

IN THE KWAZULU-NATAL COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 4870/20

In the matter between:

LOGANATHAN GOVENDER N.O.

FIRST APPLICANT

GONASEELAN GOVENDER N.O.

SECOND APPLICANT

POOBALAN GOVENDER N.O.

THIRD APPLICANT

VALAYTHUM GOVENDER N.O.

FOURTH APPLICANT

YOGANATHAN GOVENDER N.O.

FIFTH APPLICANT

COOPAMMA GOVENDER

SIXTH APPLICANT

GOPAUL ANGAPPAN

SEVENTH APPLICANT

MALA TEWARIE ANGAPPAN

EIGHT APPLICANT

AND

RAMACHUL MAHILAL

FIRST RESPONDENT

ETHEKWINI MUNICIPALITY

SECOND RESPONDENT

HEARD ON: 10 MAY 2011

DELIVERED ON: 10 MAY 2011

JUDGEMENT

RADEBE J:

1. The Applicant instituted proceedings in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 (PIE Act). The First Respondent opposes the Application on the one point of substance, namely, that the Applicants ought to have brought these proceedings in terms of the Extension of Security of Tenure Act, No 62 of 1997 (ESTA)
2. It was conceded on behalf of the Applicants that in the event that this Court holds that the present proceedings ought to have been brought in terms of ESTA, then it would follow that this Court does not have jurisdiction to entertain the present application. For this Court to have jurisdiction in a matter there should be consent by the parties as provided for in section 16 & 17 of ESTA. Failing consent of the parties, the Court will not have jurisdiction and the application ought to fail on that point alone.

3. In determining the issue, the Court has had regard of the nature of:
 - 3.1 the land in question (the property) as defined in section 2 of ESTA;
 - 3.2 the special conditions as envisaged in the Title Deed which appears on Annexure "D" on pages 35-42 of the indexed papers;
 - 3.3 the Zoning Certificate which is Annexure "J" of the Applicants Founding Affidavit, page 56 of the indexed papers;
 - 3.4 a letter from the Surveyor-General, which is Annexure "K" of the Applicants' Founding Affidavit, on page 57 of the indexed papers.
4. Mr Collingwood, for the Applicants, submitted that in terms of Annexure "J" the property is currently zoned as Special Residential I. However, that is not the tone of the contents of annexure "J". The relevant passage reads as follows:

"... the property described as Portion 1 of Erf 776 Tongaat, is within the jurisdiction of the eThekweni Municipality (North), and is zoned Special Residential I in terms of the Tongaat Town Planning Scheme in the course of preparation ...

(my emphasis)

As a result of the Strategic Framework Plan, and Local Area Plan being prepared (my emphasis) for the Northern Entity, all development proposals are also subject to environmental, traffic, stormwater and geotechnical assessments. No development proposals, will be approved without these assessments being approved by the relevant approving authorities."

It is clear from the wording of the said letter that the stage at which it was when Annexure J was generated, namely on 23 July 2007, the zoning referred to was is the preparation process. The Applicants have not shown by any other document that the preparation has been completed.

5. This leaves this Court to look at the Title Deed, Annexure D, under the conditions imposed thereon, especially on page 4, points A to D. read together with the letter from the Surveyor-General (Annexure K). The conditions on the Title Deed are as follows:

- "A. The land may not be sub-divided without the written approval of the Controlling Authority as defined in Act No. 21 of 1940, read in conjunction with Act 44 of 1948.*
- B. Not more than one dwelling house together with such outbuildings as are ordinarily required to be used in conjunction therewith, shall be erected on the land except with the written approval of the Controlling Authority as defined in Act 21 of 1940 and in conjunction with Act No. 44 of 1948.*
- C. The land shall be used for residential and agricultural purposes only and no store or place of business or industry whatsoever may be opened or conducted on the land without written approval of the Controlling Authority as defined in Act No. 21 of 1940, read in conjunction with Act No. 44 of 1948.*
- D. No building or any structure whatsoever shall be erected within a distance of 91,44 metres from the centre line of the national road, without the written approval of the Controlling Authority as defined in Act No. 44 of 1948.*

The above conditions contain restrictions on the use of the land, which are applicable to agricultural land.

6. That the property is designated as agricultural land is also borne out by the fact that its ownership was transferred to the applicants as heirs in undivided shares. Applicants 1 to 5 hold the land in their representative capacities on behalf of heirs who have since passed on, and that in terms of the relevant provision of the Joint Will and Testament of the Deceased which appears on page 2 of the Title Deed (page 38) of the Indexed papers.
7. To strengthen the point regarding the conditions set out above, I refer also to Annexure "K" page 57 of the indexed papers. This is a letter dated 18 September 2009 (prior to the commencement of these proceedings) addressed to the Applicants' attorneys by the Surveyor-General. In the third paragraph thereof the following is said:

"The Private Township Board deemed that an application under Ordinance 27 of 1949 was not required and that Act 21 of 1940 was applicable. Since no application was made under Ordinance 27 none of the proclamation requirements under this Ordinance were necessary."

The conditions imposed by Act 21 of 1940 in conjunction with Act 44 of 1948 were applicable and Portion 1 of Erf 776 Tongaat was then first registered under these conditions in Deed of Transfer 6492/1964".

8. Section 2 of ESTA provides that the Act shall apply to all
"land other than land in a township established, approved proclaimed or otherwise recognized as such in term of any law or encircled by such a township or townships, but including:

- (a) any land within such township which has been designated for agricultural purposes i.t.o. any law ...*
- b) ...*

The property in question therefore qualifies to be dealt with i.t.o.

ESTA as: (i) *It is clearly designated as agricultural land as envisaged in the Deed of Transfer, No. 6492/1964; (ii) It is not a township as it has not been established, nor approved nor a township as it has not been established, nor approved nor proclaimed as such in terms of any law. The Applicants*

have not succeeded in convincing this court that the presumption contained in Section 2 (2) of ESTA has been rebutted.

Page 8

Section 2(2) of ESTA provides that:

"land in issue in any civil proceedings in terms of this Act Shall be presumed to fall within the scope of this Act unless the contrary is proved."

The burden of proof therefore falls upon the Applicants, who have to discharge the onus on a balance of probabilities.

9. The applicants have made lengthy submissions in respect of the proclamation of a township and the procedures to be followed in establishing a township. However, nothing in the applicants' submissions shows that such proclamation has indeed be done especially in contradiction of the nature and conditions tabulated in the Deed of Transer. They have also not proved that the land is not any land within such a township approved or proclaimed, or otherwise recognised as such after 4 February 1997 in compliance with Section 2 (2) of ESTA.

10. I therefore make the finding that those proceedings ought to have been brought in terms of the ESTA. Hence this Court does not have jurisdiction to hear the present application. There is therefore no need to deal with the First Respondent's Counter-application based on an improvement lie and/or undue enrichment, save for the issue of costs attendant thereto, which should follow the result and be awarded to the First Respondent.

11. I therefore make the following order:

- 1) The Application is dismissed with costs.
- 2) The First Respondent is granted leave to withdraw the counter-application.
- 3) The Applicants are ordered to pay the costs of the counter-application jointly and severally, the one paying the others to be absolved.

RADEBE J

APPLICANTS' COUNSEL:

A.D. COLLINGWOOD

INSTRUCTED BY:

KRISH NAIDOO, GOVENDER & CO.
C/O HASSAN PARSEE &
POOVALINGAM

FIRST RESPONDENTS COUNSEL:
INSTRUCTED BY:

N.N. DHEODUTH
I.C. MEER, MOTALA & CO.
C/O DASHNEE REDDY ATTORNEYS