

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **Randburg** on 19, 20 and 21 July 1999
before **Gildenhuis J**

CASE NUMBER: LCC R10/98

In the case of:

CITY COUNCIL OF SPRINGS

Applicant

and

OCCUPANTS OF KWA-THEMA 210

Respondents

JUDGMENT

GILDENHUIS J:

History of the application for eviction

[1] A number of people occupy land forming part of the proposed township, Kwa-Thema Extension 3, on the farm Kwa-Thema 210, Registration Division IR, in the district of Springs. I will refer to them as “the occupiers”. The land is owned by the City Council of Springs, a transitional local council. The occupiers erected informal structures on the land in which to live. In their papers, the respondents referred to this land as “the farm”, and I will do the same. The applicant is in the process of establishing a township on the farm and requires vacant possession for survey work and to install services.

[2] The applicant first obtained a rule *nisi* and eventually a final order in the Springs Magistrate’s Court for the eviction of the occupiers from the farm. It is common cause that the Extension of Security of Tenure Act ¹ (which I will call ESTA) applies to the farm. This Court, on automatic review,² set aside the Magistrate’s eviction order, and on 3 September 1998 substituted it with a rule *nisi* calling upon each of the occupiers and upon the head of the provincial office of the Department of Land Affairs, Gauteng, to give reasons, if any, why an order should not be granted as follows:

1 Act No 62 of 1997 (as amended).

2 Under section 19(3) of ESTA.

- “1 ordering each occupier and every person holding title under an occupier to vacate the property and to remove every informal structure (other than a permanent structure) occupied by him or her on the property, within thirty days from service of the final order in a manner of service as ordered by the Court;
- 2 interdicting and restraining each occupier and every person holding title under an occupier from thereafter depriving the Applicant or its agents or employees of the possession, use and enjoyment of the property;
- 3 ordering the Applicant to make available free of charge to each occupier vacating the property in terms of 1:
- (a) land to be used for the erection of a temporary structure or structures for the occupiers’ accommodation at the waiting area as described in Annexure ‘F’ to the Applicant’s founding affidavit; and
- (b) transport of the occupiers’ belongings, including the materials salvaged from any structure to be removed in terms of 1;
- 4 in the event of any occupier failing to vacate the property within the time limit set in 1, authorising and directing the Sheriff -
- (a) to evict all persons occupying the property, provided that such eviction shall not be carried out earlier than three days after the expiry of the thirty day period in 1;
- (b) to ascertain and note the identify of each person so evicted;
- (c) to demolish all informal structures found on the property and to move all material salvaged therefrom to the waiting area as indicated on Annexure ‘F’ to the Applicant’s founding affidavit;
- 5 granting the Applicant such further or alternative relief as the Honourable Court may deem appropriate;
- 6 ordering -
- (a) those occupiers who oppose this order; and
- (b) any other person who opposes this order,
- to pay the Applicant’s costs.”

The circumstances under which the rule *nisi* was granted, and my reasons for granting the rule *nisi*, appear from the judgment which I gave and with which my colleague Moloto J concurred.³

[3] The rule *nisi* was duly published and properly served.⁴ Answering affidavits were delivered by a large group of respondents, who are occupiers of the farm. These respondents may not include all the occupiers whose eviction the applicant seeks. On the return day of the rule *nisi*, however, no other occupiers came forward to oppose the order.

3 The judgment is reported in *City Council of Springs v Occupants of the farm Kwa-Thema 210* [1998] 4 All SA 155 (LCC)

4 *Ibid* at 167, where the requirements for publication and service of the order are set out.

[4] On 22 April 1999 the applicant and the respondents entered into an agreement as follows:

“The applicant and the respondent hereby agree that the application which was launched in the Magistrate’s Court for the district of Springs, under case number 98/06535, be transferred to the Land Claims Court of South Africa, held at Randburg, and the parties agree to subject themselves to the finding of the aforesaid Land Claims Court subject to the normal appeal procedures.”

By order of the Magistrate’s Court, Springs, the case was transferred to this Court on 29 April 1999.

Offer to make alternative land available

[5] The applicant, in its papers, offered to make alternative land available to the occupiers. I will refer to the alternative land as “the holding area”. It will eventually form part of the proposed township, and is situated to the south-west of the cemetery in the proposed township. The respondents alleged that the holding area is unsuitable for residential purposes, firstly because it is situated on a graveyard and secondly because of swamp conditions and drainage problems. I could not decide these objections on the affidavits. On 9 June 1999, I referred the following issues to oral evidence:

“ whether there is a graveyard under the ‘holding area’; and whether the ‘holding area’ is unsuitable for occupation due to swamp conditions or drainage problems.”

[6] Evidence was heard on 19 July 1999. From the summaries of evidence which were filed on behalf of the applicant, it became clear that there is no graveyard on the holding area. The holding area is next to a graveyard, not on a graveyard. This was accepted on behalf of the respondents, and oral evidence was restricted to the issue of whether the holding area is unsuitable for occupation due to swamp conditions or drainage problems.

Suitability of the alternative land

[7] Applicant called two witnesses, Mr S F M Cronje and Mr P Goudriaan. Mr Cronje is a professional engineer and a partner in the firm Brandford and Conning. His firm is one of the two consulting firms (the other being Civil Engineering Consultants, known as Civec) employed by the applicant for the planning and establishment of Kwa-Thema Extension 3 township.

[8] Mr Cronje testified that it is evident from contour maps that the holding area is situated on higher ground, with a watershed running through it. The major portion of rainwater falling onto the holding area drains away in a South Westerly direction, the balance in a South Easterly direction. No water drains onto the holding area from higher lying adjacent land. The slope of the land within the holding area is minimal, at its lowest about 1:250. Although small puddles form after rain, which in the case of heavy rain might remain for as long as a week, it will not make the land unsuitable for residential occupation. In some parts of the existing Kwa-Thema town, the slope of the land is as low as 1:460. Occupants in informal structures can protect themselves from stormwater by constructing small earthen mounds around their structures. A test pit has shown that there is no shallow water table under the holding area, and that there are no adverse clay conditions. The holding area is not situated below the floodline of any stream. Under cross-examination, Mr Cronje testified that he heard about water problems at the nearby cemetery. Water from the cemetery drains away in an Easterly direction, and does not cross the holding area. Mr Cronje also could not deny that mosquitoes might breed in the puddles after a rain storm.

[9] Applicant's next witness was Mr P Goudriaan, a civil engineering technician from the firm Civec. He is, as residential engineer, responsible for on-site supervision at Kwa-Thema Extension 3. He testified that the holding area is free draining, without any hollow parts. Drainage will, however, be slow and puddles will form. He never saw or heard about water seeping out of the ground within the holding area. He said it is impossible for water to flow from the cemetery to the holding area. After rain, the entire holding area will be muddy. It will be the same elsewhere in Kwa-Thema Extensions 2 and 3, where suitable drainage systems have not yet been installed. He said, in cross-examination, that he did not know whether mosquitoes would breed in the puddles.

[10] An important component of the evidence of Mr Goudriaan is that 150 stands have been demarcated in the holding area. There are already 202 families living in the holding area in informal structures, two families per stand. The holding area cannot accommodate more than 100 additional families (based on a half stand per family). The existing families were moved to the holding area during the rainy season, and there were no problems with water. He has received no complaints from the existing occupiers regarding water problems. Had there been complaints, he would, according to his testimony, have known about them.

[11] The respondents presented evidence by Mr S J Mnisi, Mr P Sithole and Mr T E Yende. All of them live outside the holding area, in a portion of Kwa-Thema known as Barcelona. Both Mr

Sithole and Mr Yende are traditional doctors (sangomas). Their evidence is that after rain, water stands all over the holding area, it is muddy and there are problems with mosquitos. The holding area is not a suitable place for people to live. Mr Mnisi testified that, unlike the area where he lives, water comes “out of the ground” in the holding area. Mr Sithole testified, contrary to the experts, that after a downpour water flows from the graveyard onto the informal houses in the holding area. Mr Yende testified that water remains in the holding area for a long time. He does not know where the water comes from.

[12] Having to choose between the evidence presented by the applicant and the evidence presented on behalf of respondents, I have no hesitation in accepting the evidence presented by the applicant. It is based on scientific data, and not on random observations of persons who do not actually live in the holding area. In fact, Mr Mnisi went so far as to concede that he does not really know what is happening in the holding area. It is significant that there was no evidence of complaints by the inhabitants of the holding area. On the contrary, Mr Goudriaan testified that, if had there been complaints, the complaints would have been referred to him, and he had received none. I am satisfied that the holding area is not unsuitable for accommodation due to swamp conditions or drainage problems, notwithstanding a possible problem with mosquitoes.

Requirements for an eviction order contained in ESTA

[13] The applicant now prays for a final eviction order against all the occupiers of the farm (including the respondents). To succeed, it must comply with section 9(2) of ESTA. Section 9(2) reads as follows:

“A court may make an order for the eviction of an occupier if -

- (a) the occupier’s right of residence has been terminated in terms of section 8;
- (b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
- (c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and
- (d) the owner or person in charge has, after the termination of the right of residence, given -
 - (i) the occupier;
 - (ii) the municipality in whose area of jurisdiction the land in question is situated; and
 - (iii) the head of the relevant provincial office of the Department of Land Affairs, for information purposes,

not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Land Affairs not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with."

Compliance with section 9(2)(a) and (b) of ESTA

[14] Firstly, the applicant must establish that the rights of residence of the occupiers have been terminated in terms of section 8 of ESTA. Section 8(1) contains the following requirements:

"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."

[15] The applicant was established on 6 December 1994, and from that date became responsible for the management and control of the Kwa-Thema area, which includes the farm and the holding area. Although occupiers began living on the farm in 1992, some of them arrived after 4 February 1997. The applicant accepts that the occupiers presently living on the farm do so with the tacit consent of the owner (being the applicant), and are thus "occupiers" within the meaning given to that term in section 1 of ESTA. Occupation of land with tacit consent constitutes an agreement to occupy. In this instance, the agreement is silent as to the duration of the right to occupy. An agreement which is silent as to its duration is, under common law, terminable on reasonable notice.⁵ Under section 8(1) of ESTA,⁶ there are additional requirements for termination.

5 *Putco Ltd v T V & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) at 827H-828B.

6 Section 8(1) is quoted in [14] above.

[16] The applicant followed a protracted process to bring the occupiers' right of residence to an end. The process commenced in 1996, and included the signing of a so-called "social compact" and various meetings with the Kwa-Thema community. A steering committee was elected on which the community was represented. The respondents alleged that they were not properly represented. Mr Botha, for the respondents, referred me to the minutes of community meetings held on 20 February 1997, 12 June 1997 and 25 September 1997, where there are some indications that the question of representation on the steering committee was not finalised. These indications do not substantiate the respondents' complaint that they were not properly represented. They themselves, in their affidavits, did not substantiate this complaint. Individual community members had access to community meetings. The resettlement of the occupiers was discussed, at length and at different stages, at community meetings. At a mass meeting on 8 July 1997 the occupiers were finally informed that they were required to move from the farm. This was followed by written notices given to occupiers between 20 and 22 May 1998, which read as follows:

- "1 . . . you are hereby requested either to:
- 1.1 move to erf allocated to you if you were a successful applicant in terms of the Housing Subsidy Scheme; or
 - 1.2 to move to the designated area in the event of you not having applied/having been successful in your application.
- 2 The designated area (previously referred to as the transfer area) is east of the Eskom power line and south-west of the cemetery in Kwa-Thema Extension 3. The Chief Liaison Officer of CIVEC, Mr N Mazibuko, will allocate the stands at the designated area and can be contacted at CIVEC's office on site at Kwa-Thema Extension 3.
- 3 FURTHER TAKE NOTICE that Springs Council is prepared to assist you in the transfer of your property from your existing erf to the designated area or to your allocated erf in the event of your having been successful in your application for housing subsidy.
- 4 FURTHER TAKE NOTICE that you are given seven days from receipt of this notice to act as aforesaid, as you have received instructions previously to move to the aforesaid area (in order that the construction of the water and sewerage in Kwa-Thema Extension 3 could be executed properly),
- 5 YOUR FAILURE to act in accordance with this notice, will result in a court order to remove you to/evict you from the area.
- 6 In the event of any queries or uncertainties, kindly contact the official dealing with this matter, Mr G Smit at (011) 360-2123, or call at the Property Division, at the Council's offices."

Eight hundred of these notices were distributed amongst the occupiers.

[17] Ms Monica Mavusa, who deposed to the main answering affidavit on behalf of the respondents, admitted that the notices were distributed, but denied that all occupiers received one. She also denied that the applicant was entitled to terminate respondents' right of residence on the

farm. There are several hundred occupiers. It is not feasible for the applicant to prove that each individual one of them received the termination notice. I am satisfied that the applicant did all it could to bring the termination notices to the attention of all the occupiers. None of the respondents, each of whom filed an affidavit, alleged that he or she was unaware that the applicant gave notice to terminate their right of residence. I therefore hold that proper notice was given.

[18] The next issue is the validity of the termination notices. This is linked to the question of whether the termination is just and equitable, as required under section 8(1) of ESTA. The gravamen of respondent's objection to the termination is contained in the affidavit of Ms Mavuso, as follows:

"The Respondents presently occupy the farm and they are legally entitled to security of tenure [sic] thereon.

The Applicant is obliged to install bulk services to erven in the proposed township, thereby improving living conditions for the inhabitants thereof. However, the Applicant is not entitled to install such services for *'inhabitants who will ultimately occupy'* the farm. Such services must be installed for the benefit of the Respondents and the Applicant has no right to eject the Respondents from the farm to install services which will ultimately benefit other people.

I further deny that it is necessary for the Applicant to acquire the farm [and thereby ejecting the Respondents] in order to install the services. With due and proper town planning and planning of construction, the services can be installed while the Respondents are occupying the farm. . . "

[19] The objection is based on an incorrect premise. The farm belongs to the applicant. None of the respondents have any right of tenure in respect thereof, apart from their revocable right to occupy (which emanates from the applicant's consent) and their rights under ESTA.⁷ By granting consent to the occupiers to live on the farm, the applicant fulfilled a responsibility which it bears as a local authority.⁸ It did not abrogate its right to withdraw that consent. I also reject Ms Mavuso's unmotivated statement that, with due and proper planning, the services can be installed while the respondents are occupying the farm. Mr Mokumo, the deputy town engineer of the applicant, pointed out in his replying affidavit that it is impossible to do a layout of a township and an installation of services whilst the land is occupied, because the land surveyors cannot peg the different erven and heavy machinery cannot move between the informal structures without endangering the inhabitants.

7 The right to security of tenure which occupiers have under section 6(2)(a) of ESTA does not render revocable consent irrevocable.

8 Section 9(1)(a)(i) of the Housing Act, No 107 of 1997, reads:

"Every municipality must . . . take all reasonable steps within the framework of national and provincial housing legislation and policy to ensure that the inhabitants of its area . . . have access to adequate housing on a progressive basis"

[20] It is evident from the affidavits filed on behalf of the applicant that the applicant, after the proposed township has been established on the farm, intends to settle people who qualify for housing subsidies on the farm. Those people could include the respondents, if they qualify, but could also include other people. The people living in the holding area who have successfully applied for subsidies will be moved from the holding area as and when erven are allocated to them. Unsuccessful applicants, and those who do not qualify for a subsidy, will remain in the holding area for an indefinite period. Those people might include some of the respondents, and to that the respondents object. Mr Botha argued on their behalf that it will not be just and equitable that occupiers be evicted from the farm to make way for other people who will qualify for subsidies, who are higher up on a waiting list or who are better suited for occupation at the discretion of the town planners. I cannot accept that argument. It is based on the fallacy that their right to live on the farm, which is a *precarium* right, cannot be cancelled. ESTA allows the lawful termination of a right of residence, provided the termination is just and equitable.⁹ I do not consider the overall scheme of the applicant to provide accommodation to people in Kwa-Thema and their proposed treatment of the respondents to be unjust or inequitable.

[21] There was also an objection that the occupiers (or some of them) would have to move twice. This objection was raised during argument, and is based on the minutes of a meeting with the community which took place on 13 March 1996, in which a sequence of development that would entail only one move by the occupiers was recorded. This recordal was not raised by respondents in their answering affidavits. I do not know whether the land which was available on 13 March 1996 and which was necessary for implementing that sequence, is suitable or is still available. According to the minutes, some of the land is part of Brakpan, which could present a problem. A mere reference (made during argument) to the recordal of that sequence in the minutes is not sufficient to convince me that it is feasible or preferable to the applicant's present scheme.

[22] On behalf of the applicant, it was submitted that circumstances in the holding area are much more favourable than the circumstances under which the respondents are currently living on the farm. In the holding area, so the applicant contends, there is communal water and there are sewerage facilities in the form of ablution structures. These are not only available, but are also controlled and maintained, by the applicant, to ensure hygienic conditions. Similar facilities are not available on the farm, although the respondents do allege that the applicant provides sewerage and rubbish removal

9 Section 8(1) of ESTA.

services. Apart from the objection relating to flooding and swamp conditions allegedly existing in the holding area, which I have already dismissed, the only other objection which the respondents raised in the papers was that the holding area was situated on a graveyard.¹⁰ This objection was abandoned when the hearing of the case commenced. In the result, I am driven to the conclusion that the alternative accommodation offered to the respondents in the holding area is suitable.¹¹

[23] Bearing in mind the responsibility of the applicant to facilitate the provision of housing to people living within its area of jurisdiction,¹² and taking cognisance of the alternative accommodation offered to the occupants of the farm, I conclude that the termination of the right of residence of the present occupiers in order to allow the farm to be developed as a township, is just and equitable. Having come to this conclusion, and taking cognisance of the fact that the respondents have not vacated the farm, I conclude that the requirements of section 9(2)(a) and (b) have been complied with.

Compliance with section 9(2)(c) of ESTA

[24] Section 9 (2)(c) of ESTA requires compliance with section 10 in respect of persons who were occupiers on 4 February 1997, and compliance with section 11 in respect of persons who became occupiers after 4 February 1997. Some of the occupiers fall within the first category, the others within the last category. Under section 10(2), an eviction order may be granted if suitable alternative

10 A further objection emerged from the oral evidence given by Mr Mnisi, one of the respondents, namely that the holding area is too crowded. This objection was not raised in the papers, is not one of the issues referred to oral evidence, and was not pursued in argument.

11 It complies with the definition of “suitable alternative accommodation” contained in section 1 of ESTA, which reads as follows:

“suitable alternative accommodation” means alternative accommodation which is safe and overall not less favourable than the occupiers’ previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to -

- (a) the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services;
- (b) their joint earning abilities; and
- (c) the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active;

12 See note 8 *supra*.

accommodation is available. Under section 11(2), an eviction order may be granted if it is just and equitable to do so. I have already found that the alternative accommodation is suitable, and that the removal of the present occupiers from the farm is just and equitable. Accordingly, the requisites of section 9(2)(c) have been complied with.

Compliance with section 9(2)(d) of ESTA

[25] Section 9(2)(d) of ESTA requires advance notice of the applicant's intention to obtain an eviction order to be given to the occupiers concerned, to the municipality (which, in this case, is inappropriate) and to the relevant provincial office of the Department of Land Affairs. The subsection is subject to the following proviso:

“Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Land Affairs not less than two months before the date of commencement of the hearing of the application, this paragraph shall be deemed to have complied with.”

In my judgment of 3 September 1998, I held that the rule *nisi* which I issued will fulfill the requirements of section 9(2)(d).¹³ The rule *nisi* was properly served. More than two months have expired since its service. Accordingly, section 9(2)(d) has been complied with.

Accommodating the occupiers in the holding area

[26] My finding that the requirements of section 9(2)(a) and (c) of ESTA have been complied with, is based on the premise that the alternative accommodation which the applicant offered, is indeed available. During the evidence of Mr Goudriaan, it transpired that only a hundred families can now be accommodated in the holding area. The occupiers of the farm (which include the respondents) number much more than a hundred families. This issue was unfortunately not properly ventilated in the affidavits. The applicant explained that, for various reasons, it could not make an accurate assessment of the number of families which would have to move from the farm to the holding area. It is obvious, from the papers before me, that the applicant originally never intended to move the respondents in batches. Presently, the holding area accommodates both successful applicants in the housing scheme waiting for erven to become available and persons who are either unsuccessful applicants or who do not qualify for a housing subsidy. As erven are allocated to successful

13 See Note 3 at 162f-163a.

applicants, they will move out of the holding area, thereby making space available to new inhabitants. That rotation, so the applicant now submits, will enable it, over time, to move all the occupiers to the holding area, and from there move those who are successful in their housing subsidy applications to their allocated erven.

[27] The provisions of ESTA were not designed to cater for mass evictions, as are required in this case. Accordingly, to achieve the eviction of the occupiers within the framework of the principles on which ESTA is based, the Court must be innovative in the order which it makes. The papers before me comprise more than 623 pages. Much time and effort have gone into their preparation. There have been several court hearings. Rather than dismissing the application on the basis that suitable alternative accommodation is not now available to all the occupiers who will have to vacate the farm, I would prefer to find a way in which the transfer of occupiers can be staggered. The applicant requested me to do so.

The eviction order

[28] In terms of section 12(1) of ESTA, a court which orders the eviction of an occupier must:

- “(a) determine a just and equitable date on which the occupier shall vacate the land; and
- (b) determine the date on which an eviction order may be carried out if the occupier has not vacated the land on the date contemplated in paragraph (a).”

It is, in my view, within the powers of this Court to authorise the applicant to serve notices over a period on individual occupiers requiring them to vacate the farm by not later than a specific date to be stated in the notices. A fair notice period will be four weeks. Accordingly, the vacation date to be stated in the notices must not be earlier than 28 days from the date of service. The implementation of the eviction order may give rise to problems not catered for in directions contained in the order. Accordingly, there must be an opportunity to apply to this Court for additional directions, clarification of existing directions or even the amendment of existing directions. The authority to serve the notices to vacate over a period of time, as and when alternative accommodation becomes available, cannot continue indefinitely. A fair cut-off date after which the applicant will no longer be entitled to serve notices to vacate the farm under the order which I intend to make, is 30 June 2000.

[29] By allowing the applicant to serve notices to vacate on occupiers at different times over an

extended period of time, the applicant will be in a position to impose different time limits to move on different occupiers. This, so Mr Botha argued on behalf of the respondents, is unfair. The Court should decide when each occupier must move. I do not believe that giving the applicant the authority to decide which occupiers must move and when, is necessarily unfair. It must be remembered that the occupiers no longer have a right of residence on the farm. It is within the power of the applicant to be more lenient to some occupiers than to others. In any event, an occupier who is of the opinion that the eviction order which I intend to make is being unfairly implemented, may apply to this Court for relief.

[30] The eviction order which I intend to make contains a cumbersome implementation procedure. The burden of complying with this procedure will rest mainly on the applicant. The applicant has, to a large extent, itself to blame for the cumbersome provisions of the order, because it was only realised at the hearing of the matter that the holding area no longer has sufficient space to provide alternative accommodation to all the occupiers of the farm at the same time. My order will, to some extent, be based on a draft order submitted to me by Mr Putter on behalf of the applicant, in which the applicant attempted to address some of the problems.

[31] Moving the occupiers from the farm to the holding area will involve costs and effort. The applicant offered to provide the necessary transport to move the materials with which the informal structures were made and to move the personal belongings of the occupiers, free of charge. Mr Kruger, for the respondents, raised the possibility of damage in transit. The applicant suggested a clause in the Court Order which will preserve the occupiers' right to claim damages based on delict, should such damage occur. I will use the wording suggested by the applicant.

Was the application for the eviction order properly authorised?

[32] Mr Botha, in the heads of argument filed on behalf of the respondents, submitted that it appears from the record that the executive committee of the applicant on 22 July 1997 resolved that the people must be relocated voluntarily (not by legal action) and that the order prayed for provided for compulsory eviction. He pointed out that no resolution by the applicant to institute the present proceedings was submitted. Both Mr Naude, who deposed to the founding affidavit and Mr Makumo, who deposed to the main replying affidavit, stated that they had the necessary authority. They both asked, in their affidavits, for eviction orders against the respondents. Argument in the matter was

concluded on 21 July 1999 and I reserved judgment. On 19 August 1999, the respondents' attorney, by letter, requested me to hold the judgment over and to allow the respondents the opportunity to address the Court on the following aspects (I quote):

- “1. On 28 July 1999 the City Council of Springs took a resolution with retrospective effect.
2. It has since come to our attention that the retrospectivity of such Resolution could be in conflict with Section 33 of the Constitution Act 108 of 1996 which relates to the principles of the Administrative Law.”

I informed the attorneys that if the respondents wanted to reopen their case, they must bring a formal application. Subsequently I was informed (also by letter) that after long discussions, the respondents decided not to proceed with such an application. Although it would have been a wise precaution for the applicant to attach an authorising resolution to its papers, this is not strictly necessary.¹⁴ The possible absence of authority was, for the first time, raised during argument. There is no evidence before me to indicate that Mr Naude's and Mr Makumo's statements of authority are incorrect. Accordingly, I find that, on the evidence before me, the application is properly authorised.

Costs

[33] I now come to the question of costs. Litigation under ESTA is public interest litigation. The Court usually does not make a cost order, unless special circumstances justify such an order. In this case, Mr Putter (for the applicant) submitted that special circumstances are present. Firstly, the affidavit of Ms Mavuso (one of the respondents) creates the impression that the holding area is situated on top of a graveyard, which was clearly shown not to be the case. In my view, this is not necessarily indicative of bad faith. According to the testimony of Mr Sithole, the cemetery and the waiting area were perceived to be “the same place”. Mr Putter also referred to the misrepresentation of the number of respondents. All the respondents signed supporting affidavits to the affidavit of Ms Mavuso. Some respondents signed two supporting affidavits, and some even signed three supporting affidavits, thereby creating the impression of a much larger number of respondents than there actually was. This could well have been a deliberate attempt to mislead the Court, and I take a serious view of it. The three respondents who gave oral evidence are unsophisticated people. The other respondents are probably also unsophisticated. I am not convinced that those respondents who signed more than one supporting affidavit necessarily intended to mislead the Court. The intention to

mislead, if there was such an intention, might well be with the person who collected the affidavits. The attorney for the respondents often appear in eviction matters before this Court, and I do not believe that he would deliberately try to mislead the Court. It is, however, regrettable that he did not spot the duplications and triplications.

[34] If I decide to award costs against all the respondents jointly and severally, it could place an unjust burden on those respondents who might have the ability to pay, which would surely be a small minority. If I award costs only against those respondents who signed more than one supporting affidavit, I may be discriminating unfairly, because I am not convinced that they are necessarily guilty of attempting to mislead the Court. Perturbed as I am by the duplication and triplication of the supporting affidavits and the overall misleading effect created thereby, I do not consider that, in the interests of justice, I ought to make a special cost order against the respondents (or some of them) or depart from the Court's ordinary practice of making no cost order where the matter falls within the sphere of public interest litigation.¹⁵ I am also mindful of the fact that the parties must, in future, continue dealing with each other.¹⁶ The decision to make no cost order also applies to previous hearings, where the question of costs was held over for final determination.

[35] It is ordered that:

- (1) This order applies to every respondent and to every other person who on 22 May 1998 was an inhabitant of that portion of the farm Kwa-Thema No 210, Registration Division IR, Transvaal, which is shown on a map attached to the applicant's founding affidavit and marked annexure E (herein referred to as "the farm"), and to every person holding under a respondent or under such an inhabitant (herein individually or collectively referred to as "an occupier" or "occupiers").
- (2) The applicant is entitled to have every occupier evicted from the farm according to the directions contained in par (3)-(9) of this Order.

15 In the matter of *Hlatshwayo and Others v Hein* [1997] 4 All SA 630 (LCC) at 639e-644c; 1999 (2) SA 834 (LCC) at 844F-850A, Dodson J gave an extensive analysis of the approach which this Court should take on cost orders in public interest litigation.

16 See *Mahlangu v de Jager* [1999] 1 All SA 691 (LCC) at 705f.

- (3) Every occupier must vacate the farm and remove every informal structure (other than a permanent structure) occupied by him or her on the farm, if the occupier is served with a notice to vacate (herein “the vacation notice”) by the applicant, by not later than a date to be stated in the vacation notice (herein “the vacation date”). The vacation date must not be earlier than 28 days after the date of service of the vacation notice.
- (4) The vacation notice to each occupier:
 - (4.1) must have annexed to it a copy of this order;
 - (4.2) must state the vacation date;
 - (4.3) must contain an offer of alternative accommodation to be made available free of charge on an area to the east of the Eskom power line and south-west of the cemetery in the proposed township of Kwa-Thema Extension 3, as indicated in annexure F to the applicant’s founding affidavit (hereinafter referred to as “the holding area”); provided that the alternative accommodation offered may not be smaller than a half erf as presently demarcated on the holding area; the half erf which is offered must be identified in the vacation notice; and
 - (4.4) contain an offer of transport to be made available to the occupier, free of charge on the vacation date, for moving all building materials used in any structure inhabited by the occupier on the property, and for moving the personal effects of the occupier and of those holding title under him or her, to the allocated half erf within the holding area.
- (5) The vacation notice must be served personally on an occupier or on a member of his or her household who is apparently over the age of 18 years, unless the Court authorises a different form of service. Service may be effected through the Sheriff or by an official of the applicant.

(6) Every occupier must, at the time when a vacation notice is served upon him or her, give to the Sheriff or to the official of the applicant serving the notice:

(6.1) his or her full names and identity number;

(6.2) the full names and identity numbers, if any, of all those residing in his or her household;

(6.3) if requested to do so, the date of commencement of his or her occupation of the property; and

(6.4) information on any application made by him or her for a housing subsidy.

(7) The Sheriff is hereby authorised:

(7.1) to evict every occupier who has been served with a vacation notice and who has not vacated the property by the vacation date stated in the vacation notice; and

(7.2) to demolish all informal structures (other than permanent structures) occupied by such occupier on the farm and to move all materials salvaged therefrom to the half erf allocated to him or her in the holding area;

The Sheriff may evict such occupiers and demolish such structures not earlier than seven days after the vacation date, if they have not by then vacated the farm.

(8) The applicant must maintain a register indicating in respect of each occupier served with a vacation notice:

(8.1) his or her name and identity number;

(8.2) the date, time and manner of service of the vacation notice;

- (8.3) the vacation date as contained in the vacation notice;
- (8.4) the half erf allocated in the holding area to the occupier on whom the vacation notice is served; and
- (8.5) the name of the person who effected service of the vacation notice.

The register must be available for inspection by any occupier during office hours at the applicant's offices at Room 311, Block F, Community Centre, South Main Reef Road, Springs.

- (9) The alternative accommodation to be made available in terms of par (4.3) of this order must be made available for an indefinite period, but subject to termination in terms of the common law and the provisions of the Extension of Security of Tenure Act, 1997.
- (10) In the event of damage to property of occupiers in the process of transporting their belongings, the occupiers shall be entitled to institute action against the applicant on the normal principles of delict.
- (11) This order will lapse in respect of all occupiers who have not been served with a vacation notice by 30 June 2000.
- (12) Application may be made to this Court for further directions on the implementation of the order in par (2), or for a variation or clarification of the directives contained in par (3) to (9). Such application must:
 - (12.1) if made by the applicant, be on notice to the respondents, to be served at the address of their present attorney or at any other address as they may indicate;
 - (12.2) if made by a respondent, be on notice to the applicant, to be served at the address of its present attorney or at any other address as it may indicate; and
 - (12.3) if made by an occupier who is not a respondent, be made on notice to both the

applicant and the respondents, to be served as set out in (12.1) and (12.2).

- (13) No order is made as to costs, in respect of this hearing and in respect of previous hearings where a decision on costs was held over for final determination.

JUDGE A GILDENHUYS

Heard on: 19, 20 and 21 July 1999

Handed down: 2 September 1999

For the Applicant:

L G F Putter instructed by *Davies Theunissen*

For the Respondents:

J J Botha instructed by *Nico van Rensburg and Associates*