



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION)**

**CASE NO: 51032/08
DATE: 22 SEPTEMBER 2009**

IN THE MATTER:

PCM ERASMUS

APPLICANT

AND

**THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

1stRESPONDENT

MR GODFREY MTENJE

2ND RESPONDENT

MR ABRAM MORUBA

3RD RESPONDENT

MR ALFRED MADIOPE

4TH RESPONDENT

**THE UNLAWFUL OCCUPANTS ON SMALL
HOLDING 54 ANDEON
PRETORIAAFRICAN NATIONAL**

5TH RESPONDENT

JUDGMENT

RAULINGA, J

[1] The applicant brought an application for the eviction of the second and further respondents from the immovable property referred to as "Smallholding 54, Andeon, Pretoria.

[2] The application is based on the *'rei vindicatio'* in terms of the Prevention of the Illegal Eviction and unlawful occupation of Land Act, Act 19, of 1988 (PIE) In the main application, the applicant after complying with the provisions of PIE lodged

an '*ex parte*' application to serve the notice in terms of section 4 (2) of PIE.

[3] On the 19th of August 2009 when the application to serve in terms of section 4 was to be heard, the respondents raised a 'point *in limine*' that the application ought to have been brought in terms of the Extension of Security Tenure Act 62 of 1997 contending that this court lacks jurisdiction and that the matter ought to have been referred to the Land Claims Court which has jurisdiction to entertain such an application.

[5] The point *in limine* is raised on behalf of the respondents in that all respondents contended that they are not unlawful occupiers in terms of the PIE Act, but are in fact lawful occupiers in terms of ESTA.

The respondents' evidence is that they occupied the property

1. having obtained express consent from the applicant
2. pursuant to the conclusion of oral rental agreements
3. the applicant having tacitly consented to the respondents' residence or occupation of the property

[6] However, the applicant avers that

1. the respondents never worked on the land and did not have consent to move their dependants onto the land

2. all of the respondents who filed opposing papers claim to be unemployed but in other affidavits they refer to the fact that their structures were demolished while they were at work.

3. The respondents do not claim that their income falls below the threshold of R5 000, per month which would entitle them to protection in terms of ESTA.

[7] It is incumbent upon the respondents to show on a balance of probabilities that ESTA is applicable.

[8] In terms of PIE an "*unlawful occupier*" is defined as:

"means 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 a person whose informal right to land, but for the provisions of the Interim Protection of Informal Land Rights Act (131 of 1996)"

"Owner" is defined as the registered owner of land including an organ of State

In terms of ESTA an "*occupier*" is defined as:

"means a person residing on land which belongs to another person and who has 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 for 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"

[9] The application of E5TA is set out in Section 2(1) of ESTA;

(1) subject to the provisions of Section 4, this Act shall apply to all land other than land in a township established, approved or otherwise recognized as such in terms of any law, or encircled by such townships 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.

The land in Question "Small Holding 54, Andeon.

Pretoria is a plot that is used for agricultural/rural purposes. No organ of State has the sole control over it. It therefore holds that the owner has sole control over this land and all those who live in it. The said land is described on page 18 of the papers (Annexure PE 1) as follows:

"Landbouwhoewe (beteken) een stuk grond uitsluitend of hoofdzakelik gebruik voor land - of tuinbouw of voor het telen of houden van huisdiere, pluimvee of bijon". It can be safely concluded that this land is used for agricultural/rural purposes.

[10] The applicant concedes that the second and further respondents are renting the land, but claims that such contract was terminated by an eviction notice dated 31 October 2005. However, the respondents argue that the eviction notice is irregular in that it does not comply with the provisions of the PIE Act by virtue of the arbitrary nature thereof. It therefore, holds that the notice of 31 October 2005 is not a proper notice and as such any withdrawal of the consent intended thereby, was irregular. This fact is conceded by the applicant.

[11] The submission by the applicant that the respondents did not mention that they earn less than R5 000 per month, does not hold water. The fact that there is an omission does not entitle the applicant to infer that they earn more than R5 000 per month. This can also be gleaned from Form PE 6 on Page 41 of the

papers which was completed by the respondents. It is therefore clear that the applicant did not comply with the provisions of the PIE Act, on which it wishes to rely.

[12] The respondents have continuously and openly resided on the land for a period of more than one year and there is as such a rebuttable presumption that the respondents resided in the property with consent of the owner. Further, in view of the fact that the land in question is agricultural land the applicant ought to have referred the matter to either the Magistrate Court or the Land claims Court, both of which have jurisdiction to hear matters falling under ESTA. *The Lebowa Platinum Mines Ltd v Viljoen* 2009 (3) SA 511 (SCA) is authoritative in this respect:

In this case the learned Maya, JA quoted a dictum from *Mkangeli and Others v Joubert and Others* 2002 (4), SA 36 (SCA) at para 9,17 and 18:

'Generally speaking *ESTA protects a particular class of impecunious tenant on rural and semi-rural land against eviction from that land.... It seems... that... the Legislature intended to impose extensive limitations on any right to seek the occupiers' eviction from that land. This intention appears to be emphasised by the plain wording of ss 9 (1) and 23 (1) of ESTA [which prescribe that an occupier may be evicted only on the authority of a court order] A literal interpretation of these provisions appears to indicate an intention on the part of the Legislature that any right to have an occupier evicted, **regardless of who may be the holder of such right and whatever the source of such right may be**, should be subject to and limited by the provisions of ESTA."*

She then concluded as follows:

“These views, with which I respectfully agree, tend to reinforce mine- that although there is obviously a particular class of vulnerable persons who were the legislature's primary concern when ESTA was conceived, of which a respondent may not be a member, courts are nonetheless enjoined to consider the colour-blind provisions of s 26 (3) of the Constitution when interpreting ESTA, From the wide wording of such provisions, it hardly seems inconceivable that in that exercise a person falling outside the designated category, but nonetheless possessed of a landowner's consent or some other legal right, may fall within its purview”

This application for the eviction of the respondents is fatally flawed as it should have been brought in terms of ESTA and not in terms of PIE.

[13] Consequentially as seen in the decision mentioned above the matter should be entertained by the Land Claims Court.

[14] In its submissions, the applicant made a plea that instead of dismissing the application the Court should refer the matter to the Land Claims Court.

[15] I am not inclined to make such an order in view of the fact that the application is paralyzed by a number of irregularities.

[16] In the premises, I would make the following order:

The applicant's application is dismissed with costs.