

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED
Signature <i>[Signature]</i>	
Date <i>21/01/2020</i>	

CASE NO: 5059/16

In the matter between:

AMOS MUCHANYISE**APPLICANT**

and

MAGISTRATE, GROBLERSDAL**FIRST RESPONDENT****NON PARIEL ONTWIKKELING CC****SECOND RESPONDENT****ELIAS MOTSOALEDI LOCAL MUNICIPALITY****THIRD RESPONDENT**

JUDGMENT

MPHAHLELE AJ

- [1] On 18 February 2016 the Second Respondent applied for an eviction order against the Applicant from Farm Roodewald 193, the Remainder of Portion 27, Groblersdal ("the property") in the district court of Groblersdal.
- [2] The order was granted on 17 August 2016 in the absence of the Applicant's legal representative but after having regard to the opposing affidavit of the Applicant.
- [3] The Applicant was given until 31 October 2016 to vacate the property.
- Background facts
- [4] The Applicant's case is that he had resided on the property with his mother and father since 1986 when his parents started working on the property.
- [5] He contends that he had tacit consent to occupy the property as the Second Respondent knew for 19 years that he was living there with his family and never informed him that he doesn't have authority to reside on the property.
- [6] The Second Respondent's case is that the Applicant's parents were the only persons occupying the property and they were the only persons who had permission to do so, both from the previous owner and from himself.

- [7] The Applicant's mother passed on 13 July 2008 and his father on 20 June 2014.
- [8] The Second Respondent states that after the death of the Applicant's parents, the Applicant and his family started living on his property without his permission and that the Applicant even started bringing his own farm animals onto the property and that despite his numerous requests to remove the farm animals and to vacate the property the Applicant blatantly refused.
- [9] The Second Respondent gave the Applicant notice to vacate the property which is undated and annexed to the eviction application as Annexure "D".
- [10] On 16 October 2015, the Applicant was served with a letter by the Sheriff, from the Second Respondent's attorneys, in terms of which the Applicant was required to vacate the property within 14 days, and he refused to comply with the contents of the said letter.
- [11] Subsequently, the Second Respondent then proceeded with the eviction application against the Applicant in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 ("PIE").

- [12] The Applicant opposed the eviction application. His main opposition was based on the fact that he was not an illegal occupier on the property and that there was an apparent dispute of facts on the papers before the First Respondent.
- [13] He also raised a point in limine of non-compliance with the provisions of Section 9 (1)(2)(d)(i)(ii) and (iii) of the Extension of Security of Tenure Act No. 62 of 1997 ("ESTA").
- [14] It is common cause that the Applicant is working on a neighbouring farm and was refusing to vacate the property. He has cut the farm fence and the Second Respondent opened criminal cases under case numbers 86/7/14 and 101/7/14 respectively with the South African Police Services.
- [15] The Applicant's contention is that after the death of his father, Mr Grobler, a member of the Second Respondent, without any discussion with him, erected a fence alongside his homestead to prevent his goats and cattle to graze on the property. He then cut the said fence so that his livestock can graze.
- [16] The First respondent on 17 August 2016 granted an eviction order against the Applicant and it is the said order which the Applicant now seeks to review and set aside.

THE DISPUTE BETWEEN THE PARTIES

[17] The dispute between the parties which I am required to determine, relates to whether the Extension of Security of Tenure Act No.62 of 1997 ("ESTA") or Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 ("PIE") is applicable.

[18] Secondly, whether a dispute of fact exists between the parties.

APPLICANT'S CONTENTIONS

[19] The Applicant contends that on the factual findings by the First Respondent, on the definitions of " consent", "occupier", the preamble to PIE as compared to the preamble to ESTA , as well as the respective provisions of the two Acts, it is evident that the First Respondent erred in applying the provisions of PIE instead of ESTA.

[20] That the Second Respondent should have proceeded in terms of ESTA, and not the provisions of PIE which was not applicable on the facts as found by the First Respondent.

[21] Therefore, the decision of the First Respondent to apply the provisions of PIE instead of ESTA, falls to be reviewed, set aside and replaced by the order dismissing the Second Respondent's application with costs.

[22] The application is opposed by the second Respondent.

Is Extension of Security of Tenure Act No.62 of 1997 ("ESTA") or Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 ("PIE") applicable to the dispute between the parties?

[23] An "occupier" is defined in section 1 of ESTA as meaning:

"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) . . .

(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".*

- [24] It is evident from the definition of “*occupier*” that a person cannot be an occupier as defined in ESTA if his or her residence on someone else’s land is not based on consent or on another right in law.

Termination of right of residence.

- [25] Section 8 of ESTA provides:

- “(1) *Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to-*
- (a) *the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;*
 - (b) *the conduct of the parties giving rise to the termination;*
 - (c) *the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;*
 - (d) *the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and*

- (e) *the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence."*

[26] Section 8(4) and (5) of ESTA reads as follows:

"(4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and—

(a) has reached the age of 60 years; or

(b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge, may not be terminated unless that occupier has committed a breach contemplated in section 10 (1)(a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.

- (5) *On the death of an occupier contemplated in subsection (4), the right of residence of an occupier who was his or her spouse or dependant may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependant has committed a breach contemplated in section 10(1)."*

- [27] The Second Respondent's contention seems to be that for the Applicant to be evicted in terms of ESTA, he must be an occupier in terms of ESTA. Since the Applicant is no longer an occupier in terms of ESTA, his occupation is unlawful and as a result eviction should be effected in terms of PIE.
- [28] The Second Respondent places reliance on the decision by Gildenhuis AJ in **Landbounavorsingraad v Klaasen 2005 (3) SA 410 (LLC), at 425 A – B**, when the Court held that the concept 'occupier' in ESTA in two senses: the first is a narrow one which encompasses only those persons who are or were parties to a consent agreement with the owner or the person in charge of the land or those who have "another right in law" to reside thereon. The second is a wide one which encompasses those who derive their rights to reside through or under occupiers in the narrow sense. The latter group falls outside the statutory definition of 'occupier'.
- [29] The Court further held that a person residing on land will not be an 'occupier' (as defined) unless there is a legal nexus between that person and the owner. There is no such nexus between family members living with that person on the one hand, and the owner or person in charge of the land on the other.

- [30] This meaning of “occupier” seems to ignore the fact that a person who has “*another right in law*” to reside on land which belongs to another person is also defined as an occupier.
- [31] In dealing with the question whether the Applicant should be evicted in terms of the provisions of PIE or ESTA, I need to determine the nature of the property which is occupied by the Applicant.
- [32] In terms of s 6(2)(d) of ESTA occupiers have the right to family life. One of the implications of this provision is that occupiers have the right to have members of their family stay with them, even on a permanent basis.
- [33] Section 8 (5) provides that on the death of an occupier, the right of residence of an occupier who was his or her spouse or dependant may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependant has committed a breach contemplated in section 10 (1).
- [34] In **Dique NO v Van der Merwe en Andere 2001(3) SA 1006 (T) at 1011E – D** the court held that the first- and second respondents' derivative rights of occupation came to an end on the deaths of Mr Ntoyakhe and Mr Groenewald respectively. In the case of the first respondent because the person from whom she derived her right of occupation had passed away and in the case of the second respondent because the marriage relationship from which her right

of occupation flowed had come to an end upon the death of her husband. That the notices required by subsection 8(5) of ESTA were duly given and that the required 12 calendar months' written notices have expired have not been placed in issue in those proceedings.

[35] In **Simonsig Landoed (Edms) Bpk v Vers and Others** (Unreported Judgement of Cape of Good Hope Provincial Division delivered on 09 May 2007), Van Reenen and Ndita JJ were faced with the question whether the nature of the rights of residence that flow from the provisions of Section 8(5) of ESTA is such that they fall within the meaning of the concept "right" in the phrase "another right in law to do so"?

[36] The Court held at paragraph [25] that:

"[25] An ineluctable consequence of the recognition by Section 8(5) of Esta of the first- and second respondents' continued rights of residence pending the expiration of a written notice period of 12 calendar months is the existence of a correlative obligation on the part of the appellant, admittedly of only a limited duration, to respect the exercise of such rights, failing which, compliance could be compelled by a court of law. In the premises such rights as flow from the provisions of Section 8(5) of Esta, in our view, constitute a legal right in the narrow (See: Agrico Masjienerie (Edms) Bpk v Swiers (supra) at pages 58 – 59) alternatively, in a wider sense, in that the respondents' rights

of residence constitute at least a “legally recognised interest” (per Coetzee J in *Secretary for Inland Revenue v Kirsch* (supra)).

- [26] It follows that we incline to the view that the first- and second respondents’ rights of residence during the period following upon the deaths of Mr Ntoyakhe and Mr Rossouw until the expiry of the notice period of 12 calendar months, constituted occupation in terms of “another right in law to do so” within the meaning thereof in the definition of occupier in *Esta*. The fact that the first- and second respondents had theretofore occupied their respective cottages as the conjugal partner and wife respectively of employees of the appellant and not as occupiers in their own right does not, in our view, stand in the way of a finding that they subsequently did so in their own right as they then exercised their rights of residence in a totally different capacity.
- [27] That the first- and second respondents’ occupation of their respective cottages became unlawful the moment the notice period of 12 calendar months expired is beyond doubt (See: **Mkangeli and Others v Joubert and Others** 2002 (4) SA 36 (SCA) at 43 I; **Land- en Landbou Ontwikkelingsbank van Suid-Afrika v Conradie** 2005 (4) SA 506 (SCA) at 514 F – G). Whether they then became unlawful occupiers as defined in Section 1 of *Pie* is a different matter. An unlawful occupier is in *Pie* defined as meaning “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 Act, 1997 and excluding ... " (the further exclusion is not relevant for the purposes of this judgment and the underlining has been provided). If the concept "occupier" in the underlined phrase were to be construed as referring to a person still qualifying as an occupier under *Esta* its effect would be to render the first exclusion meaningless or otiose as a person can be an occupier for the purposes of *Esta* only if he or she resides on land belonging to another pursuant to consent or another right in law to do so and accordingly, would automatically be excluded from such definition which requires an absence of such consent or right. It is a cardinal rule of construction of statutory enactments that the plain meaning of words used therein must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly (See: **Bhyat v Commissioner for Immigration 1932 AD 125 at 129**; also see: **Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk 1994 (3) SA 407 (A) at 422 A - C**). Schutz JA in **Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape 2001 (3) SA 582 (SCA) at 587 E – F** said that the effect of the formulation of the above principle by Stratford JA in *Bhyat's* case is that:

“... the court does not impose its notion of what is absurd on the legislature’s judgment as to what is fitting, but uses absurdity as a means of divining what the legislature could not have intended and therefore did not intend, thus arriving at what it did actually intend.”

*As, in our view, it is inconceivable that the legislature could have intended the absurdity that the first exclusion in the definition of unlawful occupier would be purposeless, we incline to the view that the true intention of the legislature in using the concept “occupier” therein was to refer to any person who had earlier, but no longer, enjoyed the status of an occupier in terms of Esta. That conclusion is not only consonant with the provisions of Section 9(1) of Esta which provides that an occupier “notwithstanding the provisions of any other law ... may be evicted only in terms of an order of court issued under this Act” but also the following view expressed by Olivier JA in a minority judgment in **Bekker and Another v Jika: Ndlovu v Ngcobo 2003 (1) SA 113 (SCA) at 146 B – D:***

“In my view, the exclusion in PIE of the application of ESTA is a strong indication in favour of the more limited ambit of PIE. It is clear that the Legislature wished to avoid any overlap between the two statutes. But, be that as it may, the net result is that PIE excludes a person who has or at a

certain time had consent or another right to occupy the land of another. PIE does not apply to them."

*It is also consonant with the presumption, espoused by **Gutsche J in Rex v Gwantshu 1931 EDL 29** and Gildenhuys AJ in the unreported case of **Kusa CC v Mbele (LCC 39/2002)** to the effect that a subsequent general enactment is not intended to interfere with an earlier special provision unless such an intention is clearly manifested.*

[28] *In view of the foregoing we have come to the conclusion that after expiration of the notices in terms of Section 8(5) of Esta, the status of the first- and second respondents was not that of unlawful occupiers in terms of the definition thereof in Pie and that the magistrate was correct in having come to the conclusion that the provisions of Esta found application and not those of Pie."*

[37] Section 2 of ESTA provides that the 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.

- [38] The object of the ESTA is to protect a class of tenants ('occupiers') on rural or semi-rural land who have acquired their tenancy with the consent of the landowner against eviction or through any other right in terms of the Act.
- [39] PIE applies to all land throughout the Republic of South Africa, unless the Extension of Security of Tenure Act 62 of 1997 (ESTA) applies.
- [40] In my view the First Respondent should have applied ESTA and not PIE. As a result, the First Respondent misconceived the whole nature of the enquiry in arriving at applying PIE instead of ESTA.
- [41] There is no rational connection between the decision and the information before the First Respondent and the reasons for the decision.
- [42] He misconstrued the legal provisions and principles relating to the matter before him in arriving at the decision or conclusion and as a result, there is no rational connection between the decision and the information which was before the First Respondent and the reasons for it.

[43] The distorting effect of this misdirection of the First Respondent renders the judgement for the eviction of the Applicant unreasonable and irrational.

[44] As a result, the decision stands to be reviewed and set aside. Having arrived at the aforesaid conclusion, there is no need for me to deal with the alleged dispute of fact.

[45] I accordingly make the following order:

1. The eviction order granted by the First respondent on 17 August 2016 is reviewed and set aside.
2. The Second Respondent is ordered to pay costs on party and party scale.



pp **M S MPHAHLELE**
ACTING JUDGE OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE

I agree


A handwritten signature in black ink, consisting of a large loop at the top and several sharp, angular strokes below, is written over a horizontal line.

**E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE**

APPEARANCES

Heard on : 18 October 2019

Judgment delivered on : 23 January 2020

For the Applicant : Adv. M S Manganye

Instructed by : Malesela Moloto Attorneys

For the Second Respondent : Adv. L Pretorius

Instructed by : Harvey Nortje Wagner & Motimele Inc

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