three garages, one store room and two boreholes.”¹⁵

[14] Appellant alleges that he improved the property after he had purchased it by replacing certain borehole equipment, a geyser and plastered the kitchen. He claims a lien over the property for the aforesaid improvements stating baldly that he would suffer a loss of “at least R300 000.00”. No details of the alleged costs of these improvements were given. It is a bald statement unsupported by any credible evidence whatsoever. No indication is given that the so-called improvements were either necessary or useful or that it enhanced the market value of the property. It would appear that in any event, the alleged improvements were more in the nature of items of maintenance. It is trite law that improvement liens cover only the lesser of the owner’s actual enrichment and the lien holder’s expenditure.¹⁶ No details were provided upon which any right of retention in favour of the appellant could be established.

ON APPEAL

¹⁴ See **Truth Verification Testing Centre CC v PSE Truth Detection CC and Others** 1998 (2) SA 689 (W) at 698H – J; **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA) at 290 paragraph [26]; **Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another** 2011 (1) SA 8 (SCA) at 14B – I.

¹⁵ See Paragraph 3.7 of the Answering Affidavit at p 63 of the Record.

¹⁶ See **FHP Management (Pty) Ltd v Theron NO and Another** 2004 (3) SA 392 (CPD) at 405F – 406B.

[15] On behalf of the appellant, appeared Mr J. J. Botha. He argued the matter on heads of argument prepared by Adv Adrian Vorster. These heads of argument raised four issues on appeal:

1. A constitutional issue was raised that the fundamental re-evaluation of the perception, definition, characteristics and social functions of ownerships in South African law was necessary.¹⁷
2. Whether the jurisdiction of the court a quo was ousted by the applicability of the ESTA Act which required a finding as to whether Appellant and his family were in fact occupiers as defined therein.
3. Whether the failure to join the Midvaal Local Municipality as a party constituted a material defect in view of the provisions in the PIE Act that the applicable municipality carry constitutional and statutory duties in relations to eviction proceedings under the PIE Act.
4. The question whether eviction will be just and equitable in the circumstances of this case.¹⁸

A CONSTITUTIONAL RE-APPRAISAL OF THE ELEMENTS OF OWNERSHIP

[16] This argument was all but abandoned when Mr Botha conceded that it was never raised in the notice of appeal. Furthermore, the requirements of Rule 16A of the Uniform Rules of Court which require notification of a constitutional issue to the registrar of the court, was not complied with. In these circumstances this aspect was not argued by either counsel.

APPLICABILITY OF THE ESTA ACT

¹⁷ See paragraph 1.1 at p 2 of the Heads of Argument.

¹⁸ See paragraph 2.15 at pp 9 and 10 of the Heads of Argument.

[17] Mr Botha conceded that this defence was raised in the answering affidavit without any supporting evidence forthcoming from the Appellant. He did, however, submit that the case disclosed by the answering affidavit fell within the definition of “occupier” as defined in section 1 of the ESTA Act. This section provides as follows:

“**'occupier'** means a person residing on land which belongs to another person, and who has or [sic] on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding-

- (a) ...
- (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”

[18] The elements of this definition of an occupier are:

1. Consent after 4 February 1997;
2. Another right in law to occupy;
3. A person who works the land himself without employees in his service other than his family members;
4. A person whose income is in excess of the prescribed amounts.¹⁹

[19] **Consent:** As indicated earlier in this judgment, actual consent for Appellant and his family to reside on Holding 140 could not be established. The very first intimation that Appellant had of his trespass on Holding 140 occurred upon receipt of the attorney’s letter of demand to vacate that property. Attached to this letter was a copy of the notice from the Municipality. Prior to receipt of that letter, there would have been no need for Appellant to obtain any consent as he was of the view that he was lawfully occupying Holding 141 and not Holding 140. After receipt of the attorney’s letter of demand, consent could no longer be

¹⁹ It is common cause that the threshold of income was prescribed as R5 000.00 per month in terms of Government Notice R1596 published in the Government Gazette 18457 of 28 November 1997.

obtained. The letter informed him of the illegality of the structures on Holding 140 and consequently his illegal occupation thereof. The letter further claimed unconditionally, his eviction from the property. Any alleged consent granted to Appellant thereafter is, therefore, spurious and fanciful.

[20] Mr Botha valiantly attempted to rely on the presumptions in sections 3(4) and (5) of the ESTA Act.²⁰ Sub-section (4) contains a presumption which is rebuttable and sub-section (5) contains a deeming provision. The presumption in sub-section (4) has been conclusively rebutted as indicated above. Hence the conclusion that Appellant cannot rely on that sub-section for proof of consent.

[21] It then remains to be seen whether Appellant may rely on sub-section (5) containing the deeming provisions. It states clearly that where an occupier had resided on land belonging to someone else for a period of three years, it shall be deemed that such occupier had done so “with the knowledge of the owner...” In the present case it is common cause that the residence of Appellant on the Respondents’ property was done without the knowledge of the Respondents. The uncontested facts indicate that the residence of Appellant on Holding 140 only came to the knowledge of the Respondents as a result of the Midvaal Local Municipality’s letter, declaring the structures on Holding 140 illegal. Thus, although Appellant resided on Holding 140 for more than three years, both sides accepted that knowledge of the illegality of such residence was only acquired by the Respondents on 11 May 2009. In

²⁰ The sub-sections read as follows:

- “(4) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be **presumed** to have consent **unless the contrary is proved**.
- (5) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of three years shall be **deemed** to have done so **with the knowledge of the owner** or person in charge.” [Emphasis added]

these circumstances no reliance can be placed on a deeming provision which is in direct conflict to the proven facts in a case.²¹

- [22] There is a further reason why the defence of consent can not apply to the present case. In the answering affidavit Appellant raised the defence of the applicability of ESTA only in relation to sections 2 and 17. No basis for reliance on these sections was pleaded other than a reliance on the contents of section 17(2). Appellant raised this defence rather curtly in the following terms:

“1.2 I deny that this Honourable Court has jurisdiction to hear this application, the reason being that the order sought by the Applicants are governed in terms of Section 2 of the Extension of Security of Tenure Act No 62 of 1997 (ESTA).

1.3 In terms of Section 17(1) of ESTA, a party may, subject to the provisions of Section 19 & 20, institute proceedings in the Magistrate’s Court within use (sic “whose”) area of jurisdiction the land in question is situated, or the Land Claims Court.

17 (2) 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.

I confirm that I have not consented to the jurisdiction of this Honourable Court.”

- [23] The statement by Appellant in the last two paragraphs commencing with (2) constitutes a reliance on section 17(2) of the ESTA. Appellant therefore relied exclusively on a defence that ESTA applied by virtue of section 2 and 17(2). As to the applicability of ESTA, the Appellant did not rely on consent received from the Respondents. The question of consent was, however, raised in connection with the Appellant’s defences arising under the provisions of the Prevention of Illegal Eviction from and Unlawful occupation of Land Act No 19 of 1998 (“PIE”).²² This will be dealt with when dealing with the appellant’s defences under that Act.

²¹ See **S v Rosenthal** 1980 (1) SA 65 (AD) where Trollip JA explains the different meanings of the word “shall be deemed” at 75G – 77B

²² See paragraphs 2 to 3.10 of the Answering Affidavit pages 60 to 64

[24] Finally, where as in this case an applicant applies for eviction in terms of the PIE Act and the unlawful occupier does not institute a counter-application and is content to adopt the stance that he/she is entitled to the protection of ESTA, putting the applicant to the task of disproving such a defence, then section 20 of ESTA can not avail the unlawful occupier.²³

[25] **Another right in law:** Appellant did not rely on any other right in law to justify his occupation of Holding 140. In any event, an unlawful occupier who simply moves on to the property of another without consent or an order granted in terms of section 14 is not an ESTA occupier. The appellant occupied the respondents' property without any "right in law" to do so.²⁴ Nor has the Land Claims Court exclusive jurisdiction in terms of section 20 where no function is claimed under its provisions.²⁵

[26] **A person working the land himself without employing any person:** Appellant gave absolutely no details as to whether or not he worked the land. No facts indicated whether he employed any staff or only his family members.

[27] **Income beyond R5000-00:** The absence of any evidence as to Appellant's monthly income sounded the final death knell to this defence. In fact, Mr Botha acknowledged this fact in a concession contained in paragraph 3.27 of his heads of argument:

"3.27. The appellant did not disclose his income and has not discharged the onus to show that he is an ESTA occupier. The court *a quo* therefore correctly found that he is not an ESTA occupier."

²³ See **Agrico** supra at pges 315D to 316D, paragraphs [20] to [22]

²⁴ See **Agrico** supra at page 320D – E

²⁵ See **Agrico** supra paragraph [20]

- [28] It should also be noted that the jurisdictional findings made by the Land Claims Court in **Skhosana and Others v Roos t/a Roos se Oord and Others** 2000 (4) SA 561 (LCC) at pages 565 to 568, paragraphs [7] to [14] were overruled by the SCA in the case of **Agrico v Swiers** supra at page 316 paragraph [22]. For all of the above reasons the defence that the court's jurisdiction was ousted by ESTA must fail. It should also be borne in mind that ESTA and the PIE Act are mutually exclusive; it is either the one or the other that is applicable, but not both.²⁶

FAILURE TO JOIN THE MIDVAAL MUNICIPALITY AS A PARTY TO THE PROCEEDINGS

- [29] This defence was merely stated as a proposition in the answering affidavit. No details were supplied indicating in what respect the Respondents failed to comply with the provisions of the PIE Act. It was only during argument that the deficiency of joining the applicable municipality as a party to the proceedings, was raised.
- [30] Reliance was placed on the cases of **Cashbuild (South Africa) (Pty) Ltd v Scott and Others** 2007 (1) SA 332 (T) and **Sailing Queen Investments v The Occupants of LA Colleen Court** [2008] JOL 21320 (W). It was submitted that mere service of the papers on the Midvaal Local Municipality was not enough. The intervention of the municipality as a party to the proceedings was a statutory necessity for purposes of supplying information to the court regarding alternative accommodation and/or land available for relocation and/or the appointment of mediators in terms of section 7 of the PIE Act to attempt to resolve the dispute between the parties.

²⁶ See **Agrico Masjienerie (Edms) Bpk v Swiers** supra at page 308B – C

[31] The contrary view was expressed in **Drakenstein Municipality v Hendricks and Others** 2010 (3) SA 248 (WCC) at paragraphs [21] and [25] where the following was said:

“[21] ... (T)he question of the joinder of appellant (the Municipality) is not an independent question. The need for joinder would only arise where the municipality has a direct interest in the proceedings by reason of its duty to report to the court or to appoint a mediator.

....

[25] Not one of the *Cashbuild*, *Sailing Queen* or *Shorts Retreat* cases is therefore authority for the proposition that the municipality must be joined in all cases, even where reporting to the court or mediation is not required.”

[32] I respectfully agree with the conclusions of the court in the **Drakenstein** matter. Even the Constitutional Court recently found that the joinder of a municipality is not an absolute precondition in all cases. In the unreported judgment in the case of **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another** CCT 37/11, in paragraph [45] the following was stated:

“In view of the intertwined responsibilities of the national, provincial and local spheres of government with regard to housing, it would generally be preferable for all of them to be involved in **complex** legal proceedings regarding eviction and access to adequate housing. Indeed, joinder might often be essential and failure to join fatal. **Whether it is necessary to join a sphere in legal proceedings will, however, depend on the circumstances and nature of the dispute in every specific case.** In this matter the absence of the Provincial Government is not fatal. The obligations and conduct of the City have to be considered. The joinder of the City as the main point of contact with the community is essential.” (Emphasis added)

[33] The facts of this case are such that the municipality can be of no assistance in resolving the dispute. This is not a case where indigent masses of people have to be relocated and where only the municipality can supply information of available land which will be suitable to receive a large number of families. **This is a case between a landowner and an unlawful occupier who is also a landowner of the adjoining property.** It is common cause that the adjoining Holding 141 owned by

the appellant is a vacant stand, 2.1133 hectare in size.²⁷ In these circumstances the availability of alternative land or accommodation is not an issue. If need be the appellant and his family can vacate the structures on the respondents' property and move next door onto their own property where they can build themselves a shack, erect a prefab building, or erect a tent etc. In such a case the assistance of the municipality is not required. The argument that the municipality could render mediation services in terms of section 7(1) of the PIE Act is, with respect, a red herring. The actual dispute in the present case is not so much between a landowner and an unlawful occupier, but between the unlawful occupier and the person who sold him the adjoining property without informing him that the building structures were illegally erected on the respondents' property. The appellant's remedy is against Scheepers who sold the property. With that dispute the municipality cannot and should not assist. The appellant could have instituted a counter-claim against the respondents for the costs of the improvements alternatively the appellant should institute an action for damages against Mr and Mrs Scheepers. None of these disputes concern the Municipality nor would section 7(1) as they are not "disputes in terms of the Act". The disputes between the appellant and Scheepers fall outside the terms of the PIE Act. So too the dispute between the appellant and the respondents in regard to any claim for enrichment, a lien or compensation. A Municipality cannot mediate such legal issues which can only be settled by a court of law.

- [34] Insofar as the decisions in the **Cashbuild** and **Sailing Queen** cases, determine that a municipality is to be joined in all cases where eviction is sought under the PIE Act, I respectfully disagree with such conclusion.

²⁷ See Annexure "JV4" at p 14 of the Record. See also paragraph 3.8 of the Answering Affidavit on p 63 of the Record

- [35] I am therefore of the view that the joinder of the Midvaal Local Municipality was neither fatal nor necessary in the present case.

**IS IT JUST AND EQUITABLE TO EVICT THE APPELLANT AND HIS
FAMILY?**

- [36] In my view, it would be just and equitable to evict the appellant and his family. The appellant has had notice since 15 May 2009 of the illegality of the building structures as well as the unlawfulness of his occupation. For almost twenty months he has done nothing to safeguard his position and/or attempt to remedy the precarious situation in which he found himself. His suggestion of swapping his property for the respondents' property is with respect quite untenable. Why would the respondents swap an unbonded property for a bonded property? In any event, the respondents bought three adjoining properties as an investment possibly for on sale to developers presumably as a nest egg for their retirement. It is inconceivable that they would relinquish the benefit of having three adjoining properties in favour of two adjoining properties and a non-adjoining property.

- [37] The respondents are currently aged 77 and 75 years. They have done nothing wrong which would justifiably cause them to be mulcted in the confusion caused by the *error in corpore* as between the appellant and Scheepers. The respondents are entitled to the undisturbed possession of their property.

- [38] Finally, the appellant sought to rely on encroachment as a further defence. However, this cannot succeed since the illegal structures were not built partly on the appellant's property and partly on the respondents' property. The illegal buildings were built wholly on the respondents' property. A similar situation occurred in the case of **Agrico**

Masjinerie (Edms) Bpk v Swiers 2007 (5) SA 305 (SCA), yet at no stage was the question of encroachment either mooted or considered.

CONCLUSION

[39] For the reasons set out above I am of the view that the court a quo came to the right conclusion and that the appeal cannot succeed. I therefore make the following order:

The appeal is dismissed with costs.

DATED AND SIGNED THIS 10th DAY OF FEBRUARY 2012 AT
JOHANNESBURG



C. J. CLAASSEN
JUDGE OF THE HIGH COURT

I agree

C. LAMONT
JUDGE OF THE HIGH COURT

I agree

Z. CARELSE
JUDGE OF THE HIGH COURT

It is so ordered.

Counsel for the Appellant: Adv J. J. Botha
Counsel for the Respondents: Adv A. Jacobs

Attorney for the Appellant: De Klerk Vermaak & Partners Inc
Attorney for the Respondents: Du Plessis De Heus & Van Wyk

Argument was heard on 30 January 2012