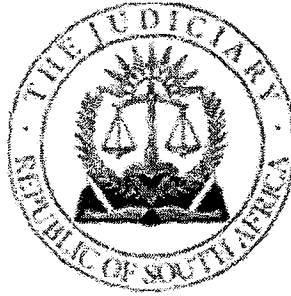


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 3562/19

(1)	REPORTABLE YES / NO
(2)	OF INTEREST TO OTHER JUDGES YES/NO
(3)	REVISED
15/2/2019	
DATE	SIGNATURE

In the matter between:

CROSSPOINT PROPERTY INVESTMENTS (PTY) LTD
CRADLE CITY (PTY) LTD

1st Applicant

2nd Applicant

and

MABILO ALLAN
THOSE REMAINING OF ZUMA MOLUNGISI & 42
OTHERS LISTED IN ANNEXURE "A" TO THE NOTICE
MOTION

1st Respondent

2nd to 44th Respondent

THE FURTHER OCCUPIERS OF THE REMAINING
EXTENT OF PORTION 13 OF THE FARM
LINDLEY 528 J.Q

45th Respondent

JUDGMENT

KEIGHTLEY J

Competing jurisdiction of High Court and Land Claims Court – urgent interim evictions – PIE and ESTA – owner cannot seek eviction under s5 of PIE for “unlawful occupiers” – interpretation of s15, s17 and s20 of ESTA absent consent between the parties High Court does not have concurrent jurisdiction to consider urgent interim eviction

applications under ESTA.

1. This judgment concerns the issue of competing jurisdiction of the High Court and the Land Claims Court in applications for urgent interim eviction orders under either section 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 ("PIE"), or section 15 of the Extension of Security of Tenure Act 62 1997 ("ESTA") respectively. In view of the time constraints involved, this judgment was prepared overnight.
2. By way of urgency, the applicants move for an order that provides, among other ancillary relief, that:

"Pending proceedings to be instituted in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 ("PIE"), alternatively in terms of the Extension of Security of Tenure Act 62 1997 ("ESTA") the ... Respondents be evicted from ... (the description of the first property is given) to ... (the description of the second property is given)."

3. The second applicant is the owner of the two properties in question, which lie more or less adjacent to each other and which originally formed part of the same farm. They are held under separate title deeds. I shall refer to the first property, on which the respondents currently reside as "property 1", and the second property, to which the applicants seek to move the respondents to, as "property 2".
4. The first applicant has been granted a tender by the Gauteng Department of Human Settlements to develop the broader area on which the properties are situated in terms of a project that will yield thousands of units of integrated housing and associated social facilities. The development will take place on land situated next to the Lanseria Airport. There are many informal settlements in the area and the applicants say that part of the

development is designed to provide, among other things, a substantial volume of housing for vulnerable residents.

5. The properties comprise undeveloped land and fall outside a proclaimed township. The respondents are a group of people who live in 28 informal houses on property 1. There is a long history of litigation concerning their occupation. It is not necessary to traverse it in any detail save to indicate that most of it has been conducted in the Land Claims Court. After an eviction order was granted by the High Court in 2008, the respondents succeeded in obtaining an order from the Land Claims Court restoring their occupation of the land. Since then, the second applicant applied for their eviction under ESTA in the Land Claims Court in 2010 ("the LCC eviction application"). That matter appears to have suffered extensive delays for a variety of reasons and to date has not been finalised. A similar application to the present one was brought before the High Court in the latter part of 2017, but was struck for want of urgency. It seems the court did not consider the question of jurisdiction.
6. The applicants have now launched fresh urgent proceedings, on the basis that the removal of the respondents from property 1 to property 2 is urgently required for the development project to move forward. The second applicant says that it has sold property 1 to a partner in the development project and that it is under a contractual obligation to remove all illegal occupiers from that property by 18 February. Failing this, it says, the project will not proceed. The respondents oppose the relief sought.
7. In their founding papers the applicants expressly relied on section 5 of PIE as the legal basis for their application. That section deals with urgent proceedings for eviction, and permits a court to grant an interim eviction order pending the outcome of proceedings for a final order. Certain jurisdictional requirements are laid down before a court may

grant the urgent eviction order. It is unnecessary to deal with them now. Section 15 of ESTA has virtually identical provisions to allow for urgent evictions or removals.

8. Despite their reliance on section 5 of PIE as the foundation for their application, in their founding papers the applicants record that they have previously acknowledged to the respondents' attorney in the LCC eviction application that: "*The applicability of ESTA to your clients' (respondents') position is acknowledged.*" In the founding affidavit, the second applicant also expressly acknowledges any obligations it may have to the respondents under ESTA. It also states that the order that it seeks before me is intended as a precursor to an eviction application under ESTA.
9. This apparent prevarication between PIE and ESTA in the founding papers raised a concern on my part about whether the High Court had jurisdiction to consider the application at all. I was concerned that by virtue of the statutory scheme established under PIE, on the one hand, and ESTA, on the other, it was the Land Claims Court or the magistrate's court, and not the High Court, that enjoyed jurisdiction in respect of the application. As I was obliged to do, I raised the issue with the parties, and requested them to address me on it before we could proceed with the merits of the application. The applicants contend that this court has jurisdiction, while the respondents say it does not.
10. While both PIE and ESTA regulate eviction proceedings, there are important distinctions between them. In the first instance, ESTA's applicability is limited to land that is not in a proclaimed, established or approved township. Its focus is thus plainly on rural (in the broader sense) land and those who occupy it. PIE applies to all land in South Africa regardless of whether it is township or non-township land.
11. An "occupier" for purposes of ESTA is someone who resides on non-township land belonging to another who had consent or some other legal right to occupy as at, or after,

4 February 1997.¹ PIE, on the other hand, is directed at “unlawful occupiers”, who occupy without consent or another legal right. Significantly, an unlawful occupier under PIE excludes an occupier in terms of ESTA.² Therefore, from the two definitions, it appears that the two Acts are not designed to protect the occupation rights of, or regulate the eviction of, the same set of people.

12. As far as the powers of courts are concerned, under PIE, only the High Court and the magistrate’s courts have powers under the Act.³ Under ESTA, “court” is defined more broadly. It means: “A competent court having jurisdiction in terms of this Act ...”.⁴ One needs to have regard to further provisions of ESTA for clarity on what are the competent courts under it.
13. Sections 17-20 are the relevant provisions of ESTA for present purposes. They fall under the Chapter dealing with “Dispute Resolution and Courts”. Section 17, is headed “Choice of Court”. It provides in subsection (1) that: “A party may, subject to the provisions of sections 19 and 20, institute proceedings in the magistrate’s court ... or the Land Claims Court” (my emphasis). Under section 17(2), proceedings may be instituted in the High Court “if all parties to the proceedings consent thereto”.

¹ Section 1

² Section 1. The definition reads: “*‘unlawful occupier’ 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 this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996).*”

³ Section 1 of PIE, and see section 9

⁴ Section 1 of PIE

14. Magistrate's courts have jurisdiction under section 19(1) in respect of eviction and reinstatement applications, criminal proceedings under ESTA and to grant interdicts and declaratory orders under the Act.

15. Finally, it is necessary to set out in full the provisions of section 20. It provides that:

"(1) The Land Claims Court shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power—

- (a) to decide any constitutional matter in relation to this Act;*
- (b) to grant interlocutory orders, declaratory orders and interdicts;*
- (c) to review an act, omission or decision of any functionary acting or purporting to act in terms of this Act; and*
- (d) to review an arbitration award in terms of the Arbitration Act, 1965 (Act No. 42 of 1965), in so far as it deals with any matter that may be heard by a court in terms of this Act.*

(2) Subject to the provisions of section 17(2), the Land Claims Court shall have the powers set out in subsection (1) to the exclusion of any court contemplated in section 166(c), (d) or (e) of the Constitution.

(3) If in any proceedings in a High Court at the date of commencement of this Act that court is required to interpret this Act, that Court shall stop the proceedings if no oral evidence has been led and refer the matter to the Land Claims Court.

(4) The President of the Land Claims Court may make rules to govern the procedure in the Land Claims Court in terms of this Act." (my emphasis)

16. What do all of these provisions mean for purposes of establishing the question of jurisdiction in a case like this one where the applicants seek to rely on cross-pollination, as it were, of PIE and ESTA?

17. Mr Pullinger's first submission for the applicants on the question of jurisdiction was that ESTA simply did not apply in the matter before me. This is because, so the argument proceeded, ESTA only deals with evictions, not relocations. The applicants were not seeking to evict the respondents, but rather to relocate them to property 2, which the applicants say is really just a different part of the same original farm. They were thus precluded from relying on ESTA to found their application. Accordingly, he submitted, PIE governed the application, not ESTA.

18. There are a number of difficulties with this submission. In the first place, while it may be that there is case law dealing with the difference between evictions, and relocations for

purposes of ESTA, Mr Pullinger conceded that none of them considered the question in the context of determining whether the High Court or the Land Claims Court had jurisdiction in a matter like the one before me. Furthermore, in the present matter, the applicants do not seek a final order of eviction. Instead they seek an interim order pending an application for a final order. As I have already indicated, Section 15 of ESTA, permits an owner to apply for the "removal", of an occupier from land pending a final order, albeit that it seems to use the term "removal" and "eviction" interchangeably. Nonetheless, it clearly caters for an application which is the equivalent of section 5 of PIE. The definition of "evict" and "eviction" in ESTA is: "to deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of this Act." The definition seems to me to cover the situation where an owner seeks to remove an occupier under section 15.⁵

19. The most significant difficulty with Mr Pullinger's submission that the application falls outside of ESTA is that the applicants have accepted that ESTA applies to the respondents' position. In fact, there is a pending application for an eviction order against them in the Land Claims Court under ESTA. It is thus common cause that the respondents are "occupiers" under ESTA. It is plain from the definition of "unlawful occupier" in PIE that the eviction provisions of that Act do not cover occupiers under ESTA. As the Supreme Court of Appeal held in *Agrico Masjinerie (Edms) Bpk v Swiers*,⁶ the two sets of rights (under PIE and ESTA respectively) are, by virtue of the definition of "unlawful occupier", mutually exclusive.

20. From this it is clear that a person simply cannot be an "unlawful occupier", under PIE, for purposes of an application for an interim eviction order, and then morph into an

⁵ The respondents claim that they originally occupied the property with the permission of the previous owner some 20-plus years ago. The applicants do not dispute this.

⁶ 2007 (5) SCA 305 at 308C

“occupier”, under ESTA, for the final order. That would be absurd, not least because it would mean that two entirely separate courts would deal with the interim and final applications respectively.

21. For these reasons, I find no merit in Mr Pullinger’s submission that ESTA is not applicable to this application. On the facts of this case, the respondents are occupiers under ESTA. They cannot be, at the same time, unlawful occupiers under PIE. It follows that ESTA, and not PIE, is the governing Act for purposes of this application.
22. Mr Pullinger submitted further that even if I found that ESTA is applicable, this did not present an insurmountable difficulty for his clients. He submitted that, provided the facts set out in the founding affidavit met the requirements for relief under section 15 of ESTA, the applicants could proceed to seek relief under that section, and abandon their initial reliance on PIE. This submission does not on its own solve the jurisdiction problem, as I would still have to find that the High Court has jurisdiction to consider an application under section 15 of ESTA. Mr Pullinger acknowledged this, but said that on a proper interpretation of the relevant provisions of ESTA, the High Court’s jurisdiction had not been excluded from considering an application of this nature.
23. The starting point of Mr Pullinger’s argument was that the High Court has jurisdiction to consider all matters, unless precluded by statute. This basic principle is important because, he contended further, it means that the High Court must be found to have jurisdiction to consider any matter that does not fall within the exclusive jurisdiction of the Land Claims Court under ESTA. As far as basic propositions go, I have no quarrel with Mr Pullinger’s submission in this regard. My difficulties lie with the roadmap he attempted to lay down from that point in his argument onwards.
24. Mr Pullinger submitted that the exclusive jurisdiction of the Land Claims Court is governed by section 20 of ESTA. It is set out fully above. He referred to subsections

(1) and (2), and contended that the effect of reading these two provisions together is that the Land Claims Court only has exclusive jurisdiction if either of the parties seeks to invoke the powers listed under subsections (1)(a) - (d). In other words, he says, as I understood his argument, that it is only if a case concerns a constitutional decision in respect of ESTA; or the grant of interlocutory relief, a declaratory order or an interdict; or the review powers identified, that the Land Claims Court has exclusive jurisdiction. As the application for section 15 relief did not invoke any of these powers, Mr Pullinger submitted that the Land Claims Court did not have exclusive jurisdiction, and thus the High Court retained what I assume would follow to be concurrent jurisdiction to consider the matter.

25. Mr Pullinger submitted that his argument was strengthened with reference to section 15 of ESTA. That section provides that “notwithstanding” any other provision of ESTA, “a court” may grant an order for the urgent removal of an occupier. He said that “court” was wide enough to include the High Court unless its jurisdiction was excluded by s20.

26. Once again, I have difficulty with this line of argument. Mr Pullinger sought to persuade me by referring to the *Agrico* judgment cited earlier, which he said was direct authority for his point. In that case, the applicant sought an order of eviction under section 4 of PIE in the High Court. The respondent opposed the application, asserting that she was an occupier under ESTA, but the applicant disputed this. It was only at the stage of the appeal to the SCA that a jurisdiction point was raised, with the respondent contending that the High Court had not had jurisdiction in the matter.

27. The SCA rejected the argument, and in doing so said the following:⁷

“It seems to me that the proper approach to the ‘exclusive jurisdiction’ for which s 20(2) provides is defined by the terms of s 20(1), ie if a party whether as applicant or

⁷ At paras 20-21

respondent claims performance of any of the functions of a court in terms of ESTA, only the Land Claims Court has the power, including the exercise of the powers specified in subparas (a) to (d) of s 20(1), to order or implement such performance. This power of the Land Claims Court is subject to s 17(2), which provides that proceedings under ESTA may be instituted in the relevant division of the High Court if all the parties consent to this, and to s 19(1), which gives the magistrates' courts jurisdiction in respect of certain proceedings under ESTA.

In the present case the appellant did not claim any such performance. Nor did the respondent attempt to do so, eg by making a counter-application for restoration of occupation pursuant to s 14 of ESTA. She was content merely to adopt the stance that she possessed the rights of an occupier under ESTA and to put the applicant to the task of disproving her contention. It follows that s 20 was not engaged by either party." (my emphasis)

28. In my view, *Agrico* is not authority for the submissions made by the applicants before me. To begin with, unlike the facts in *Agrico*, here the applicants concede that ESTA governs the legal position of the respondents. They are "occupiers", within the meaning of ESTA, and hence whatever court function is invoked by an application to remove them from the land will of necessity be a function performed by a court under ESTA.
29. Further, it is not section 20 alone that determines the ambit of the exclusive jurisdiction of the Land Claims Court. The starting point as far as its jurisdiction is concerned is section 17(1), which makes it clear that applications are to be made to the magistrate's court or the Land Claims Court. This, of course, is subject to section 17(2) permitting the parties to consent to the jurisdiction of the High Court. It is so that section 17(1) is subject also to section 20. However, a proper reading of section 20(1) makes it perfectly clear that its intention is not to constrain the exclusive jurisdiction of the Land Claims Court in the manner contended for by the applicants.
30. The underlined portions of section 20(1) set out earlier, read with subsection (2), show quite plainly that those provisions are aimed at extending, rather than limiting, the Land Claims Court's exclusive jurisdiction. Section 20(1) speaks to the ancillary powers in

respect of which the Land Claims Court will also, and not only, have exclusive jurisdiction in the course of performing its functions under ESTA. Read together with section 17, the scheme established for “occupiers” is that applications for eviction or removal are made either to the Land Claims Court or to the magistrate’s court. They are the courts that will perform the functions prescribed under ESTA. What section 20 does is to broaden this exclusive jurisdiction to include the exercise of functions that, while not established under ESTA, are necessarily ancillary thereto, such as the power to grant interlocutory orders where, for example, an owner seeks to deprive an occupier against his or her will of her residence on, or use of land.

31. The only exception to this, as far as the High Court is concerned, is when the parties have agreed, under section 17(2), to extend the exclusive jurisdiction of the Land Claims Courts power to make ancillary orders under section 20 by consenting to the High Court’s jurisdiction. The obvious reason for this is that if the parties have consented to the High Court’s performance of functions under ESTA, then it follows that the High Court, and not ESTA, must exercise powers in respect of matters ancillary thereto. This is why section 20(2) makes section 20(1) subject to section 17(2).
32. It follows from this that I am not persuaded by Mr Pullinger’s interpretation of section 20. It does not restrict the Land Claims Court’s exclusive jurisdiction to the matters referred to in section 20(1)(a) - (d). Moreover, the SCA did not find this to be the case, as a careful reading of the dictum makes clear. What the SCA said was that: “...if a party ... claims performance of any of the functions of a court in terms of ESTA, only the Land Claims court has the power, including the exercise of the powers specified in subparts (a) to (d) of section 20(1) to order or implement such performance” (my emphasis). As my underlining indicates, the SCA recognised that the exclusive jurisdiction of the Land Claims Court included, rather than was limited to, the ancillary powers contained in the subparagraphs of section 20(1).

33. Thus, as the SCA confirms, provided an application involves the performance of functions by a court under ESTA, the exclusive jurisdiction of the Land Claims Court is triggered, and that court must determine the main matter, as well as any ancillary matters under section 20(1). Of course, this is subject to the parties either agreeing instead to the jurisdiction of the High Court, or to the situation where an application is instituted in the magistrate's court.

34. In *Agrico*, the application did not involve the performance of functions under ESTA because the status of the respondent as an "occupier" was disputed, and the respondent elected not to invoke, by way of a counter application, any of the court's functions under ESTA. As I have already said, that is not the situation here: I have found that ESTA applies. The respondents can only be ordered by a court to leave property 1 and move to property 2 under ESTA. The application necessarily involves the performance by a court of functions under ESTA. Accordingly, the Land Claims Court (or if the applicants prefer, the magistrate's court) has exclusive jurisdiction over this application. There being no consent by the respondents to the High Court's jurisdiction under s17(2), this court's power to adjudicate the application is excluded.

35. In the circumstances I find that I have no jurisdiction to consider the application. This brings an end to proceedings before me, and the case made out by the applicants on the merits must remain for determination by a court with jurisdiction under ESTA, should the applicants elect to institute fresh proceedings.

36. Finally, I record that the Mogale City Local Municipality sought leave to be joined in the proceedings. In view of my finding on jurisdiction, it became unnecessary for me to consider that application.

37. I make the following order:

"The application is dismissed with costs."



RM, KEIGHTLEY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING : 14 FEBRUARY 2019

DATE OF JUDGMENT : 15 FEBRUARY 2019

APPEARANCES

APPLICANT'S COUNSEL : AW PULLINGER

INSTRUCTED BY : VERMAAK & PARTNERS INC

1ST TO 45TH RESPONDENT'S ATTORNEY : TI PATHER

COUNSEL FOR PROPOSED 47TH RESPONDENT : MP GUMEDE

INSTRUCTED BY : MOTLATSI SELEKE INC