



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

JUDGMENT

Case no: A127/2025

In the matter between:

GARDEN ROUTE DISTRICT MUNICIPALITY

Appellant

And

GONA-HESSE! KHWE ROYAL KINGDOM – NPC

First Appellant

CORNELIUS BOTHA

Second Appellant

JAN SWARTS

Third Appellant

THE FURTHER OCCUPANTS OF ERF [...],

DYSSELSDORP AS LISTED BY THE SHERIFF

ON 21 FEBRUARY 2024

Fourth Respondent

THE OUDTSHOORN MUNICIPALITY

Fifth Respondent

Coram: GOLIATH DJP, CLOETE J et THULARE J

Heard: 23 January 2026

Delivered: 25 February 2026

ORDER

1. The appeal succeeds.
2. The order of the court *a quo* striking the appellant's application from the roll is set aside and is substituted with the following order:
 - '2.1 The application is postponed to the first available date on the opposed roll in the Eastern Circuit Local Division, Thembaletu, for hearing before a different Judge;
 - 2.2 The first to fourth respondents shall deliver a further affidavit setting out all relevant circumstances as envisaged in section 4(7) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998, not less than 10 (TEN) court days before the hearing referred to in paragraph 2.1 above, failing which the Presiding Judge may accept that they wish the matter to be determined on the papers already before the court;
 - 2.3 The fifth respondent shall deliver the required report in respect of available alternative accommodation for the first to fourth respondents, to assist the Presiding Judge in the event that the applicant succeeds in the application, by not later than 10 (TEN) court days before the hearing referred to in paragraph 2.1 above, and to this end, the first to fourth respondents shall co-operate with the fifth respondent in providing all relevant information to it, failing which the Presiding Judge may accept that, in the event of an eviction order being granted, the first to fourth respondents do not require the assistance of the fifth respondent in obtaining alternative accommodation, whether on a temporary basis or otherwise; and
 - 2.4 Costs shall stand over for later determination.'

3. Each party shall pay their own costs in the appeal.

JUDGMENT

Cloete J (Goliath DJP and Thulare J concurring):

Introduction

[1] This is an appeal with leave of the Supreme Court of Appeal against the judgment and order of the court *a quo* (Erasmus J), who found that the application launched by the appellant (Municipality) for the eviction of the first to fourth respondents (respondents) fell to be dealt with in terms of the Extension of Security of Tenure Act (ESTA)¹, and not in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (PIE)². Having made this finding, the court *a quo* struck the Municipality's application from the roll for lack of jurisdiction. That court subsequently refused the Municipality's application for leave to appeal on the basis that its order was not appealable. The Supreme Court of Appeal took a different view.

[2] The narrow issue in this appeal is thus whether ESTA or PIE applies to the eviction application, which has not been withdrawn. If PIE is found to apply (as the Municipality contends) then the Municipality will be at liberty to re-enrol, and proceed with, its application. Accordingly, and save where strictly necessary, I do not deal with the factual disputes between the parties. Should we find in favour of the Municipality, the court dealing with the eviction application will determine those disputes.

¹ Extension of Security of Tenure Act 62 of 1997.

² Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998.

Relevant background

[3] On 25 January 2024, the Municipality launched the application in terms of s 4 of PIE in the Eastern Circuit Local Division, Thembaletu, for the eviction of the respondents from erven [...] and 9[...], Dysselsdorp, Western Cape. At the time, specific individuals were not identified by the Municipality as falling under the ‘fourth respondent’. Subsequently, the Municipality limited the relief sought to erf [...] (the property) and, in respect of the fourth respondent, to those individuals listed by the Sheriff on 21 February 2024, since it had never intended to seek the eviction of other individuals. The fifth respondent (Oudtshoorn Municipality) has not participated in the litigation.

[4] The Municipality’s *locus standi* is based on its registered ownership of the property in the deeds office registry. It maintains that the respondents are unlawful occupiers as envisaged in PIE. The second respondent, Mr Botha, describes himself as the Chief of the first respondent (Kingdom), and is adamant that, in this capacity, he is entitled under customary law to represent, not only himself, but also the Kingdom and the third and fourth respondents (the third and fourth respondents are said to be members of the Kingdom), both before the court *a quo* and in the appeal.

[5] When the appeal was argued, certain members of the Kingdom were present in court and appeared to be in agreement with Mr Botha on this score. While we are mindful of clear authority under South African law that a layperson may not represent a litigant, or another litigant³³, in court proceedings, it became clear at the outset of the appeal that Mr Botha (and members of the Kingdom present) would not countenance any suggestion that South African law could take precedence over what they maintain is the position under customary law.

³³ *Commissioner for the South African Revenue Service v Candice-Jean van der Merwe* (211/2021)[2022] ZASCA 106; 85 SATC 10 (30 June 2022) paras 45-46.

[6] In addition, and previously on 20 April 2024, Mr Botha delivered an affidavit in the eviction application in which he dealt with the request by counsel for the Municipality that the respondents obtain legal representation, as follows :

‘ ...we as the people have the right to determine for ourselves whether we need [a legal representative] or not and ... we are no more under the Admiral law of the sea but the law of the land, and that is Customary law or International Customary law.’

[7] It was in these particular circumstances that we took the view, for sake of disposing of the appeal, that Mr Botha could also address us on behalf of the Kingdom and its members. Any delay which would be caused as a consequence of engaging further with Mr Botha on the issue would simply not have been in the interests of justice, given that this litigation commenced two years ago. In this regard, the following.

[8] It is apparent from the record that the application first came before Gamble J on 8 March 2024, when the learned judge indicated that he required the municipality to address whether the property constituted ‘land’ for purposes of ESTA. He directed the parties to file supplementary affidavits on this issue. The Municipality filed its affidavit on 5 April 2024. The respondents failed to do so.

[9] On 22 March 2024, Gamble J made a further order. He postponed the application to 26 April 2024 ‘for purposes of its further conduct’. He granted the Municipality leave to file a further affidavit explaining whether the property has been designated for agricultural purposes in terms of any law in accordance with s 2(1)(a) of ESTA. The order also provided for the respondents to deliver their answering affidavit by 19 April 2024, and that they were to deal with ‘all of the entire application and not only the issue of jurisdiction’.

[10] It is not apparent from the papers whether the Municipality filed yet another affidavit. It had however already addressed Gamble J's concern in the affidavit filed by it on 5 April 2024. The respondents failed to file their affidavit, again, by the court ordered deadline of 19 April 2024.

[11] On 26 April 2024, the matter came before Erasmus J, who made an order in the following terms :

- ‘1. The respondents shall file any further affidavits in answer to the applicant's papers by no later than 3 May 2024.
2. The applicant is granted leave to file any further papers required in this matter on the respondents at the [following] email addresses ...
3. The application is postponed for further virtual case management before Erasmus, J to Wednesday, 22 May 2024 at a time to be allocated by the court ...’

[12] On 3 May 2024, the respondents delivered their answering affidavit. They did not deal at all with the merits of the application, as previously ordered, but attempted to deal only with the issue of jurisdiction, as well as disputing the Municipality's *locus standi* . The Municipality delivered its replying affidavit on 13 May 2024. It would seem that the respondents were thereafter given a further opportunity to deal with the merits, since they eventually delivered another answering affidavit on or about 5 September 2024. From the record it would seem that the Municipality did not deliver a further replying affidavit.

Judgment of the court a quo and grounds of appeal

[13] On 12 September 2024, Erasmus J handed down an *ex tempore* judgment. He referred to a specific point taken by the respondents that the property falls within ESTA since ‘it is being used for agricultural purposes’. The learned judge also dealt briefly with the affidavit evidence of the Municipality on this point as follows :

‘The bottom line is that [the Municipality was] looking for a “formal” zoning certificate for this erf, and it turned out it was zoned “undetermined zone” They then argue that it was not zoned agricultural zone 1 or agricultural zone 2.’

[14] Having found that s 2 of ESTA was determinative of the issue (I deal with this below), the learned judge found further as follows :

‘I have come to the conclusion that [the property] in fact falls within the Extension of Security of Tenure Act for the following reasons :

- The agreement [of lease] refers to the property as a farm. The normal definition and understanding of what a farm is, is that it includes the use for agricultural purposes. What are clear indications of what the understanding of the applicants were [the applicant was] at the time of entering into the lease agreement is that the lease agreement itself referred to quotas for crops to be produced within a particular season. It is also not unimportant that the extent of the property is some 748 hectares.
- The agreement itself further makes provision for access to what akin to [what the] Agricultural Act says. And in clause 14 thereof it deals with crops and animals on the property and that there could be compensation for crops. Crops can be alienated. If this is not a clear indication of the use of the land which the occupiers were lawfully given access to at some stage, then over and above the presumption in section 2(2) of ESTA, this should be determinative of the matter.’

[15] In summary, the Municipality’s grounds of appeal are as follows:

[15.1] The court *a quo* erred in relying on the presumption contained in s 2(2) of ESTA since: (a) the application was not brought in terms of ESTA, and s 2(2) specifically refers to civil proceedings *brought in terms of ESTA*; and (b) it was in any event not necessary for the court *a quo* to have regard to this presumption, since evidence was placed before it by the Municipality to show that the property falls within the ambit of s 2(1)(a) of ESTA, and as such ESTA does not apply; and

[15.2] The approach adopted by the court *a quo* was in direct conflict with the Full Court decision in this Division of *Droomer*⁴, which in turn referred to the decision of the Supreme Court of Appeal in *Agrico Masjinerie*.⁵

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

Discussion

[16] Dysselsdorp is a small town approximately 13 kilometres from the town of De Rust, situated just off the N12 national road between Oudtshoorn and De Rust, Western Cape. The property is one of two neighbouring erven (the other being remainder erf 9[...]), generally referred to in the area as Bloupunt. On 19 April 2022, the Municipality concluded a written lease with the Kingdom, duly represented by Mr Botha.

[17] The purpose of the lease was set out in clause 3.1, namely, to enable the Kingdom to establish ‘a Gqonaque Eland Game Reserve with an Eland Steak House; self-game drive, viewing the abundant wildlife and flora, as well as horse rides; walking; single track mountain bike trails; fishing; paintball; picnic sites and specific 4x4 tracks, *and may not be used for any other purpose whatsoever.*’ In terms of clause 11.16, the Kingdom was prohibited from allowing any other persons to reside on the property without the Municipality’s prior written permission. The property itself was described in clause 1.1.3 as ‘the Farm’.

[18] It is also common cause that the Kingdom at no stage conducted the business stipulated in the lease; that at least some of the respondents have never obtained written permission from the Municipality to reside on the property; and that the Kingdom failed to comply with its rental obligations under the lease. The reasons are in dispute. What is not in dispute is that at a meeting held on 5 December 2022, at which Mr Botha was present, the Kingdom was informed that in the event of it not making good on its arrears ‘the lease will terminate immediately’. No such payment was forthcoming.

⁵ *Agrico Masjinerie (Edms) Bpk v Swiers* [2007] ZASCA 84 (1 June 2007).

[19] Section 2 of ESTA provides in relevant part as follows :

‘2. Application and implementation of Act

- (1) Subject to the provisions of section 4, this Act shall apply to all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships, but including –
 - (a) any land within such a township which has been designated for agricultural purposes in terms of any law; and
 - (b) any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition.
- (2) Land in issue in any civil proceedings in terms of this Act shall be presumed to fall within the scope of the Act unless the contrary is proved.’

[20] In the Municipality’s founding affidavit, which was deposed to by its Manager, Mr Stratu, it was stated that at the time of conclusion of the lease, the relevant municipal official, a Mr Dongi, had informed him that the property was zoned Agricultural Zone 1, with its primary use being that of agriculture. This is no doubt why Gamble J raised the issue with the Municipality when the matter first came before him on 8 March 2024.

[21] In its supplementary founding affidavit, which was deposed to by Ms Sims, the Municipality’s Manager: Human Settlements, it was explained that Mr Dongi had conveyed the incorrect information to Mr Stratu, and that the property is in fact zoned as ‘Undetermined Zone’. This was confirmed under oath by Mr Cairncross, the Town and Regional Planner of the Oudtshoorn Municipality. The property’s zoning certificate, also produced by the Municipality, describes ‘Undetermined Zone’ as follows:

‘The objective of this zone is to enable the Municipality to defer a decision regarding a specific land use and development management provisions until the circumstances affecting

the land unit have been properly investigated, or until the owner of the land makes an application for rezoning; or a zoning determination is made by the Municipality. The objective of this zone is furthermore to create a zone to which land could revert back to when rights under current zonings, other than Single Residential Zone 1, were not exercised, especially in cases where changes in the planning context occurred since the current zoning was granted.’

[22] In *Droomer*, the Full Court held as follows :

‘[18] ... It does not matter that by virtue of its character ... [the land] is not practically suitable for agricultural use [i.e on the facts before the Full Court]. Nor is it relevant that it has never been used for agricultural purposes. The determinant criterion is its *designation* for agricultural purposes in terms of a law. The submission by the appellant’s counsel that the land had to be in actual use for agricultural purposes was misconceived. The word “designate” in the relevant sense means to “officially give a specified status”; zoning is a commonly encountered means of giving land an officially specified purpose for land use objectives ...’

[23] On the undisputed evidence before the court *a quo* the property was *not* designated for agricultural purposes. Moreover, given what was held in *Droomer*, it was irrelevant whether the property had been described in the lease as a farm; whether any farming had in fact taken place on the property; and whether certain clauses in the lease indicated that the parties envisaged the production of crops for compensation, and made reference to animals, as well as access to water . Its size was similarly irrelevant. In this regard, the court *a quo* unfortunately misconceived the legal position. ESTA simply does not apply. The further error made by the court *a quo* was its finding that the Municipality failed to prove that the property did not fall within the parameters of ESTA, as provided in s 2(2) thereof, given the Municipality’s unchallenged evidence to this effect. Consequently, the question whether the respondents are ‘occupiers’ for purposes of ESTA, which was also dealt with in *Droomer*, does not arise for determination before us.

[24] It follows that the appeal must succeed. It bears mention that counsel for the Municipality also sought to persuade us to find that the respondents are unlawful occupiers for purposes of PIE. We decline to do so because this issue is not before us on appeal. We are cognisant of the Supreme Court of Appeal decision in *Agrico Masjinerie*, where it was made clear that the issue of jurisdiction cannot be considered as a separate, preliminary point in matters such as the present. However, although the court *a quo* did not follow the correct approach on this score, it was not a ground of appeal advanced by the Municipality in its notice of appeal, and it is thus fair to infer that it did not feature in the petition of the Municipality to the Supreme Court of Appeal either.

[25] The Municipality asks for costs against the respondents. In our view, a costs order is not warranted. The issue of jurisdiction was raised *mero motu* by Gamble J after the Municipality placed incorrect information before him in relation to the zoning of the property. It was only as a result that the correct information was provided, and this cannot be laid at the door of the respondents. Moreover, the findings of the court *a quo*, and its failure to follow the correct approach to determine the matter, should also not redound to the prejudice of the respondents, which would be the case if they are mulcted with costs as a result.

[26] **The following order is made;**

- 1. The appeal succeeds.**
- 2. The order of the court *a quo* striking the appellant's application from the roll is set aside and is substituted with the following order:**
 - ‘2.1 The application is postponed to the first available date on the opposed roll in the Eastern Circuit Local Division, Thembaletu, for hearing before a different Judge;**
 - 2.2 The first to fourth respondents shall deliver a further affidavit setting out all relevant circumstances as envisaged in section 4(7)**

of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998, not less than 10 (TEN) court days before the hearing referred to in paragraph 2.1 above, failing which the Presiding Judge may accept that they wish the matter to be determined on the papers already before the court;

2.3 The fifth respondent shall deliver the required report in respect of available alternative accommodation for the first to fourth respondents, to assist the Presiding Judge in the event that the applicant succeeds in the application, by not later than 10 (TEN) court days before the hearing referred to in paragraph 2.1 above, and to this end, the first to fourth respondents shall co-operate with the fifth respondent in providing all relevant information to it, failing which the Presiding Judge may accept that, in the event of an eviction order being granted, the first to fourth respondents do not require the assistance of the fifth respondent in obtaining alternative accommodation, whether on a temporary basis or otherwise; and

2.4 Costs shall stand over for later determination.'

3. Each party shall pay their own costs in the appeal.

J I CLOETE
Judge of the High Court

I AGREE

P L GOLIATH
Deputy Judge President of the High Court

I AGREE

D THULARE

Appearances

For appellant: A F Schmidt

Instructed by: Millers Inc - George

For 1st to 4th respondents: Mr Botha, second respondent