



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

(Henney J et Montzinger AJ)

[Reportable]

High Court Ref number: 246/24

Lower Court Case No.: [B675/23]

In the appeal between:

RICARDO SIMON THYS

Appellant

and

Respondent

THE STATE

REVIEW JUDGMENT: 21 OCTOBER 2024

Montzinger AJ:

Summary Introduction

1. This special review¹ focuses on whether a property owner can use the mechanism of criminal proceedings to constructively evict an occupier as

¹ As the accused was legally represented the review of his trial and sentencing proceedings could only come before this court by virtue of s 303 read with ss 304(2)(a) of the Criminal Procedure Act, generally referred to as a 'special review'

defined in ESTA².

2. On 4 April 2024, the appellant, who was legally represented during the proceedings, was charged in the Atlantis Magistrate's Court for contravening the provisions of ss 1(1)(a) or (b) read with ss 1(1A), 1(2) and 2 of the Trespass Act, further read with ss 250(1)(d) of the Criminal Procedure Act³. The State alleged that the appellant on 31 October 2023 unlawfully and without permission entered a house on the farm Olifants-kop, Western Cape without the permission of Darien van der Spey. The last-mentioned person being the owner or person in charge of the land and/or building on the farm.
3. The appellant was convicted and thereafter sentenced on the same day to pay a fine of R 20 000,00- or twenty-months imprisonment. The sentence was wholly suspended for five years, on the condition that the appellant is not found guilty of trespassing or housebreaking with intent to steal and/or theft during the suspension period.
4. On 5 June 2024, a superior pointed out to the magistrate, that the sentence imposed exceeded the penal limit of the crime of trespassing. The magistrate was asked to send the matter to this court for special review. On 21 June 2024, the magistrate did so and addressed a letter, that accompanied the trial record, confirming that the fine of R 20 000,00 that was imposed should rather have been R 2 000,00. According to the magistrate the irregularity occurred due to an oversight and the review judge was asked to correct only the sentence in respect of the amount of the fine.
5. I have reviewed the trial record, the presiding magistrate's cover letter to the reviewing judge and had regard to the nature, impact and extend of the irregularities. I did not deem it necessary to request further clarification in

² Extension of Security of Tenure Act, 62 of 1997 (the "ESTA")

³ 51 of 1957 (the "CPA")

order to determine whether the proceedings were in accordance with justice⁴. The matter was henceforth treated as an appeal⁵.

6. The error identified by the presiding magistrate was obvious. The appellant was sentenced to pay a fine of R 20 000,00 while ss 2(1)⁶ of the Trespass Act provides for a sentence of a maximum fine of R 2 000,00. The appellant would therefore be entitled to at least a correction of the sentence by this court.
7. However, I am of the view that the appellant's conviction was not in accordance with justice as it should have been apparent to the magistrate that the provisions of the Trespass Act were used to constructively eject the appellant from the Olifants-kop farm.
8. I therefore turn to consider the appellant's guilty plea proceedings and whether it was conducted in accordance with justice. I do this by considering the Trespass Act and the current applicable eviction law legislation.

The Trespass Act and eviction legislation

9. In our pre-constitutional era evictions mostly took place in terms of the Prevention of Illegal Squatting Act also known as PISA⁷, which sought to criminalise, amongst other things, unlawful occupation of land. Our new Constitution⁸ introduced ss 26(3) that provides that no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances, and that no legislation may permit arbitrary evictions.

⁴ as provided for by ss 304(1) of the CPA

⁵ in terms of ss 304(2)(a) of the CPA read with s 14(3) and s 19(c) of the Superior Court Act, 10 of 2013

⁶ This section provided as follows: provides that: *"Any person convicted of an offence under section 1 shall be liable to a fine not exceeding R2 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."*

⁷ Prevention of Illegal Squatting Act 51 of 1951

⁸ Act 108 of 1996

10. Subsection 26(3) of the Constitution introduced a range of reform laws in respect of eviction. Two main pieces of legislation were enacted. ESTA⁹ with its main purpose to guarantee basic human rights to people who live, with consent of the landowner, in rural and peri-urban areas and to prevent unfair and arbitrary evictions. PIE¹⁰ in turn regulates the eviction of unlawful occupiers on land¹¹ otherwise not covered by ESTA. This means that occupiers, whether rural or residential can no longer be evicted without a court order in terms of either PIE or ESTA and all other laws that indirectly impacts on an occupier's ss 26(3) rights must yield to the Constitution and either PIE or ESTA.
11. This includes the Trespass Act. Although the Act has its origin during our dark history of apartheid¹², post 1994 the Act was amended to bring it line with our new constitutionally infused eviction laws.
12. Subsection 1(1) of the Trespass Act makes the following conduct a crime:

"Any person who without the permission—

(a) of the lawful occupier of any land or any building or part of a building;

or

(b) of the owner or person in charge of any land or any building or part of a building that is not lawfully occupied by any person, enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building."

13. Importantly ss 1(1A)¹³ in turn provides that:

⁹ Extension of Security of Tenure Act, 62 of 1997 ("ESTA")

¹⁰ Prevention of Illegal Evictions and Unlawful Occupation of Land Act, 19 of 1998 (PIE)

¹¹ See the definition of 'evict' in s 1 of PIE. It means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will.

¹² Being called a lynchpin law by the court in *Economic Freedom Fighters and another v Minister of Justice and Constitutional Development and another* 2019 (2) SACR 297 (GP); [2019] 3 All SA 723 (GP) ("*EFF v Minister*") – par [3]

“A person who is entitled to be on land in terms of the Extension of Security of Tenure Act, 1997, shall be deemed to have lawful reason to enter and be upon such land”.

14. It is obvious that the Trespass Act criminalises unlawful occupation of land and provides a mechanism for summary ejectment. When ss 1(1A) is read with ss 1(1) it means that while a person could possibly be convicted of the crime of trespassing in terms of ss 1(1)(a) and (b), a substantive defence to such a charge can be raised that the accused is a person who has a lawful reason to enter and be upon such land in terms of the provisions of ESTA. Therefore, considering ss 1(1A) of the Trespass Act, if an accused is charged with this crime the State has an obligation to prove that the person charged with trespassing is not a person entitled to be on the land.
15. Section 250 of the CPA establishes a legal presumption related to offences that require a license, permit, or other form of authority. Without the necessary authority, an accused is presumed not to possess that authority unless it can be proved otherwise.
16. As alluded to earlier, ss 2(1) of the Trespass Act contains the penal provisions that relates to ss 1(1). However, ss 2(2)¹⁴ in turn provides that:

“(2) A court which convicts any person under sub-section (1) may make an order for the summary ejectment of such person from the land concerned: Provided that an occupier who has a right of residence or right to use land in terms of the Extension of Security of Tenure Act, 1997, shall not be ejected in terms of this sub-section from land in respect of which he or she has such a right.”

¹³ This section was inserted in the Trespass Act by s 29 of the Extension of Security of Tenure Act, 62 of 1997 with effect from 28 November 1997

¹⁴ Subsection 2 substituted by s. 1 of Act No. 59 of 1983. Sub-s. (2) inserted by s. 29 of Act No. 62 of 1997.]

17. Considering the wording of ss 2(2), it is only triggered following a conviction under ss 1(1). However, ss 2(2) imposes a clear limitation on the penal provisions by expressly stating that an occupier under ESTA cannot be ejected from the land in question. This creates both an anomaly and a contradiction when read alongside section 1(1A). The effect of s 1(1A) is that an ESTA occupier cannot be convicted of trespassing, as the person is deemed to have a lawful reason to be on the land. Consequently, ss 2(2) becomes redundant, as the possibility of ejecting an ESTA occupier as a punishment under ss 2(2) can never arise, given that no conviction for trespassing could be validly secured in the first place. Thus, the sections appear to be at odds, with ss 2(2) becoming inapplicable under the same circumstances where s 1(1A) grants protection.
18. To complete the picture s 27 of ESTA provides that: *“Nothing in this Act shall affect the rights of an owner or person in charge in terms of the Trespass Act, 6 of 1959”*. Section 27 of ESTA seems to endorse the provisions of the Trespass Act in that an owner or person in charge is entitled to charge a person with trespassing, of course barring that the person charged is not an occupier as defined in ESTA or has a lawful reason to enter upon such land or building.
19. I did not come across many judgments on the possible abuse of the Trespass Act to construct evictions by landowners. I could also not find a judgment that deals with the Trespass Act and the provisions of ESTA. However, this is not to say that the mischief, of using the Trespass Act to construct evictions, is not playing out across our country and in our lower courts.
20. This is a mischief that courts must guard against as it was confirmed by the Constitutional Court in *Olivia Road*¹⁵ that:

“...Section 26(3), like all provisions of the Bill of Rights, deserves a generous construction. The section prohibits eviction of people from their home absent a court order that must be made after taking into

¹⁵ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (“*Olivia Road*”)

*account all the relevant circumstances. It means in effect that no person may be compelled to leave their home unless there exists an appropriate court order. The provisions of section 26(3) would be virtually nugatory and would amount to little protection if people who were in occupation of their homes could be constitutionally compelled to leave by the exertion of the pressure of a criminal sanction without a court order. It follows that any provision that compels people to leave their homes on pain of criminal sanction in the absence of a court order is contrary to the provisions of section 26(3) of the Constitution...*¹⁶

21. One judgment, *S v Koko*¹⁷ does alert one to the mischief in the use of the Trespass Act, but in the context of an occupier in terms of PIE. In *S v Koko* the accused was convicted for having entered onto premises without the permission of the lawful owner thereof. There were no prior civil eviction proceedings to determine the lawfulness of the accused's occupation. Mr Koko was charged with trespassing and sentenced to a fine of R1 000- or 100-days' imprisonment plus a further 9 months' imprisonment suspended for a period of 5 years on certain conditions. On special review this division found that the provisions of PIE did not preclude a prosecution of an unlawful occupier in terms of the Trespass Act. Also, as the prosecution of a person in terms of s 1 of the Trespass Act does not *per se* entail an eviction it does not conflict with the provisions of ss 4(1) of PIE¹⁸. In *EFF v MEC*¹⁹ a full bench endorse *S v Koko* that the Trespass Act was in harmony with the PIE Act²⁰.
22. However, the court in *S v Koko* did recognise that the Trespass Act could be used to orchestrate an eviction as the court issued a warning to the Director of Public Prosecutions that its office should guard against prosecutions in terms of the Trespass Act used by owners and persons in charge of land and/or

¹⁶ *Olivia Road* par 49

¹⁷ *S v Koko* [2005] JOL 14870 (C); 2006 (1) SCR 15 (C) ("*S v Koko*")

¹⁸ par 10 – see also *EFF v Minister* par 79

¹⁹ *EFF v Minister* n 12 above par 79

²⁰ A process to repeal the Trespass Act is under way. The status of that process is unknown. The call for comments on the proposed Unlawful Entry on Premises Bill, 2022 which main purpose was to repeal and replace the Trespass Act, 6 of 1959 was published in Government gazette No. 46705 of 12 August 2022.

buildings as a means to procure the eviction of persons without compliance with the onerous, but salutary provisions of the PIE Act²¹ .

23. While the judgment of *S v Koko* is helpful to navigate between PIE and the Trespass Act, it is less helpful in the context where ESTA is a possible defence to a charge of trespassing. ESTA and the Trespass Act expressly cross reference each other. Consequently, any attempt to invoke the Trespass Act to compel an individual to vacate their home through the pressure of criminal sanctions²², without adhering to the procedural safeguards of the country's eviction laws²³, like ESTA and PIE, would be inconsistent with the constitution and would effectively nullify the protections enshrined in ss 26(3) of the Constitution.

The provisions and implications of ESTA on the Trespassing Act

24. From the relevant quoted extracts from the Trespass Act alluded to earlier ESTA is mentioned twice. First, as a possible defence, in form of a deeming provision and again made under the penal provision of ss 2(2) as a prohibition against ejectment.
25. Contextually, interpreted it means that where an accused is charged with a contravention in terms of ss 1(1) of the Trespass Act the State must prove, in addition to the other elements mentioned in ss 1(1), that the accused is not an ESTA occupier. If it suffices that the accused is in fact an ESTA occupier, the deeming provision of ss 1(1A) will be activated and a criminal conviction cannot follow.
26. With the prohibition against finding an ESTA occupier guilty of trespassing in mind, I will now consider the requirements of an occupier envisaged in ESTA.
27. An "occupier" under ESTA is defined in ss 1(1) as follows:

²¹ *S v Kok supra* - par 24

²² *Olivia Road* par 49

²³ *S v Koko* par 24

"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) a person who has an income in excess of the prescribed amount;

(b) a person who has an income in excess of the prescribed amount; or

(c) 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."

28. The Constitutional Court has held that the provisions of ESTA have to be interpreted broadly, with the intent to afford vulnerable occupiers the fullest possible protection of their rights under the law²⁴. Furthermore, ESTA was enacted to improve the conditions of occupiers of premises on farmland and to afford them substantive protections that the common law remedies may not afford them²⁵. It is with these principles in mind that the definition of an occupier and other provisions of ESTA are considered.
29. There are essentially three requirements for a person to qualify as an occupier in terms of ESTA. Firstly, in terms of ss 2(1) of ESTA the type of land must be rural and not an established, approved, proclaimed or otherwise recognised in terms of law as a township. ESTA also applies to any land within such a township which has been designated for agricultural purposes in terms of any law²⁶.

²⁴ *Klaase and another v van der Merwe NO and others* 2016 (6) SA 131 (CC) ("Klaase") paras 50-51

²⁵ *Molusi and Others v Voges N.O. and Others* 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) par 7

²⁶ "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."

30. If the land designation is confirmed to be rural or agricultural and not a township, the next consideration is whether the individual has consent to be on the land. The concept of consent is a cornerstone in determining whether a person qualifies as an ESTA occupier. ESTA defines consent broadly ²⁷, encompassing both express and tacit consent given by the landowner or the person in charge of the land²⁸. Moreover, ESTA introduces the notion of "deemed consent"²⁹, which further protects the rights of individuals who have resided on land under certain conditions.
31. The last requirement is income. ESTA includes an income threshold that determines whether a person qualifies as an "occupier" under the Act. The definition of an occupier excludes a person from the protection of ESTA whose income exceeds the prescribed amount of R 13,625 per month³⁰. Individuals with a gross monthly income above this amount are excluded from the definition of an occupier under ESTA and its protection.
32. In civil eviction proceedings in terms of ESTA the obligation to prove that a person complies with all the requirements of the definition of an ESTA occupier rests on the individual seeking to invoke the protection of the Act³¹. However, there is a caveat to this obligation. An owner who seeks the eviction of an occupier under ESTA must make all the necessary averments and adduce the necessary evidence to make out a case in relation to every provision to which a court must apply its mind in deciding whether an eviction order is justified³².
33. I interpose to say that in the context of a charge contravening the Trespass Act, the obligation that may befall an ESTA occupier who claims protection by the provisions of ESTA will not be applicable in criminal proceeding as the law is

²⁷ Section 1 of ESTA

²⁸ par 53 of Klaase

²⁹ Subsections 3(4) and (5) of ESTA provides that for the purpose of civil proceedings in terms of ESTA, a person who has continuously and openly resided on land for a period of (a) one year shall be presumed to have consent to do so unless the contrary is proved and (b) three years shall be deemed to have done so with the knowledge of the owner or person in charge.

³⁰ See Reg 2(1) in Schedule A, GN R1632 of 18 December 1998 as amended

³¹ *Skhosana and others v Roos t/a Roos se Oord and others* 2000 (4) SA 561 (LCC)

³² *De Kock v Juggels* 1999 (4) SA 43 (LCC) at 50B - D

well established that:

“In all criminal cases it is for the State to establish the guilt of the accused, not for the accused to establish his innocence. The onus is on the State to prove all averments necessary to establish the guilt of the accused, not for the accused to establish his innocence...”³³

34. Therefore, if an individual is an occupier as defined in ESTA, then the provisions of ESTA established a comprehensive process to govern the eviction of such an occupier. It is not necessary for purpose of this judgement to venture into the strict procedural requirements of ESTA, suffice to say that they must be complied with in order to obtain a court order to evict.
35. However, in the context of criminal proceedings where the charge is one of trespassing and having regard to how the provisions of the Trespass Act is phrased, a criminal court must start with determining whether the accused is an ESTA occupier or not. Once it is found to be the case a conviction in terms of ss 1(1) the Trespass Act cannot follow. Nor can a summary ejectment as provided for in ss 2(2) of the Trespass Act be granted.

Guilty plea proceedings – legal principles

36. Having regard to the exposition undertaken in the previous paragraphs what does it mean for a magistrate faced with having to decide a criminal charge of trespassing in terms of ss 1(1) of the Trespass Act, in respect of an accused like the appellant in this instance?
37. Since the offence the appellant was charged with merited punishment of imprisonment or detention without the option of a fine, the appellant's guilty plea proceeding was governed by ss 112(2) read with ss 112(1)(b). Respectively, these provisions regulate the circumstances where an accused pleads guilty in terms of a written statement or in the case where an

³³ *R v Ndhlovu* 1945 AD 369 at p 386, See also: *S v van der Meyden* 1999 (1) SACR 447 (WLD) at 448 F-H

undefended accused is questioned by the presiding officer. In such instances it is the presiding officer's duty to be satisfied that the accused is guilty of the offence to which was pleaded.

38. The legal principles governing the assessment of a guilty plea are well-established in our law. It is sufficient to reiterate that ss 112(1)(b) and (2) of the CPA is designed to protect an accused, whether represented or unrepresented, from the prejudicial consequences of an incorrect guilty plea. It requires the presiding officer to be satisfied³⁴ that the plea of the accused, on all the essential elements of the offence, amounts to an unequivocal admission of guilt.
39. The principle that criminal proceedings should be 'in accordance with justice', is now constitutionally infused and at the heart of the right to a fair trial³⁵ provided for in ss 35(3) of the Constitution. The procedural fairness of a trial, include guilty plea proceedings.
40. The presiding magistrate court should perform its inquisitional function, where an accused pleads guilty, whether represented or unrepresented to determine whether an accused potentially falls within the definition of an occupier as defined in ESTA. If it is found that the accused raised issues that brings him/her under the purview of the protection of ESTA, the magistrate must rather record a plea of not-guilty and allow the proceedings to continue on that basis.
41. In guilty plea proceedings where the charge involved contravention of the Trespass Act it is incumbent upon the presiding magistrate to exercise the inquisitorial powers afforded to the court to ensure that justice is done. This duty requires the magistrate to thoroughly question the accused, in terms of s 112(1)(b), where such an accused is not legally represented, about the protective provisions of ESTA and also raise this issue with an accused's legal representative if it is not dealt with in a s112(2) written plea. The magistrate must actively determine whether the accused is an ESTA occupier or has a

³⁴ *S v Mkhize* 1978 (1) SA 264 (N) at 267

³⁵ *S v Dzukuda and Others*; *S v Tshilo* 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) at para 9.

lawful reason to be on the land under ESTA, as such a status would provide a substantive defence to the charge.

42. Additionally, the magistrate must be vigilant in assessing whether the Trespass Act is being improperly used as a mechanism to constructively evict an accused, without following the proper eviction procedures under PIE or ESTA. If any defence under these acts arises, the magistrate must enter a plea of not guilty.

The errors in the conviction of the appellant

43. In the present case the exchanges between the magistrate, the prosecutor and the appellant's legal representative during the sentencing proceedings should have raised doubt over the appellant's unlawful occupation of the house on Olifants-kop farm. Based on this the court should have entered a plea of not guilty and allowed the trial to continue on that basis³⁶.
44. On consideration of the record, it is evident that neither the magistrate, prosecutor nor the appellant's legal representative had an appreciation that the Trespass Act expressly refers to ESTA. If there was an appreciation for the substantive and procedural requirements laid down in ESTA to evict an occupier, as defined, the appellant should never have been convicted on the charge of Trespassing. Some of the exchanges between the magistrate and the legal representative should have alerted the magistrate that the appellant was an ESTA occupier:
45. Mr. Hanise, the appellant's legal representative, read the appellant's written guilty plea statement³⁷ into the record. The relevant part of the statement reads as follows:

"I admit that on the 31st of October 2023 and at Olifants-kop farm in the district of the city of Cape Town Your Worship I unlawfully and without

³⁶ *Attorney-General, Transvaal v Botha* 1993 (2) SACR 587 (A) and *S v H* 2004 (1) SACR 144 (T)

³⁷ In terms of section 112(2) of the CPA

permission of Darien van der Spey the lawful occupier of any land any building or part of building to it Olifants-kop farm....

What happens on the day in question I went to the address to go and sleep I went into the door which was wide opened there was nothing inside the house it was empty, so I slept on the floor, was found sleeping Your Worship in the house the following morning.

I had no right to do so as I did at the time of the offence I knew that my actions were wrong and punishable by this Honourable Court."

46. During the reading of the appellant's written guilty statement into the record the magistrate interrupted the proceedings, after hearing that it was a farm, with the following questions:

"COURT:...Okay just pause it there I hear you are saying he is admitting trespassing on Olifants farm or Olifants farm house? That would be important for punishment, was he on the house or was he just on the farm.

MR HANISE: In the house Your Worship.

COURT: Oh it is going to admit being in the house.

MR HANISE: Confirm so

COURT: Because he just admitted just being on the farm not the house.

MR HANISE: On the house Your Worship inside the house.

COURT: Ok listening.

MR HANISE: Yes may I amend the statement to include Olifants-farm house Your Worship?

COURT: Yes"

47. The first error is encapsulated in the foreshadowed exchange. The question was indeed important but not for purposes of punishment, it was rather important for determining whether the state has proven the elements of the crime. Whether the appellant was accused of committing trespassing at a particular house or on the farm is irrelevant for purposes of ESTA. The rights

of occupiers in terms of ESTA relates to the 'land'³⁸ (or the farm) and is not strictly limited to a particular house³⁹. If the appellant was sleeping in a house that he was not supposed to sleep in the landowner should deal with him in terms of the rules of the farm, but criminal proceedings in terms of the Trespass Act is not the appropriate remedy. Therefore, the first requirement for ESTA's applicability was present as it was not in dispute that the applicable land or property was rural or agricultural land.

48. After the plea was entered into the record there were further exchanges that confirm how the provisions of ESTA operated in favour of the appellant:

"MR HANISE: Your Worship in mitigating Your Worship the accused is a 37 – year – old male he is Your Worship he was residing at Olifants farm with his mother all his (sic) live"

COURT: But not in this specific house.

MR HANISE: Not in the specific house Your Worship the mother is still residing that farm Your Worship however not in the specific house.

49. This exchange show that the appellant has been residing on the farm for 37 years as it is said he has been living there for 'all his life'. As a result he had deemed consent as contemplated in s 3(4) or (5) of ESTA and the duty was on the complainant or in this instance the State to rebut the presumption.

50. The following exchange confirm that the appellant was an employee as well as the landowner's attempt to get rid of the appellant after the termination of his employment:

COURT: I don't understand that I heard he not trespassed in this specific house where he did not reside how did the[y] complainant have made a case for him to leave the farm, I don't understand the complainant said telling him to go trespassing the house.

³⁸ *Oranje and Others v Rouxlandia Investments (Pty) Ltd* 2019 (3) SA 108 (SCA) par 10

³⁹ *Snyders & others v De Jager & others* 2017 (3) SA 545 (CC) para 77.

MR HANISE: No Your Worship apparently Your Worship eh the, the accused was, was, was working for the complainant and eh the complainant [sic: the accused] just stayed away he did not come to work until he was fired by the complainant and he remained on the farm and eh the complainant has been trying to get rid of the accused to eh vacate the farm not to stay there anymore but apparently he was been he has been uhm eh refusing Your Worship or he has been neglecting the move out Your Worship of the farm hand the ...[intervene]...

COURT: but how will this case assist the complainant to get accused to move out of the farm?

MR HANISE: By getting him arrested Your Worship so that he does not come back to the farm rather being sent to prison Your Worship."

51. The termination of an occupier's right of residence or his eviction prior to resignation or dismissal in terms of the LRA⁴⁰ is irregular⁴¹. An owner is obliged to continue housing dismissed employees pending a dispute on the validity of their dismissal, which includes the lawfulness thereof⁴².
52. The next exchange show that the magistrate was in fact concerned about whether the appellant was being evicted with the use of the Trespass Act:

MR HANISE: Your Worship in our view that is no longer this home because the owner is trying to evacuate vacate him Your Worship he is trying to get rid of him.

COURT: But your view is wrong. You can only evict if you get the laws of this country are very clear and they historical most important historical reasons for these laws.

MR HANISE: Yes your worship

COURT: That you can only evict with a court order, so if, if today or whenever he walks back home on the farm and at the gate he meets the

⁴⁰ Labour Relations Act 66 of 1995

⁴¹ S 8(3) of ESTA and *Karabo and Others v Kok and Others* 1998 (4) SA 1014 (LCC) at 1019F.

⁴² *Karabo and Others v Kok and Others supra* at 1022C–H

farm owner and saying you cant come in yes he is entitled to approach the civil court on urgent basis.

53. The exchanges, foreshadowed in the previous paragraphs, illustrate that the appellant's legal representative had a limited or no understanding of the substantive requirements of an eviction of an ESTA occupier. If he did he would never have made the submissions he did. Although the magistrate had some sense about the consequence of the guilty finding, the error was already committed when the appellant was convicted. The magistrate should have conducted this enquiry prior to convicting the appellant, but having said that, s 113 of the CPA empowers a court to enter a plea on not guilty at any stage before sentence.
54. After these exchanges it should have been apparent to the magistrate, prosecutor and the appellant's attorney that the appellant could not have been found guilty. Firstly, it was expressly stated on the record that the complainant was using the Trespass Act to evict the appellant. This is exactly what the Trespass Act was trying to prevent by its direct reference to ESTA. That conclusion alone should have resulted in a plea of not-guilty being entered on behalf of the appellant.
55. However, the further exchanges between the magistrate and the appellant's legal representatives should have lead them to the conclusion that the appellant was clearly an occupier as defined in ESTA. The land applicable was a farm or rural land. The appellant has lived on the farm all his life with this mother. Furthermore, he has worked for the complainant on the farm, but was recently fired from his work, that meant he had no income to earn in excess of the threshold of R 13 635 per month income.
56. This meant he could never have been found guilty of the crime of Trespassing. The presumption in s 250 of the CPA is rebutted if an accused is an ESTA occupier and could not assist the State. The conviction and sentence therefore falls to be set aside.

Conclusion

57. Rather than using the Trespass Act to remove an occupier, the correct legal procedure to follow was the eviction process prescribed by ESTA. Although, the Trespass Act criminalises unauthorised entry onto land, magistrates and prosecutors should guard against the provisions of the Trespass Act being used to evict and should always undertake an inquiry to determine whether the accused's presence was lawful under ESTA. In this matter the magistrate failed to do so. Consequently, the proceedings were not in accordance with justice.
58. Therefore, I would make the following order:
- (a) The conviction and sentence in respect of the provisions of the Trespass Act are set aside with immediate effect.
 - (b) It is left within the discretion of the Director of Public Prosecution or the senior prosecutor of the lower court to decide whether to institute the proceedings against the appellant *de novo*.

A MONTZINGER
Acting Judge of the High Court

I agree. It is so ordered

R HENNEY
Judge of the High Court