IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 10 and 13 June 1999 **CASE NUMBER:** LCC71/99
before **Bam P** and **Gildenhuys J**

In the case between:

JOHN VORSTER NGWENYA AND 35 OTHERS Applicants

and

DORIS GRANNERSBERGER Respondent

JUDGMENT

BAM P AND GILDENHUYS J:

[1] An urgent application was brought by thirty-six applicants on 26 May 1999. The respondent is the registered owner of Plot 434, North Riding, Randburg (hereinafter "the property"). The applicants alleged that they lived in stables and outbuildings on the property, having obtained the consent of the owner or person in charge at the time, and that they are occupiers of the property within the meaning given to that term in section 1(1) of the Extension of Security of Tenure Act[1] (hereinafter referred to as "ESTA").

[2] On 20 and 21 May 1999 the respondent demolished the stables and outbuildings. Following upon the demolition, some of the applicants erected temporary structures on the property, into which they moved. In their notice of motion, they prayed for an order that suitable alternative accommodation be provided to them by the respondent and for other relief.

[3] The respondent filed an answering affidavit on 7 June 1999. She contended, *in limine*, that the would-be applicants lacked *locus standi* because they are not occupiers, that this Court furthermore lacked jurisdiction because ESTA was not applicable to the property, and that the relief prayed for was, in any event, not competent in terms of ESTA. Insofar as the merits were

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1 Act 62 of 1997, as amended.

concerned, she contended that there existed numerous disputes of fact which the Court would be unable to decide on the papers before it.

[4] The matter was argued on 10 June 1999. After listening to argument, we referred the following issues to oral evidence:

- whether each of the applicants lived on the property, and if so, for what period;
- which of the applicants, if any, had consent from the owner or person in charge when they commenced living on the property; and
- which of the applicants, if any, have an income in excess of R5 000,00 per month.

Oral evidence from the first and second applicants was heard on 13 June 1999.

[5] It was argued on behalf of the respondent that, if oral evidence was envisaged, we should at the commencement of the argument on 10 June 1999 have put the applicants to an election to either proceed on the papers as they stood and risk a dismissal of the application in the event of the Court being unable to the resolve the factual disputes on the papers alone, or otherwise apply to have the disputes concerned referred to oral evidence at that early stage. In the matter of *Dhladhla and Others v Erasmus* [2] this Court decided that it is not always necessary for an applicant who foresees factual disputes to elect at the commencement of the proceedings whether or not to apply to have those factual disputes referred to evidence. The Court is fully entitled, at the end of the argument, to refer particular factual issues to evidence.

[6] On 13 June 1999, after the first and second applicants gave evidence, the applicants reached an agreement with the respondent in terms whereof it was admitted that nine of the applicants lived on the property with the permission of the owner or person in charge prior to 21 May 1999, and that the income of none of those nine applicants exceeded R5 000,00 per month. The other applicants, with the exception of the second and twenty-fifth applicant, intimated that, although they did not intend to pursue any relief in terms of this application, they did not admit any of the

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2 1999 (1) SA 1065 (LCC) at 1071C-E; See also *Administrator, Transvaal, and Others v Theletsane and Others* 1991 (2) SA 192 (A) at 200B-E.

allegations made by or on behalf of the respondent in the papers before the Court, and that they reserved their rights in respect of any future litigation. The second and twenty-fifth applicants are still living on the property, in buildings which were not demolished.

[7] The names of the nine applicants whose right to reside on the property prior to 21 May 1999 was admitted, are set out below. They alleged in affidavits before the Court that their occupancy commenced on the dates indicated hereunder.

Number	**Name**	**Commencement of occupancy**
6	Justice Makhalemele	May 1992
7	Gerlad Zibonelo Zweni	June 1990
10	Abram Molefi Bosaletsi	March 1996
12	Charles Manea Selomana	September 1995
14	Allen Jabulani Nyathi	March 1989
15	Alfred Matlabe	April 1986
26	Jester Ndlovu	March 1990
27	Frans Lesiba Chokwe	November 1989
32	Thulani Shezi	August 1994

[8] On behalf of the respondent it was argued that the nine applicants were nonetheless not occupiers under ESTA because the property is excluded from the operation of ESTA under section 2(1) thereof. Section 2(1) reads as follows:

> "2(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 -
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> (a) any land within such a township which has been designated for agricultural purposes in terms of any law; and
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> (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."

[9] The property, so it was alleged, comprises land within an approved township. In support of this allegation, the respondent submitted a certificate from the local authority concerned (the Northern Metropolitan Local Council), which reads as follows:

> "**PROPOSED TOWNSHIP KEVIN RIDGE**
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> I hereby confirm that the township application to establish a township on Holding 434 North Riding was approved on 4 February 1999 subject to certain conditions.
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> After these conditions have been complied with the township will be promulgated in the Provincial Gazette as an approved township."

It is clear from the certificate that only the application to establish the township was approved. The actual establishment of the township (sometimes called promulgation) has not yet been approved.

[10] The Town-Planning and Townships Ordinance (Gauteng) (hereinafter the Gauteng Ordinance)[3] governs the establishment of townships in Gauteng. If a landowner applies for the establishment of a township, the application must be approved by the administrator (now the premier of the province concerned) [4] if the local authority concerned is not an authorised local authority,[5] or by the local authority itself if that local authority is an authorised local authority.[6] The approval of the application can be subject to conditions, some of which may relate to the payment of endowment.[7] There are also procedural requirements with which the applicant must comply. The approval of an application to establish a township will not necessarily result in its establishment. If the endowment is not paid or any other condition is not fulfilled or if the requisite procedural steps are not taken, the township might not be established at all. A considerable time

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3 Ordinance 15 of 1986 (Gauteng), as amended. Proclamation 161 of 1994 assigned this Ordinance to Gauteng, Eastern Transvaal, Northern Province and North-West.

4 In terms of section 71(1) of the Gauteng Ordinance.

5 An authorised local authority is a local authority which has been declared as such by the Administrator in terms of section 2 of the Gauteng Ordinance. An authorised local authority has more powers relating to the establishment of townships than a local authority which is not an authorised local authority.

6 In terms of section 98(1) of the Gauteng Ordinance. Although it does not appear so from the papers before us, the Northern Metropolitan Local Council is in all probability an authorised local authority.

7 Section 71(2) and (3) and section 98(2) and (3) of the Gauteng Ordinance.

period could elapse between the approval of an application to establish a township and the actual establishment thereof.

[11] Under the Gauteng Ordinance, land only becomes a township when it is declared to be an "approved township" by notice in the Provincial Gazette.[8] The term "approved township" is defined in this Ordinance [9] as follows:

> "(iv) `approved township' means -
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> (a) a township declared an approved township in terms of section 79 or 103;
> (b) a township approved in terms of any repealed law relating to townships;"

The Town-Planning Ordinance of Kwazulu-Natal[10] contains the following definition of "approved private township":

> "'approved private township' means a private township the establishment of which was approved by the Administrator under the Private Township and Town-planning Ordinance, 1934 (Ordinance No. 10 of 1934), and after the commencement of this Ordinance a private township the establishment of which has been approved by the Administrator and notified by him as approved in terms of this Ordinance;"

The definition in the Townships Ordinance of the Free State[11] reads as follows:

> "'approved township' means a township declared an approved township, or recognized as a township, in terms of section 14(1)(*a*) or in terms of any prior law relating to townships;"

In none of these ordinances does the concept of a "proclaimed township" appear. The term is probably a left-over from previous legislation. The procedure for the establishment of townships

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8 The notice must be published by the Administrator under section 79 of the Gauteng Ordinance or by the local authority concerned under section 103(1) of the Gauteng Ordinance, depending on whether the local authority concerned is an authorised local authority or not.

9 Section 1(iv).

10 Section 1 of the Town-Planning Ordinance, 27 of 1949 (Natal), as amended.

11 Section 1 of the Townships Ordinance, 9 of 1969 (Free State), as amended.

in the erstwhile Cape Province is governed by the Land Use Planning Ordinance.[12] It differs substantially from that of the other provinces.

[12] The term "approved township", or derivatives of that term, is a defined term in three of the four provincial ordinances currently in force. It is clear from the definitions that it means a township which has actually been established, and not land in respect of which an application for the future establishment of a township has been approved. Section 2(1) of ESTA excludes land in a township "established, approved, proclaimed or otherwise recognised" from the operation of the Act. The adjectives "established", "proclaimed" and "otherwise recognised" carry the connotation of a township which actually exists in law and not a township which is in the process of coming into existence. Applying the *noscitur a sociis* principle as a mode of reasoning, the term "approved" must be given the same connotation.[13] This accords with the meaning given to "approved township" in the ordinances under which townships are established, as we have set out in par [11] above.

[13] It was alleged that the property is currently zoned agricultural and this zoning will in all likelihood be retained until the proposed townships comes into existence. Until then, the property may be used for agricultural purposes. I do not think the legislature intended to remove land from the operation of ESTA upon the approval of an application to establish a township on that land, before the township is actually established. It may take a long time before the township is established, if it is established at all. It is well known that applicants for township establishment are not always in a position to fulfill the conditions for establishment. I accordingly hold that ESTA will continue to apply to the property until it is declared to be an approved township in terms of section 79 or 103 of the Gauteng Ordinance. In making this finding, I must respectfully differ from Fevrier AJ, who has come to a different conclusion in the unreported decision of *Portion 88 Wilgespruit (Pty) Ltd v Beacon Hill Investments (Pty) Ltd and Another*.[14] Fevrier AJ did not refer to the definition of "approved township" in the Gauteng Ordinance. He seems to

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12 Ordinance 15 of 1985 (Cape), as amended.

13 Compare the example given by De Groot, included in the judgment of Rumpff ACJ in the case of *Buglers Post (Pty) Ltd v Secretary for Inland Revenue* 1974 (3) SA 28 (A) at 35A-C.

14 Witwatersrand Local Division of the High Court of South Africa, case no 22620/98, 9 October 1998.

have equated the approval of the application to establish a township with the approval of the township, within the meaning of the word "approved" as used in section 2(1) of ESTA. The two concepts are entirely different. For the reasons given above, I am of the view that the legislature, by using the word "approved" in section 2(1) of ESTA, intended to refer to that approval by which a township is legally established (or put differently, by which it is promulgated).

[14] Even if I am wrong in making the above finding, the provisions of ESTA will still apply in respect of the nine applicants, because they were all occupiers before the application to establish a township on the property was approved on 4 February 1999.[15]

[15] Lastly, it was argued on behalf of the respondent that ESTA does not apply to the property because the property is encircled by townships.[16] It is, however, clear from the affidavit of Mr C J Pretorius, a qualified town planner and Operational Manager Land Use Management in the employ of the Northern Metropolitan Local Council, that there are substantial gaps in the circle. Some of these gaps comprise land in respect of which no application to establish a township had been approved, others comprise land in respect of which applications to establish townships were approved, but where the townships have not yet been declared to be "approved townships". This is of significance in light of the interpretation which I have given to section 2(1) of ESTA.[17] The argument that the property is encircled by townships was not pursued with any great vigour. Bearing in mind the presumption that any land in issue in civil proceedings under ESTA is presumed to fall within the scope of ESTA unless the contrary is proved,[18] I cannot find that the respondent had proved that the property falls outside the scope of ESTA by reason of being encircled by townships.

[16] ESTA is social legislation. This Court has, in the past, refrained from making costs orders when adjudicating social issues,[19] unless there are special circumstances which justify a cost

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15 Section 2(1)(b) of ESTA (quoted in par [8] above).

16 Under section 2(1) of ESTA (quoted in par [8] above), such land is excluded from ESTA.

17 See par [13] above.

18 Section 2(2) of ESTA.

19 See, for example, *Ngcobo and Another v Van Rensburg and Others* [1997] 4 All SA 537 (LCC) at 548b-h; *Mlifi v Klingenberg* [1998] 3 All SA 636 (LCC) at 664c; *Hlatswayo and Others v Hein* [1997] 4 All SA 630 (LCC) at 639e-644c; *Serole and Another v Pienaar,* [1999] 1 All SA 562 (LCC) at 570.

order.[20] We were urged on behalf of both the nine successful applicants and on behalf of the respondent to find special circumstances which would justify a costs order in their favour. There is unsatisfactory conduct on both sides. The nine successful applicants aligned themselves with the other applicants who abandoned their prayers for relief after it appeared that the second applicant, who gave oral evidence, lived in a garage on the property which was not demolished. He was not evicted at all. His evidence on affidavit differed *toto caelo* from his oral evidence. The respondent, on the other hand, acted high-handedly in demolishing the stables and outbuildings. She attempted to justify this action by relying on the demolition permit which she obtained. The applicants countered by stating that the demolition permit was obtained under false pretences, viz pursuant to a statement that the stables and outbuildings were uninhabited.

Taking into account the unsatisfactory conduct by both the applicants and the respondent, we concluded that justice would best be served if we made no costs order at all.

[17] For the reasons set out above, we made the following order on 17 June 1999:

1 The respondent is ordered to provide accommodation on the property known as Plot 434, North Riding, Randburg to the following nine respondents until such time as those respondents may either have voluntarily vacated the property or may have been lawfully evicted from the property:

Respondent number	**Name**
6	Justice Makhalemele
7	Gerald Zibonelo Zweni
10	Abram Molefi Bosaletsi
12	Charles Manea Selomana
14	Allen Jabulani Nyathi
15	Alfred Matlabe
26	Jester Ndlovu
27	Frans Lesiba Chokwe

20 See, for example, *City Council of Springs v The occupants of the Farm Kwa-Thema, 210* [1998] 4 All SA 155 (LCC) at 165g; *Karabo and Others v Kok and Others* 1998 (4) SA 1014 (LCC) at 1024J-1025B, [1998] 3 All SA 625 (LCC) at 635g-h; *Mahlangu v De Jager* [1999] 1 All SA 691 (LCC); *New Adventure Investments and Another v Mbatha and Others* 1999 (1) SA 776 (LCC) at 779H-780A, *Ntuli and Others v Smit and Another* 1999 (2) SA 540 (LCC) at 550G-554H, [1999] 2 All SA 1 (LCC) at 10d-14a

32	Thulani Shezi

2 It is directed that the order in par 1 must be implemented as follows:

2.1 The respondent must by not later than 23 June 1999 make available to each of the nine applicants a movable hut which contains at least 8.5 square metres floor space.

2.2 The hut allocated to each respondent is for the occupation of that respondent.

2.3 Any respondent to whom a hut is allocated is responsible for any damage to that hut, unless such respondent can show that he did not cause and could not have prevented the damage.

2.4 The respondent must sign the necessary documents which will enable the nine applicants to have, at their expense, water connected to the property for their use on the property.

3 Any party may, on the same papers, apply to the Court for further directions as to how the order in par 1 must be implemented, or for an amendment of the directions in par 2.

4 No order is made as to costs.

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PRESIDENT F BAM **JUDGE A GILDENHUYS**

Heard on: 10 and 13 June 1999 **Handed down:** 22 June 1999

For the applicants:
Adv J Botha instructed by *Nico van Rensburg Attorneys*, Johannesburg.

For the respondents:

Adv M Nowitz instructed by *Wertheim Becker Attorneys*, Johannesburg.