IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NUMBER: LCC63/2021
REPORTABLE: Yes
OF INTEREST TO OTHER JUDGES: Yes
REVISED.
16 August 2022

In the matter between:

STELLENBOSCH UNIVERSITY	Applicant
and	
RICHARD RETOLLA	1st Respondent
JAYDENE RETOLLA	2nd Respondent
ALL OTHER PERSONS UNLAWFULLY RESIDING AT HOUSE NUMBER W [....], WELGEVALLEN, ERF [....], IN THE REGISTRATION DIVISION OF STELLENBOSCH	3rd Respondent
STELLENBOSCH MUNICIPALITY	4th Respondent
PROVINCIAL DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	5th Respondent
REGISTRAR OF DEEDS, WESTERN CAPE	6th Respondent

SURVEYOR-GENERAL, WESTERN CAPE 7th Respondent

REASONS FOR DECISION

COWEN J

Introduction

1. On 9 February 2022, I granted an order in the above matter on an unopposed basis. I now furnish my reasons for decision on the request of the parties. The order I granted is in the following terms:

> "1. For purposes of the eviction proceedings of the first and second respondents, the Applicant's property described as Welgevallen, Erf [....], in the registration division of Stellenbosch, consists of land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law as contemplated in section 2(1) of the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the property is accordingly excluded from the provisions of ESTA."

2. The applicant in these proceedings, Stellenbosch University, sought a declaratory order regarding the status of a property it owns - Welgevallen, Erf [....], Stellenbosch (the property) in relation to the Extension of Security of Tenure Act 62 of 1997 (ESTA). It sought the order to confirm whether the provisions of ESTA or the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) apply for purposes, *inter alia,* of eviction proceedings against the first and second respondents.

3. In order to qualify as an occupier for purposes of ESTA, it is necessary, amongst other things, for a person to reside on land to which ESTA applies.[1] Section 2 of ESTA is entitled 'Application and implementation of Act'. Sub-sections 2(1) and

[1] *Droomer NO and another v Snyders and others* [2020] ZAWCHC 72 (*Droomer NO*) at para 11.

(2), which must be applied to decide the case before me, provide (with emphasis supplied):

> (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.
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> (2) Land in issue in any civil proceedings terms of this Act shall be presumed to fall within the scope of the ESTA Act unless the contrary is proved.

4. The first and second respondents are Mr Richard Retolla and his spouse Mrs Jaydene Retolla. They reside on the property in House W [....]. Mr Retolla is alleged to be a former employee of the applicant. The third respondent is cited as all other persons unlawfully residing in House W [....]. Relief was ultimately only sought and granted in respect of the first and second respondents, who did not participate in or oppose the proceedings. There are others residing in other houses on the property, who are not parties to these proceedings and I return to this issue below.[2]

5. The application first came before me in October 2021. At that stage only the first to third respondents were cited as respondents. On 25 October 2021, I postponed the matter until 25 January 2022. In my order, I confirmed that the question whether the property is subject to ESTA will be dealt with as a preliminary

[2] See paras 38 to 39 below.

issue in the proceedings for eviction of the respondents. I joined the Stellenbosch Municipality, the relevant Provincial Department of Rural Development and Land Reform (the Department) and on the request of the applicant, the Registrar of Deeds, Western Cape and the Surveyor General, Western Cape. These parties were joined as the fourth to seventh respondents and I afforded them an opportunity to participate. I requested the Stellenbosch Municipality and the Department to deliver an affidavit indicating their views on the status of the property in light of the laws governing townships applicable in the Western Cape. I required service of the order on the first to third respondents and afforded them a further opportunity to participate.

6. On 6 December 2021, the Registrar of Deeds delivered a report recording, *inter alia,* that from a registration point of view there are no objections to the order being granted. The day before the hearing and well out of time, the Municipality and the Department delivered affidavits. The applicant consented to their late receipt. The first and second respondents still did not elect to participate. On 25 January 2022, Mr Havenga SC appeared for the applicant and Mr Mauritz for the Department.

7. Section 2(2) of ESTA, which presumes land in issue in civil proceedings to fall within its scope unless the contrary is proved serves to protect security of tenure of vulnerable persons. A respondent in an ESTA eviction process is unlikely to be in a position to confirm the status of the land, whereas persons who seek eviction will either have direct knowledge of it, or are able to access the relevant information. In this case, the applicant is Stellenbosch University which owns substantial property in Stellenbosch and has existed as an institution of knowledge for over a century. In many if not most cases where land falls within a township as defined, proving the status of property should be a simple matter, as although the law relating to township development is technically complex, it is formal in nature. But difficult issues can arise in a case such as this one, which involves not only a town founded in 1697, but property on its urban edge. When the application of ESTA under section 2(1) arises for decision, each case must be decided on its own facts having regard to the evidence placed before the Court and the presumption in section 2(2). Also material is the fact that ESTA is remedial legislation enacted to provide security of tenure for

many South Africans in rural areas vulnerable to unfair eviction, and is 'umbilically linked' to the Constitution,[3] specifically section 25(6).[4] A person should not be denied ESTA's protections without lawful reason. Moreover, for ESTA to serve its purpose of protecting against vulnerability, section 2(1) must be interpreted and applied so as to provide certainty about the geographical boundaries of ESTA's application.

8. As appears from my order, I concluded that the property is excluded from ESTA. I did so because I am of the view that the applicant has demonstrated that the property consists of land in the township of Stellenbosch, which, on the uncontested evidence before me, was recognised in law as a township at the latest in 1927 when the Townships Ordinance 13 of 1927 (the 1927 Townships Ordinance) came into force, and which has been part of the township since before 4 February 1997. It is zoned Education and used for that purpose. There is nothing to suggest that it is designated for agricultural purposes in terms of any law.

9. This case requires consideration of laws relating to township development in the affected area, which, it must be noted, was a former white area. The law relating to township development is long and complex. It has differed over time, under different constitutional dispensations, in different parts of the country and it differs in different contexts.[5] Despite measures since 1994 to reform planning law, it remains starkly framed by our colonial and apartheid history. When town planning is in issue, it must always be remembered, as the Constitutional Court held in *DVB Behuising*, that residential segregation on racial lines was a cornerstone of the apartheid policy,

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[3] *Klaase v Van der Merwe* 2016(6) SA 131 (CC) at para 51 with reference to *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007(6) SA 199 (CC) (the latter case dealing with the Restitution of Land Rights Act 22 of 1994 ('the Restitution Act')).

[4] Section 25(6) provides: A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.'

[5] An example of a case arising in an unusual context involving large public utility projects is *Greeff and others v Eskom Holdings Soc Ltd and others* [2021] ZALCC 22 (17 September 2021) (*Greeff*). In *Greeff*, this Court concluded that Redan township near Vereeniging was established by the predecessor of Eskom Holdings SOC Ltd (Eskom) in terms of section 4 of the Electricity Act 1922 which conferred on the then extant Electricity Commission the power to 'acquire land … for the purpose of erecting thereon dwelling-houses for persons in its employ, to erect such dwelling-houses and to enter into agreements with such persons for the letting or sale of such dwellings to such persons.' The Court held, accordingly, that Redan was 'recognised as [a township] in terms of any law.' In doing so, it acknowledged that '[t]he drafters of ESTA clearly had the situation of Eskom in mind, and possibly other large public utility projects …', thereby differentiating the position where a provincial or local administration must be engaged. See paras 30 to 32.

the geographical plan of which was described as forming part of a 'colossal social experiment and a long term policy'.[6] That history still explains much of the spatial and land inequality that still scars South Africa's geography, frames economic disparity and entrenches vulnerability and marginalisation, including in respect of evictions. Section 2 of ESTA must always be applied cognisant of this constitutional, historical and geographical legal complexity and in light of ESTA's remedial purposes.

10. As regards the history of the property and applicable laws, the Court was partly assisted by expert evidence proffered through the applicant by Mr John Obree, a retired professional land surveyor living in the Western Cape and various reports and submissions provided by the parties and counsel. I refer to features of this material. I also refer more fully to the history of the relevant laws. As mentioned, the property was in a former white area. It would be imprudent for me in this judgment to venture beyond what is necessary to deal with the facts of this case. But it must be emphasised that the history I refer to, in the result, does not detail the broader colonial and apartheid legacy of town planning law nor do I consider ESTA's application in areas in which black people were unjustly confined to live.[7]

The legislative history relevant to the property

11. In his evidence, Mr Obree mentions that there is 'confusion in the Cape' around the use of the word 'township'. The province now known as the Western

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6 *Western Cape Provincial Government and Others In Re: DVB Behuising (Pty) Limited v North West Provincial Government and Another* [2000] ZACC 2; 2000 (4) BCLR 347; 2001 (1) SA 500 (CC) (*DVB Behuising*) at para 41 with reference to the remarks on the provisions of the Group Areas Act 77 of 1957 in *Minister of the Interior v Lockhat and Others* 1961 (2) SA 587 (A) at 602D-E.

7 Some of this history is detailed in *DVB Behuising* supra n 6. The author Jeannie van Wyk provides an account of this history in Planning Law, Juta, 2020, from pp 44 to 57 distinguishing the position in respect of former South African Development Trust land, the former 'self-governing territories' and the former TBVC 'states', and distinguishing further between rural and urban land. Some of the laws referred to are the Black Land Act 27 of 1913, the Development Trust and Land Act 18 of 1936, the Black Administration Act 38 of 1927, the Black Laws Amendment Act 56 of 1949, the Group Areas Act 41 of 1950, the Group Areas Act 36 of 1966, the Community Development Act 3 of 1966, the Promotion of Bantu Self-Government Act 46 of 1959, the National States Constitution Act 21 of 1971 and the Black Communities Development Act 4 of 1984. Proclamations and regulations are also relevant including the Regulations for the Administration and Control of Townships in Black Areas (Proclamation R293 of 1962) Proclamation R154 of 1983, Government Notice R1886 of 1990, Government Notice R1886 of 1990 and the Regulations relating to Township Establishment and Land Use GG 10433 of 12 Sept1986.

Cape, where Stellenbosch is situated, was formerly part of the Cape Province. From Union in 1909 until the democratic transition in 1994, there were four provinces recognised in what ultimately became the Republic of South Africa under apartheid.[8] At the time of the democratic transition in 1994, the Cape Province consisted of a much broader territory including parts of what is now known as the Eastern Cape, the Northern Cape and part of the North West Province.

12. In *Ngwenya*,[9] this Court recognised that the law on township development in the former Cape Province has differed materially to that in the other three erstwhile provinces (the Transvaal, Natal and the Orange Free State). At the time *Ngwenya* was decided in 1994, the term approved township' or derivatives of that term were defined in the three former provinces under provincial laws.[10] Van Wyk, in her book Planning Law, explains how these former provinces introduced legislation providing for the establishment of new townships and distinguishes the position in the former Cape Province as being on a different footing,[11] at least for the period other than the years 1927 to 1985. As Van Wyk explains, during those years (1927-1985), township establishment was governed by the 1927 Townships Ordinance followed by the Townships Ordinance 33 of 1934 (the 1934 Townships Ordinance). The applicable procedures were similar to those in other provinces, which were governed by ordinances regulating the establishment of townships, which could be established only with approval of the relevant functionary and which ultimately entailed the submission of plans and diagrams with the Surveyor-General for approval, thereafter their lodgement with the Registrar of Deeds and ultimately a declaration by notice of an approved township in the Provincial Gazette.[12] Both the 1927 and 1934 Townships Ordinances set out similar procedures for the formal establishment of townships.

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[8] See section 1 of the Constitution of the Republic of South Africa 32 of 1961, section 1 of the Constitution of the Republic of South Africa 110 of 1983. The origin of the four former provinces dates back to the South Africa Act 1909 enacted by the Parliament of the United Kingdom.

[9] *Ngwenya and Others v Grannersberger* [1999] ZALCC 28 (22 June 1999) (*Ngwenya*).

[10] Id at para 12.

[11] Supra n 7 at p 39.

[12] See Van Wyk Planning Law: Principles and Procedures of Land Use Management (first ed) 1999, Juta, pp182.

13. Of course, many towns had been developed prior to the 1927 and 1934 Townships Ordinances. Van Wyk describes the position in the former Cape Province:

> 'Prior to 1927 the Cape practice in respect of the establishment of towns was unique in South Africa. As the colony expanded new districts were laid out, so that by 1836 the Cape Colony was divided into two provinces, the western and the eastern. On the establishment of each new district, in terms of a specific placaat or statute, a drostdy was founded, and the boundaries of the district defined. Each town within the district adopted municipal status, which was in effect the establishment of the town. For each municipality so established legislative enactments were promulgated. In many cases, the separate legislative enactments of the various municipalities regulated the practice of township establishment.[13]

14. It also appears from the 1927 and 1934 Townships Ordinances, that before 1927, recognised processes for the layout and subdivision of land in towns existed.[14]

15. The 1927 Townships Ordinance operated prospectively. It regulated both the establishment and extension of townships. In section 1, it defined various terms including a township, an approved township,[15] and a general plan[16]. The definition of a township was:

> 'a piece of land or a group of pieces of land divided, laid out or built upon for residential, industrial, occupational or similar purposes or in the opinion of the Administrator intended or destined or likely to be used for any such

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[13] Van Wyk, supra n 7 at p 39.

[14] See section 30 of the 1927 Townships Ordinance which made provision for the revision of existing lay-outs or subdivision of land for building purposes. See section 8 of the 1934 Townships Ordinance.

[15] Meaning: 'a township the establishment of which has been approved by the Administrator under this Ordinance.'

[16] Meaning 'a plan representing the erven and public spaces within a township or proposed township in their relative positions and shall include a plan recognised and filed as a general plan in a Deeds Registry or Surveyor-General's office prior to the commencement of this Ordinance.' The processes for submission and approval of a general plan by the Surveyor-General, their submission thereafter to the Registrar of Deeds and ultimate publication by the Administrator of the township in the Provincial Gazette were set out in Chapter II from section 16. Failure by an owner timeously to comply with the duties of plan submission would result in the lapse of the approval.

purpose, and shall include an extension of a township. Provided that ordinary subdivisions of land situated within a municipality shall not be deemed to be a township, unless in the opinion of the Surveyor-General, or the Registrar of Deeds, such sub-division will, in effect, constitute an evasion of the intent of this Ordinance, as more fully described in section six thereof.'

16. Section 6 provided:

'After the commencement of this Ordinance no township shall be established except in accordance with the provisions of this Ordinance. Any land which at the date of such commencement has been laid out as a township by means of actual survey into erven and public places, each of which has been defined by land marks or beacons placed at its corner points and the plan in respect of which has been approved by the Surveyor-General, shall be exempt from the provisions of this Chapter.'

17. Under the 1934 Townships Ordinance, a 'township or subdivided estate' was defined to mean 'any land subdivided or laid out, whether by actual survey, the erection of buildings or structures or in any other manner, for residential, industrial, occupational or similar purposes, but does not include a minor subdivision.' Section 6 of the 1934 Townships Ordinance was similar to section 6 of the 1927 Townships Ordinance.[17] The duties of an owner to submit a general plan of the approved township to the Surveyor-General for approval, and thereafter submit them to the Registrar of Deeds were regulated by sections 19 and 20. The approval would lapse

[17] In its original form, it read: 'After the commencement of this Ordinance no township shall be established or estate subdivided except in accordance with the provisions of this Ordinance. Any land which at the date of such commencement has been laid out as a township or has been subdivided by means of actual survey into erven and public places and the plan of which has been registered in the office of the Surveyor-General shall be exempt from the provisions of this Chapter.' The provision was subsequently amended. As at 1959 it read: 'After the commencement of this Ordinance no township shall be established or estate subdivided or minor subdivision made except in accordance with the provisions of this Ordinance. Any land which at the date of such commencement has been laid out as a township or has been subdivided by means of actual survey into erven and public places and the plan of which has been registered in the office of the Surveyor-General shall be exempt from the provisions of this Chapter, except insofar as any portion thereof or any erf therein is further subdivided or laid out.' (As amended by section 1 of Ordinance 9 of 1950 and section 3 of Ordinance 19 of 1959).

if an owner failed timeously to comply.[18] If compliant, the Administrator would notify the township in the Provincial Gazette.[19]

18. The 1934 Townships Ordinance was repealed by the Land Use Planning Ordinance 15 of 1985 (LUPO), which was in force when *Ngwenya* was decided in 1994. Under LUPO, there are no procedures set out for the establishment of townships. Indeed, LUPO did not define the term 'township' at all. Rather, LUPO made provision for the development of land as towns by way of approved subdivisions[20] supported by zonings.[21] As indicated by its definition, zonings were to be determined by the relevant scheme regulations as defined. In turn, the definition of a scheme regulation incorporated various determinations made under the 1934 Townships Ordinance. Moreover, section 7 of LUPO incorporated certain town-planning schemes under the 1934 Townships Ordinance as zoning schemes. Subdivisions were regulated centrally by sections 23 to 27. In terms of section 23(1), from the commencement of LUPO, an application for subdivision would be granted or refused in terms of section 25, with relevant zonings indicated. Section 26, entitled 'Approval of general plan or diagram', provided that where an application for subdivision is granted, the landowner must submit a general plan or diagram, as indicated by the Surveyor-General concerned, to that Surveyor-General for his approval.[22] Section 27 of LUPO then regulated the process of engagement with the Registrar of Deeds in respect of the subdivision: If an owner failed timeously to comply with its provisions, the grant of the application was deemed to have lapsed but where the owner complied in a manner that precluded such lapsing, the subdivision was deemed to be confirmed. Section 23(2), deemed as confirmed

[18] See section 19(3) and section 20(3) of the 1934 Townships Ordinance.
[19] See Section 20(6).
[20] 'Subdivide' in relation to land, was defined in section 1 to mean 'to subdivide the land whether by – (a) survey; (b) the allocation, with a view to the separate registration of land units, of undivided portions thereof in any manner; or (c) the preparation thereof for such subdivision.'
[21] Defined in section 1 to mean, when used as a noun: 'a category of directions setting out the purpose for which land may be used and the land use restrictions applicable in respect of the said category of directions, as determined by relevant scheme regulations.'
[22] Section 26 read: 'If an application is granted under section 25, the owner of the land concerned shall submit a general plan or diagram, as indicated by the Surveyor-General concerned, to that Surveyor-General for his approval.'

subdivisions, township layouts or subdivisions by survey into erven and public places where the plan had been registered in the office of the Surveyor-General.[23]

19. The above description of the position under LUPO gives broad legislative content to the following dictum of this Court in *Ngwenya:* 'The procedure for the establishment of townships in the erstwhile Cape Province is governed by [LUPO]. It differs substantially from that of the other provinces.'[24] It also explains why in the Western Cape, it makes sense to speak of the establishment of townships by way of subdivision.[25]

20. LUPO continued in force in the Western Cape after 1994 and remained in force until its repeal by the Western Cape Land Use Planning Act 3 of 2014 (LUPA), which commenced, in respect of the Stellenbosch Municipality on 1 December 2015.[26] LUPA was enacted not long after Parliament's enactment of national legislation, the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA).[27] Under the Constitution, municipal planning is designated as a local government matter, which the Constitutional Court has held 'includes the zoning of land and the establishment of townships.'[28] However, it is listed in Part B of Schedule 4 which means that it is also a functional area of concurrent national and provincial

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[23] Section 23(2) provided: 'Land which on the date of commencement of the Townships Ordinance, 1934 (Ordinance 33 of 1934) had been laid out as a township or had been subdivided by means of an actual survey into erven and public places and the plan of which has been registered in the office of the Surveyor-General concerned, shall be deemed to be a confirmed subdivision for the purposes of this Ordinance except in so far as any portion thereof or any erf therein is further subdivided or laid out.'

[24] Supra n 9 at para 11. See Van Wyk, supra n 7 pp 34 – 38 for an account of the history of the Ordinances applicable in these provinces.

[25] See Van Wyk, supra n 7 at p325 n 242. See too Droomer NO para 15.

[26] Proclamation 30 of 2015.

[27] The enactment of SPLUMA must be viewed against the division and allocation of legislative and executive powers contemplated by the Constitution. The Constitution recognises three spheres of government – national, provincial and local – and allocates legislative and executive power between them. In doing so, the Constitution designates functional areas either as functional areas of concurrent national and provincial legislative competence (Schedule 4) or functional areas of exclusive provincial competence (Schedule 5). The Constitution also recognises local government matters, in terms, *inter alia,* of section 156. In terms of section 156(1), a municipality has executive authority in respect of, and has the right to administer – (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and (b) any other matter assigned to it by national or provincial legislation. In terms of section 156(2), a municipality 'may make and administer by-laws for the effective administration of the matters which it has the right to administer.

[28] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) at para 57.

competence to the extent set out in section 155(6)(a) and (7) of the Constitution.[29] Moreover, regional planning and development, urban and rural development and housing are designated functional areas of concurrent national and provincial competence (Schedule 4) and provincial planning is an exclusive provincial competence (Schedule 5).

21. It is thus unsurprising that SPLUMA does not purport to regulate township development in any detail. SPLUMA does define a 'township'[30] and then proceeds to regulate townships centrally by delineating what related functions vest with provincial and municipal government respectively and determining certain procedures. Put generally, provincial legislation may regulate matters relating to township establishment and subdivision of land, amongst others.[31] As regards municipal government, SPLUMA recognises applications for township establishment and subdivisions of land as municipal matters and details certain related procedures.[32] Thus, under SPLUMA, it is largely to provincial and- municipal laws that one must turn to understand current decision making about township development.

22. As indicated, LUPA was enacted by the Western Cape legislature in 2014 and came into force in respect of Stellenbosch in December 2015. It defines a 'township' in similar though not identical terms to SPLUMA.[33] Viewed from the perspective of ESTA, however, what is notable about LUPA is its absence of regulation of township

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[29] Section 155(6)(a) and (7) provide as follows:

'(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (30 and, by legislative or other measures, must –

(a) Provide for the monitoring and support of local government in the province.

(7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).'

[30] It is defined in section 1 as 'an area of land divided into erven, and may include public places and roads indicated as such on a general plan.' A 'general plan' is defined to mean 'a plan formally approved by the Surveyor-General in terms of the Land Survey Act 8 of 1997.'

[31] For the specific terms of the empowering provision reference should be made to section 10(1)(a) and Schedule 1 of SPLUMA.

[32] First, they must be approved in terms of section 41 of SPLUMA by municipalities and specifically Municipal Planning Tribunals established in terms of section 35 of SPLUMA or an authorised official (as contemplated by section 35(2) to (4). Second, where conditions of township establishment 'provide for a purpose with the consent of the administrator, a Premier, the townships board or any controlling authority' that consent is now to be granted by the municipality. See section 45(6).

[33] It is defined to mean 'an area of land divided into erven, and may include public places indicated as such on a general plan'. It differs as it does not refer to roads. A general plan, in line with SPLUMA, is defined to mean 'a general plan as defined in section 1 of the Land Survey Act 1997.'

development in those express terms. Under LUPA, the functions of municipalities in respect of development of towns centre on 'land use planning',[34] defined as 'spatial planning and development management'. LUPA sets out the framework for land use development which, akin to the position under LUPO, ensues via the mechanisms of, centrally, subdivision of land supported by zoning schemes and zoning.[35] As under LUPO, LUPA requires an approved subdivision plan to be submitted to the Surveyor-General for approval.[36] There are transitional provisions to cater for the retention of existing schemes, zonings, subdivisions and other approvals.[37] This absence of regulation of 'township' development in LUPA is notable when viewed through the lens of ESTA, but it is unsurprising when viewed in light of the history of planning legislation in the Western Cape and former Cape Province.

23. What the above legislative history shows is that in the Western Cape, where the 1927 and 1934 Townships Ordinances applied, towns that had already developed when the 1927 Townships Ordinance was enacted, were recognised as such by that Ordinance to the extent that they fell within its definition of a township.[38] It was only from the commencement of that Ordinance that township approvals were prospectively required (subject to the exemption in section 6)[39] and in respect of which the requirement for the submission for approval of general plans was imposed. In turn what this means is that there are some early towns in the Western Cape recognised by law, specifically the 1927 Townships Ordinance, in respect of which there will be no formal township approval and there will be cases, hopefully rare, where no general plan approved by the Surveyor-General exists. This does not mean that the Surveyor-General has no records of the township establishment or development. For example, section 8 of the 1934 Townships Ordinance imposed a duty on landowners to register with the Surveyor-General any plan of subdivision approved by any local authority before the commencement of the 1927 Townships Ordinance.[40] And further development was regulated. In my view, the recognition

[34] Section 2(1).
[35] See for example, Chapter 4 Part 1 regarding zoning schemes, Chapter 4 Part 3 regarding Zonings and other use rights and Chapter 4 Part 4 regarding Subdivisions.
[36] Section 36(7) and (8)(a).
[37] See for example Chapter 4 Part 3.
[38] See para 15 above for the definition.
[39] See para 16 above for the terms of the exemption.
[40] See too section 30 of the 1927 Townships Ordinance.

afforded these early towns by the 1927 Townships Ordinance, even if no general plan approved by the Surveyor-General existed, constitutes recognition in terms of a law of a township contemplated by section 2(1) of ESTA.[41]

Case law regarding the application of ESTA in the Western Cape

24. In *Droomer NO*,[42] a full bench of the Western Cape High Court sitting on appeal, considered whether that Court had jurisdiction in respect of an eviction from certain immovable property near Pniel in the Stellenbosch municipality. The eviction was instituted in terms of the PIE Act. The Court concluded that ESTA applied holding as follows in respect of the word 'township' in section 2(1):

> 'The word 'township' is not defined in ESTA, but the context in which it is used in s 2 makes it clear that something more than just a developed area is required. A 'township for the purpose of ESTA means a development or approved subdivision that has been formally recognised as such in terms of a law.' That is the effect of the words 'established, approved, proclaimed or otherwise recognised as such in terms of any law.' [43]

25. In arriving at that finding, with which I agree, the Court referred to SPLUMA's definition of the word township (and the definition of a general plan),[44] which the Court regarded as 'the commonly used meaning of 'township' in South African statutory parlance'.[45] In *Droomer NO* there was no evidence that the affected or surrounding land qualified as a township by virtue of formal recognition as such.[46]

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[41] In this sense, it creates another category of such laws to those recognised by this Court in *Greeff*, supra n 5.
[42] Supra n 1.
[43] Para 15.
[44] In n 7 to the judgment in *Droomer NO*, supra n 1. For these definitions, see above para 21, n 30.
[45] See n 7 to the judgment in *Droomer NO*, supra n 1.
[46] See para 15. The Court held that the fact that the property is earmarked in terms of the Stellenbosch Municipality's 2017 spatial development framework as an area for future development does not make the land a township as a spatial development framework 'is a conceptual guide that sets out a local authority's land use and development aspirations. …. It does not confer land use rights, and although it might identify land for township development it is not the medium whereby a township is established, approved, proclaimed or otherwise recognised as such in terms of any law.'

26. I was referred to two pre-SPLUMA decisions of this Court concerning the application of section 2 of ESTA to land in the Western Cape: *Bosworth*[47] and *Schaapkraal*.[48]

27. *Bosworth* concerned the status of Lake Brenton Holiday Resort near Knysna. This Court rejected a submission that whether a property is 'recognised' as a township for purposes of section 2 of ESTA, depends on a conspectus of factors such as whether the property falls inside or outside the area of jurisdiction of a local authority, whether the owner pays municipal rates and taxes, receives municipal services or its zoning. Rather, this Court referred to two forms of legal recognition of a township and concluded that there was no evidence that either was met:

> 27.1. First, the Court relied on the definition of a township in the Land Survey Act 8 of 1997 (the Land Survey Act) which, like its predecessor the Land Survey Act 9 of 1927, defined a 'township' to mean;
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> > 'a group of pieces of land, or of subdivisions of a piece of land, which are combined with public places and are used mainly for residential, industrial, business or similar purposes, or are intended to be so used.'
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> 27.2. Second, the Court referred to the fact that the procedure for township establishment differs from province to province but noted that a common feature is the preparation of a general plan of a township, defined in the Deeds Registries Act 47 of 1937 (the Deeds Registries Act) to mean 'a plan which represents the relative positions and dimensions of two or more pieces of land …'.

28. The Court in *Bosworth* was not called upon to decide whether a general plan is a prerequisite for all historical townships to be recognised by law.

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[47] *Leon Bosworth v Tradeprops 106 (Pty) Ltd* [2007] ZALCC 8 (11 June 2007) (*Bosworth*) (per Gildenhuys J and Pienaar AJ.
[48] *Schaapkraal Community v Cassiem* [2010] JOL 25016 (LCC) *(Schaapkraal)* (per Bam J).

29. In *Schaapkraal*, the property was in the place known by that name: Schaapkraal. This Court concluded that the property was in a township as contemplated by section 2 of ESTA, relying in part on expert evidence given by, amongst others, Mr Obree. In doing so, as in *Bosworth*, the Court relied on the definition of a township in the Land Survey Act noting that the definition is similar to the definition in the 1934 Townships Ordinance.[49] The Court also concluded that on the evidence before it, LUPO confirmed Schaapkraal's status as a township.[50] Thus, in *Schaapkraal*, where the property was held to be excluded from ESTA's ambit, both forms of legal recognition were met.

30. In light of SPLUMA, reliance on the definition of a township under the Land Survey Act may be debatable, but it is not necessary for me to consider this in view of my conclusions below. Suffice to note that SPLUMA does not amend ESTA.

The application of section 2 to the property

31. Mr Obree explains that Stellenbosch was founded as far back as 1679, long before the 1927 Townships Ordinance came into force. Unfortunately, very little information was supplied to the Court regarding its development under law during this extended period in the sense suggested by Van Wyk.[51] This is unfortunate not least given the applicant's unique access to knowledge, but it is understandable that laws of this sort may in the usual course be difficult to access. It is explained that the first local authority of Stellenbosch was formalised as far back as 1682. However, on the evidence before me, I can accept that as at 1927, Stellenbosch had long been established as a town with municipal status constituted of 'pieces of land divided, laid out or built upon for residential, industrial, occupational or similar purposes', this being the definition of a township in the 1927 Townships Ordinance.[52]

32. There is, however, no suggestion on the papers that there existed any plan of Stellenbosch approved by the Surveyor-General or registered in that office either at

[49] Para 15 and 16. And indeed the 1927 Townships Ordinance.
[50] At para 18.
[51] See above para 13. In the absence of information that confirms the establishment of an old town in terms of law, that conclusion cannot be drawn.
[52] See above para 15.

the time the 1927 Townships Ordinance commenced or at any time thereafter pursuant to that Ordinance, the 1934 Ordinance or LUPO. There is also no evidence suggesting that the property became incorporated into Stellenbosch by virtue of any specific township approval or specific approved or deemed confirmed subdivision.

33. Evidence that property is and remains incorporated into a township by way of an approved general plan in accordance with the above laws may determine the property's status. However, at least in respect of towns established in the Western Cape before the commencement of the 1927 Townships Ordinance, it appears that general plans approved by the Surveyor-General and subsequently registered with the Registrar of Deeds may not always exist. But this does not mean that the 1927 Townships Ordinance did not recognise them as townships as defined in that Ordinance. What it does mean for litigants is that proof that a property forms part of a township recognised in terms of law may be more difficult and will require a litigant to satisfy a Court that the property has been duly incorporated into the township so recognised.

34. In this case, Mr Obree has opined that the property formed part of Stellenbosch township from at the latest 1960, when the property was depicted as falling with the municipal area and boundary of Stellenbosch Town as extended and redefined in terms of section 8 of the Municipal Ordinance 19 of 1951.[53] It was not thereby suggested that inclusion within a municipal boundary determines the boundary of a township: that would be contrary to what was said in *Bosworth.* Rather, this was relied on to corroborate what is said to have already transpired, namely that the property had already been included in the township. And at that stage, 'wall-to-wall' municipalities that can straddle urban and rural areas did not yet exist as they do today.[54] Mr Obree opines that the inclusion of the property in the town had occurred much earlier. First, he explains that the town's lands have been laid out for registration in the Deeds Office by land surveyors acting with consent from the local authority or provincial government in terms of applicable legislation

[53] Proclamation 223 of 1960 and its Schedule.
[54] Today Stellenbosch forms part of the Stellenbosch Local Municipality, which also includes the town known as Franschoek, the immediately surrounding areas and the areas in between. This is under the system of local government contemplated by section 151(1) of the Constitution in terms of which municipalities must be established for the whole of the territory of the Republic.

from time to time. Second, although there is no plan of Stellenbosch in a cadastral sense, there is what is known as an Allotment Area. Third, and importantly, the property description was changed from being designated a Farm to an Erf when, between the 1940 and the early 1970s, a process ensued in the office of the Surveyor-General to remove anomalies in the description of properties in the town to ensure that all erven in the town were described as such and not as farms.[55] In this regard, the property was first transferred to the Applicant under title deed T [....] in 1917 and at that time was described as the Remaining Extent of Portion of the farm Welgevallen and quitrent land adjoining. It was later registered in the Farm Register of Stellenbosch as Farm No [....]. The property was re-designated through the above-mentioned process as Erf [....], Stellenbosch.

35. The Surveyor-General has unfortunately not delivered any report, but did not oppose the application. The Registrar of Deeds has no objection to the grant of relief from a registration point of view. The Municipality and Department agree the property can be accepted as forming part of the township of Stellenbosch. The Department has supplied some evidence supporting the applicant's case:[56] It substantially confirms the applicant's evidence and supplies the map showing that the property forms part of the Stellenbosch Township Allotment Area.

36. It is unfortunate that I was not supplied with evidence of precisely when and how the property was incorporated in the township of Stellenbosch. However, in view of the unanswered allegations and evidence in the founding affidavit, supported by Mr Obree, the reports supplied and the stance of the parties, I conclude that the property is part of Stellenbosch township as developed under law.

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[55] An 'erf' was defined in section 1 of the 1934 Townships Ordinance to mean 'every piece of land in a township or subdivided estate (whether approved under this Ordinance or not) registered in the Deeds Registry as an erf, stand, lot or plot, and shall include any piece of land other than a public place shewn on a general plan of a township or subdivided estate or proposed township or subdivided estate.'

[56] The Department also refers to the applicable municipal spatial development but this is not ultimately of assistance in view of the legal nature of a spatial development plan. See *Droomer NO* supra n 1 at para 16.

37. On the evidence, it is clear the property has not been designated for agricultural purposes in terms of any law and as the Municipality confirms: the property is zoned (and used) for Education.[57]

Joinder and procedure

38. The final issue that warrants explanation is the Court's response to a submission advanced on behalf of the Department that the Court should not proceed with the matter unless all persons resident on the property had been notified or joined as they stand to be affected by its status under ESTA. After hearing the parties on this issue, I proceeded subject to safeguards to protect the rights and interests of any person similarly placed to the first and second respondents. It is for this reason that the order refers expressly to it being given for purposes of the eviction proceedings of the first and second respondents and relief was only ultimately sought against them. It was also with this concern in mind that I stated in my order of 25 October 2021 that the issue of the status of the property would be dealt with as a preliminary issue in eviction proceedings instituted by the applicant against the first and second respondents. This approach narrowed the relief from what was originally sought by the applicant which, had it been granted, would have determined the status of the property as an abstract issue.

39. It warrants emphasis that the procedure that the applicant sought to follow in this case was somewhat unusual in that it sought a declaratory order from this Court regarding the application of ESTA upfront, mindful that the PIE Act and ESTA operate in a mutually exclusive way.[58] This Court is a creature of statute. It does not have jurisdiction over evictions subject to the PIE Act.[59] Moreover, the legislature has to date not conferred on this Court the power to transfer eviction proceedings

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[57] The applicants supplied a zoning certificate indicating the primary uses of the property to be a day care centre, extramural facility, hostel, indoor sport, occasional use (one event / year), outdoor sport, place of education, public institution, tertiary educational institution, private road. Additional uses are identified as being dwelling house, employee housing and place of worship. Consent uses permitted on application include clinic, freestanding base telecommunication station, place of assembly, renewable energy structure, rooftop base telecommunication station, welfare institution and occasional use (> one event / year).

[58] *Agrico Masjineri (Edms) BPK v Swiers* 2007(5) SA 305 (SCA) at para 4.

[59] *Mamahule Communal Property Association and Others v Minister of Rural Development and Land Reform* [2017] ZACC 12.

instituted in this Court to the High Court, which means that when commencing legal process initiating an eviction (or seeking restoration), a potential litigant must consider which legislation applies and then follow the prescribed procedures. If they happen to institute proceedings in the wrong Court they must start afresh. In these circumstances, it is understandable that where the status of property in terms of section 2(1) of ESTA may be unclear, as in this case, a litigant may wish to seek a declaratory order from this Court before furthering the litigation. In my view, it would be desirable for the legislature to consider making appropriate provision for the transfer of proceedings between the High Court and this Court. However, not least in the absence thereof, I am of the view that there is no impediment to an applicant seeking appropriate declaratory relief provided that all parties intended to be bound thereby are notified, joined and afforded a fair opportunity to participate, including in respect of access to legal representation.

40. In light hereof, and in light of the broader complexities relating to section 2(1) of ESTA, I have requested the Registrar to circulate a copy of this judgment to the Legal Aid Board, now responsible for funding in terms of section 29(4) of the Restitution Act, the Minister of Agriculture, Land Affairs and Rural Development, and the Minister of Justice, who is currently piloting a Land Bill through Parliament.

S J COWEN
Judge, Land Claims Court

Appearances:

Applicant:	Mr Havenga SC
	Instructed by Cluver Markotter Attorneys.
Fifth Respondent:	Mr Mauritz

Instructed by State Attorney, Cape Town.