



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 222/2020

In the matter between:

**FRANNERO PROPERTY INVESTMENTS
202 (PTY) LTD**

(Previously Frannero Property Investments 202 CC)

APPLICANT

and

CLEMENT PHUTI SELAPA

FIRST RESPONDENT

DIMAKATSO SEMELA

SECOND RESPONDENT

KHENSASI MABUNDA

THIRD RESPONDENT

GEORGE NGOVENI

FOURTH RESPONDENT

FREDDY RAPAO

FIFTH RESPONDENT

SYLVIA MABUNDA

SIXTH RESPONDENT

**UNLAWFUL OCCUPIERS OF PORTION 35
OF THE FARM WATERVAL 306,
REGISTRATION DIVISION JQ,
NORTH WEST PROVINCE**

SEVENTH RESPONDENT

RUSTENBURG LOCAL MUNICIPALITY

EIGHTH RESPONDENT

**DPARTMENT OF RURAL DEVELOPMENT
AND LAND REFORM**

NINTH RESPONDENT

**DEPARTMENT OF LOCAL GOVERNMENT
AND HUMAN SETTLEMENT**

TENTH RESPONDENT

together with

UNIVERSITY OF THE FREE STATE

LAW CLINIC

AMICUS CURIAE

Neutral citation: *Frannero Property Investments 202 (Pty) Ltd v Clement Phuti Selapa and Others* (case no 222/2020) [2022] ZASCA 61 (29 April 2022)

Coram: DAMBUZA and MOTHLE JJA and MEYER, SMITH and WEINER AJJA

Heard: 30 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 29 April 2022.

Summary: Land tenure - Extension of Security of Tenure Act 62 of 1997 – onus to prove application of – the party who invokes the Act bears the onus – sufficient evidence must be tendered.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Nobanda AJ with Hendricks DJP and Nonyane AJ concurring, sitting as court of appeal):

- 1 Special leave to appeal is granted;
- 2 In relation to the respondents whose names appear in schedule A attached to this order the appeal is dismissed;
- 3 In relation to the rest of the respondents the appeal is upheld. The order of the full court is set aside and replaced with the following order:
 - ‘1 The appeal is upheld.
 - 2 The application is referred back to the high court for determination of the application brought in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
 - 3 There shall be no order as to costs’.
- 4 There shall be no order as to costs.

JUDGMENT

Dambuza JA (Mothle JA and Meyer, Smith and Weiner AJJA concurring)

Introduction

[1] The issue in this application for special leave to appeal is whether a community of about 300 people who occupied the applicant’s property known as Portion 35 of the Farm Waterval 306 in Rustenburg, Northwest Province (the property), were occupants under the Extension of Security of Tenure Act 62 of 1997 (ESTA). Aligned to that is the question whether the termination of their

rights to occupy the property by the applicant was lawful, and whether the order of eviction sought by the applicant should be granted.

[2] Following its termination of the rights of the community to occupy the property, the applicant, Frannero Property Investments 202 (Pty) Ltd (Frannero), brought an application in the North West Division of the High Court, Mahikeng (Djaje J (high court)) to evict them from the property in terms s 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act). That court found that it had no jurisdiction to hear the eviction application because the first to seventh respondents were occupiers in terms of ESTA and that their occupancy rights had not been lawfully terminated as prescribed in that Act. On appeal, the full court of that Division (Nobanda AJ with Hendricks DJP and Nonyane AJ concurring), confirmed the finding that the respondents were occupiers under ESTA and dismissed the appeal. This application for special leave to appeal follows the dismissal of that appeal.

BACKGROUND

[3] The property was initially owned by Rustenburg Platinum Mines (RPM). It was used as a water source in that water was pumped from it to RPM's mining sites. A single rondavel on the property was used to accommodate RPM's employees who worked on the water pumps.

[4] In 1983 the property was registered in the name of Mr Felix Formariz. He then built a house thereon. In 1992 he came to live on the property. From 1996 he started constructing more buildings on the property consisting of small rooms with a general ablution area.¹ From 2000 he started leasing the rooms to mine workers through oral rental agreements concluded with them. Occupation was on

¹ The respondents asserted that Mr Formariz came to live on the property in 1990. This dispute of fact has no significant bearing on the real issues in this court.

a month to month basis. Rental was payable at the beginning of each month, and the agreements were terminable on a month's notice by either party. Only the tenant and one other person were permitted to occupy a room. Mr Bucks was employed as a manager of the rental enterprise. Between 2001 and 2010 various tenants came to occupy the property and then vacated it.

[5] After Mr Bucks' departure, Mr Formariz discovered that his tenants had developed a practice of vacating the rooms without giving notice, and they would substitute unauthorised tenants when vacating the rooms. Some of the unauthorised tenants defaulted on rental payments. In 2011 Mr Formariz employed Mr Francisco de Matos as the manager. By this time the rental buildings consisted of 5 blocks, referred to as Blocks A, B, C, D and O. Only Block B had power supply, with a commensurately higher monthly rental.

[6] During 2012 Mr Formariz applied successfully to the Portfolio Committee: Planning and Human Settlement at Rustenburg Local Municipality, in terms of s 96 read with s 69 of the Town Planning and Township Ordinance 15 of 1986, for the establishment of an Industrial Township known as Waterval East Extension 60 on the property. The property was rezoned accordingly in September 2012. By this time 50% of the tenants were defaulting with rent payment. Mr de Matos held meetings with the tenants to discuss the non-payment of rentals. At those meetings the establishment of the Industrial Township on the property and an impending sale thereof to the applicant were also discussed. However, the non-payment of rentals persisted despite the discussions.

[7] Mr Formariz instructed his attorney, Mr Adriaan Wessels, to assist in resolving the problems experienced with the tenants. At a meeting held with the tenants during October 2012, Mr Wessels advised the tenants that because non-payment of rentals had persisted, eviction orders had been obtained against

several 'illegal occupiers'. He also advised them again about the rezoning of the property, together with the imminent sale thereof to the applicant.

[8] On 29 October 2012 a sale agreement was concluded between Mr Fomariz and the applicant's predecessor in title. In that same year the applicant took occupation of the property and was in charge thereof. The tenants were advised that the rental agreements concluded with Mr Fomariz would be honoured, provided that they paid the rentals. During August 2014 the applicant had the number of the industrial erven on the property increased from 22 to 34. It then gave written notices of cancellation of the lease agreements, through its attorneys, during September 2014 to all tenants in the following terms:

'WRITTEN NOTICE OF CANCELLATION OF VERBAL LEASE AGREEMENT

To: All TENANTS and OCCUPIERS residing at the property known as PLOT 35 WATERVAL.

...

We confirm the following:

- 1) The premises occupied by you was sold to the client and stands to be registered in the name of our clients shortly;
- 2) In terms of the sale agreement all risk and benefit have already passed to the purchasers and it is as a result thereof that they have several rights, including the right to let these premises to you, to accept rent, to cancel such lease agreement and to claim occupation, possession and undisturbed use of the premises;
- 3) You are a tenant of these premises in terms of a verbal lease agreement between yourself and the previous landowner, Mr Felix Formariz, alternatively in respect of a verbal lease agreement between yourself and the client, which agreement was concluded after the client had purchased the property from the previous landowner;
- 4) The property was rezoned by the Rustenburg local Municipality to industrial land and the client intends developing an Industrial park on the property;
- 5) Prior to our client purchasing the property you were verbally informed of the fact that these premises were to be sold and that the new owner will claim ownership of the property;

- 6) During 2012 and after several applications for eviction were concluded by the previous landowner - Mr Felix Formariz, one Mr Adriaan Wessels from the firm Grabler Vorster Attorneys attended the premises and met with all tenants at that stage occupying the premises. Amongst others it was discussed that the premises was then in the process of being sold, that the premises were never zoned for the purpose of residential housing and that the new landowners will require the tenants to vacate the premises at some stage;
- 7) Subsequent to the aforementioned you have remained in occupation of the premises by virtue of your verbal lease agreement with Mr Felix Formariz, alternatively by virtue of your verbal lease agreement with our client;
- 8) Take note that this however now serves as your 30 (THIRTY) days written notice of cancelation of the verbal lease agreement and your lease shall terminate on the 31st of October 2014;
- 9) You are therefore required to vacate the premises by no later than 31 October 2014;
- 10) Should you fail to vacate as aforesaid your occupation of the premises shall become illegal on the 1st of November 2014 in terms of Section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of land Act 19 of 1998 as you will then not have any consent or permission from the purchaser to occupy the premises;
- 11) Should you fail to vacate the client will stand to suffer damages in respect of the loss of beneficial occupation of the premises being withheld from them and further damages;

TAKE NOTICE:

- 1) You are hereby informed in writing that this serves as your 30 (THIRTY) DAYS WRITTEN NOTIFICATION OF THE CANCELLATION OF YOUR VERBAL LEASE AGREEMENT;
- 2) Your lease term shall terminate on the 31st of OCTOBER 2014;
- 3) You are Informed in writing that you should deliver all keys to the said premises at Grobler Levin Soonlus Attorneys at the corners of Beyers Naude Avenue and Brink Streets, Rustenburg by no later than 14:00pm on 31 October 2014;
- 4) Should you fail to adhere to any of the above mentioned, an application for your eviction from the premises will follow. You shall be held liable for all costs of the Application for your Eviction, which will be issued as a matter of urgency, as well as further damages which may have been caused by your Unlawful Occupation of the said property.'

It is not in dispute that the notice was delivered to all the tenants.

[9] Through their attorneys, the tenants denied that they had been advised of the impending sale of the property. More pertinently they asserted that they had been in occupation of the property for almost 30 years and the applicant could not cancel the agreement unilaterally and without an order of court.

[10] Subsequent thereto, Mr Formariz, who was still the legal owner of the property, instructed the municipality to disconnect the electricity supply to the property. A borehole located on the property also stopped working. This caused the tenants to institute proceedings in the Rustenburg Magistrates Court, seeking an order against the applicant for restoration of the disconnected services (the spoliation application). However, that application was later withdrawn. The applicant refused to have the electricity reconnected, even though the respondents did make a payment towards the electricity account. For their part the tenants refused to pay rent and, in addition to demanding restoration of electricity supply, they wanted their rooms upgraded and the property cleaned. They were told that this could not happen in view of the anticipated change of ownership. Ultimately, the Rustenburg Municipality made arrangements for water supply and cleaning of the property.

[11] On 27 February 2015, the sale agreement concluded with the applicant's predecessor in title was cancelled and replaced with one concluded with the applicant. According to the applicant, by May 2015 the amount of outstanding rentals had escalated to R944 504.50. The property was transferred to the applicant on 7 August 2015. In that same month the applicant instituted proceedings in the high court for eviction of the respondents.

[12] In the application for eviction, the first six respondents were the six tenants that had been the applicants in the spoliation application (in the magistrates court), as office bearers of the tenants' representative organization. The seventh

respondent were the rest of the tenants, cited as ‘Unlawful Occupiers of Portion 35 of the Farm Waterval 306, Registration Division JQ, North West Province’.

[13] Mr Francois Grobler, the applicant’s director, explained in the founding affidavit the difficulties of tracking down each and every tenant because they worked different shifts and because of the unauthorised sub-letting. He estimated the average period of occupation of the current occupants to be no longer than three years.

[14] As foreshadowed in the cancellation notices the applicant contended that the respondents were unlawful occupiers of the property. It pleaded that cancellation of the leases was effected in terms of the oral lease agreements, alternatively, in terms of the Rental Housing Act 50 of 1999. It asserted that the respondents stopped paying rent in 2014 and arrear rentals had accumulated to R944 504.50. It lamented the poor condition of the property, saying that the respondents were living in hazardous conditions as there was neither water nor electricity supply on the property. It contended that there was sufficient alternative accommodation in Rustenburg wherein they could be accommodated.

[15] In asserting their claim that they were occupants in terms of ESTA, the respondents highlighted that they had the previous owner’s consent to occupy the property from 2000 until 2012, and thereafter the applicant’s consent until, at least, 2014. They insisted that they had been in occupation for more than 5 years and disputed the validity of the cancellation, saying they were never afforded an opportunity to make representations prior to termination of their rental agreements. The termination of their lease agreements was therefore not just and equitable, so they contended. They pleaded that some of them were not employed, and others earned less than R5000 per month. They maintained that their rental

agreements were terminated because the applicant wanted to develop the property into an industrial park rather than because of arrear rentals.

[16] In the answering affidavit, Mr Paulino Chivola Chivura alleged that he had lived on the property since 1990 and that at some stage he was the manager and assisted in collecting rentals, a claim which was disputed by Mr Formariz. The disputed fact was not material because, as will become apparent in the discussion that follows, the respondents (or some of them) started to reside on the property, at the latest, from 2001. When the notices of lease cancellation were issued in 2014, the earliest occupants had been occupiers for 13 years. Although Mr Chivura insisted that the present respondents had been in occupation since 1997, he did not deny that over time, there was no control over tenants' change of occupancy of the property. And it was not in dispute that the notices of termination of occupancy rights were given to all tenants that were in occupation in 2014.

[17] The Municipality lamented the shortage of housing, land and financial resources to enable it to meet its Constitutional obligation of providing residents with housing. The Municipal Manager, Mr Nqobile Sithole, stated that contrary to the applicant's contention, it was 'impossible' for the municipality to provide housing accommodation to the large number of respondents in this case. He listed several other landowners within the Rustenburg Municipality precinct who, collectively, were trying to evict about 4000 tenants.

[18] In dismissing the appeal, the full court found that the high court had correctly upheld the respondent's special plea, that the respondents were occupiers under ESTA and that it lacked jurisdiction to determine the application. However, contrary to the finding of the high court, the full bench found that the onus was on the respondents rather than the applicant, to show that their

occupation was regulated under ESTA, including proving that their income was less than the prescribed amount of R5 000.00.² The respondents had discharged that onus, so held the full court.

In this court

[19] The application for special leave to appeal was premised on the ground that the respondents had failed to prove that they were occupiers in terms of ESTA. It was submitted on behalf of the applicant that once the 30 day period given in the cancellation notices expired the respondents became unlawful occupiers.

[20] However, the relief sought by the applicant had transformed to include an order that, in the event of this Court finding that it was just and equitable to grant an eviction order, such order should be made conditional on the State buying the property or finding alternative accommodation for the respondents within two months of the order. In the event of that option not succeeding, the State had to consider expropriating the property from the applicant or paying constitutional damages to it, so it was contended. These suggestions emanated from the contents of an affidavit filed by the ninth respondent, the Department of Rural Development and Land Reform, in which it was stated that the Department was investigating the possibility of acquiring the property. But that is as far as the communication by the Department went. No proper case had been made for this Court to make an order compelling the Government to buy the property from the applicant.

² In 2018 this amount was increased to R13 625.00 by GN 72 dated 16 February 2018 and GN 84 dated 23 February 2018.

Appeal Discussion

[21] In *Randfontein Municipality v Grobler & Others*³ this Court said the following about the two pieces of legislation on which the parties rely in this case: ‘ESTA and PIE were adopted with the objective of giving effect to the values enshrined in ss 26 and 27 of the Constitution. The common objective of both statutes is to regulate the conditions and circumstances under which occupiers of land may be evicted. The main distinction is that broadly speaking ESTA applies to rural land outside townships and protects the rights of occupation of persons occupying such land with consent after 4 February 1997, whilst PIE is designed to regulate eviction of occupiers who lack the requisite consent to occupy. Occupiers protected under ESTA are specifically excluded from the definition of ‘unlawful occupier’ in PIE. An order for the eviction of occupiers may be granted under ESTA by a competent court on just and equitable grounds, having regard to the different considerations applicable in each instance. The Land Claims Court is a specialist tribunal established by s 22 of the Restitution of Land Rights Act 22 of 1994 and enjoys jurisdiction, subject to ss 17, 19, 20 and 22 of ESTA, to deal with cases determined under ESTA. It follows, therefore, that if the land was occupied with consent, either express or tacit, the jurisdiction of the High Court to deal with it is excluded in the absence of consent to its jurisdiction.’

This excerpt sums up the legal principles applicable in the determination of the issues in this appeal.

[22] The jurisdictional facts for the application of ESTA relate to: (a) the person occupying the land, and (b) the land that is occupied. In terms of s 1(1)(x) of ESTA an ‘occupier’ is:

‘a person residing on land which belongs to another, and who as on 4 February 1997, or thereafter, had consent or another right in law to do so, but excluding –

(a) a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act No 3 of 1996);
and

(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land

³ *Randfontein Municipality v Grobler and Others* [2009] ZASCA 129; [2010] 2 All SA 40 (SCA) at para 4.

himself or herself and does not employ any person who is not a member of his or her family;
and

(c) a person who has an income in excess of the prescribed amount.’

[23] Section 2 regulates the land to which ESTA applies. Section 2(1) provides that ESTA applies to:

‘ . . . all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of the law, or encircled by such a township or townships . . . ’

[24] Consistent with the basic common law principle that ‘the party who alleges must prove’, which is applicable in the determination of the incidence of the onus in civil cases, the burden to prove that ESTA applies in relation to a specific occupier rests on the occupier who invokes the application of the Act. The occupier must bring herself within the ambit of the Act by proving that she complies with all the components of the definition of an occupier in the Act, including that she is not excluded from the application of the Act under s1(1)(x).⁴

[25] However, the occupier is assisted by a number of presumptions contained in the Act. In relation to consent s 3(4) of the Act provides that:

‘For the purposes of civil proceedings in terms of this Act, a person who continuously and openly resided on land shall be presumed to have consent unless the contrary is proved.’

There is also a deeming provision provided for in s 3(5) of the Act in terms of which a person who has continuously and openly resided on land for a period of three years shall be deemed to have done so with the *knowledge* of the owner or a person in charge.

[26] In relation to the land occupied a presumption that operates in favour of the occupier is contained in s 2(2) of the Act, to the effect that:

⁴ *Skhosana and Others v Roos t/a Roos se Oord and Others* 2000 (4) SA 561 (LCC) at 572H-574. See also CP Smith *Evictions and Rental Claims- A practical guide* Chapter 5 at para 5.9.4.

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

This presumption meant that once the respondents raised the special plea under ESTA, the property had to be presumed to fall within the scope of the Act unless the applicant proved the contrary. In any event there was no dispute about the fact that when the property was zoned in 2012, the respondents were already tenants thereon.

[27] The dispute related to whether they were the kind of persons who qualified as occupiers in terms of ESTA. Apart from the fact that the presumptions operated in favour of the respondents, an acknowledgement that the respondents did, at some stage, have consent to reside on the property, or could be presumed to have had such consent, was implicit in the applicant’s own case, although much was made of the inability to ascertain when exactly some of the occupiers took occupation. Such acknowledgement was apparent from the cancellation notices. Therefore the respondents did not need to prove that they did have consent to reside on the property.

[28] However, the onus to prove that they were not disqualified under the exclusions remained unsatisfied. Once more it was apparent from the evidence that the respondents were not labour tenants and they were not using or intending to use the property for industrial, mining or commercial purposes. What remained was for them to prove that their income did not exceed the prescribed amount.

[29] The evidence tendered by the respondents in this regard consisted of a single sentence in Mr Chivura’s answering affidavit, that the ‘[m]ajority of the Respondents are unemployed and do not earn an income in excess of R5 000 per month’. Such a bare averment was not adequate for the discharge of the onus on the respondents to prove that their income did not exceed the prescribed

maximum income. The respondents' income was a matter peculiarly within their knowledge. Casting the burden of proof on them in this regard was not unduly harsh. On the other hand placing such a burden on the applicant would cause undue hardship.

[30] Mr Chivura's evidence was hearsay. He did not explain how he got to know of the income earned by each tenant or 'most tenants' on the property. He did not specify the amount of income earned by such tenants nor did he identify the respondents who were unemployed or earned less than R5000.00. Only 15 of the 48 deponents to confirmatory affidavits filed with his answering affidavit said they were unemployed. The rest said they were employed but did not divulge their earnings. They merely stated the dates on which they took occupation of the property and then went on to confirm the contents of Mr Chivura's affidavit in so far as it related to them. Yet Mr Chivura never referred to any of his co-respondents by name. Curiously, Mr Chivura gave no evidence as to his own employment details and earnings. Then there was no evidence on the rest of the 300 occupants. Consequently only the 15 respondents brought themselves within the ambit of ESTA.

[31] It was submitted on behalf of the applicant that if this court were to grant leave to appeal and uphold the appeal it should decide the eviction application in line with the suggested order. On the other hand the amicus submitted that there was insufficient information on record, particularly on the respondents' circumstances and the impact the eviction would have on them. This court should therefore refer the matter back to the high court.

[32] It was the responsibility of the respondents to respond in full to the allegations made by the applicant in support of the PIE application. Such is the nature of motion proceedings. In the answering affidavit Mr Chivura stated that

the 48 affidavits represented a portion of the respondents' confirmatory affidavits and that the remainder would be made available to the court should it be necessary to do so. No further evidence was made available to court. There is no explanation as to what the anticipated evidence would be and why it was not tendered to court as would be expected.

[33] Nevertheless it is true that because of the technical approach adopted by the respondents in raising their special plea, neither the high court nor the full bench dealt with the merits of the application brought by the applicant based on the PIE Act. This is in contrast to the position in *Odvest 182 (Pty) Ltd v Occupiers of Portion 26 (Portion of Portion 3) of Farm Klein Bottelary No 17, Botfontein Road ('The Property') and Others*⁵ wherein, although pleading that ESTA was applicable instead of PIE, the occupiers consented to the jurisdiction of the high court. In this case this Court would be determining the issues brought under the PIE Act for the first time on appeal, something which it has always been reluctant to do. In fact, there is no decision of the high court on the PIE Act application. It would therefore be undesirable for this court to determine the issues arising in that application on appeal.

[34] In the end I am satisfied that the applicant did make out a proper case for special leave to be granted in this case. The approach to determination of the onus and satisfaction thereof under ESTA is significant and important. Its clarification will benefit not only the applicant; it is a point of law of general public importance.

[35] The following order is granted:

- 1 Special leave to appeal is granted;

⁵ *Odvest 182 (Pty) Ltd v Occupiers of Portion 26 (Portion of Portion 3) of Farm Klein Bottelary No 17, Botfontein Road ('The Property') and Others* (19695/2012) [2016] ZAWCHC 133 (14 October 2016).

- 2 In relation to the respondents whose names appear in schedule A attached to this order the appeal is dismissed;
- 3 In relation to the rest of the respondents the appeal is upheld. The order of the full bench is set aside and replaced with the following order:
 - ‘1 The appeal is upheld.
 - 2 The application is referred back to the high court for determination of the application brought in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
 - 3 There shall be no order as to costs.’
- 4 There shall be no order as to costs.

N DAMBUZA
JUDGE OF APPEAL

SCHEDULE A

1. Bontie Dlamini,
2. Caroline Sebaya,
3. Khensane Jane Mabunda.
4. Kholiwe Blayi,
5. Masego Philadelphia Khoza,
6. Mpho Lekaba,
7. Nkhabeng Thresia,
8. Okafor Pased,
9. Petrus Bushy Sebaya,
10. Pretty Lesego Mashigo,
11. Saphirah Busang,
12. Sebase Precy Mokgwatsane
13. Thotyelwa Motshwaedi,
14. Victor Nyatho, and
15. Zukiswa Mkrweqe.

Appearances:

For applicant: JHF Pistor SC with GV Maree

Instructed by: Falcon & Hume Inc, Sandton
Webbers, Bloemfontein

For respondents: No appearance

For amicus: JFD Brand with RN Ozoemena