THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 543/08

RANDFONTEIN MUNICIPALITY — Appellant

and

JOHN MICHAEL GROBLER — First Respondent
BEN MSIMANGA — Second Respondent
THE OCCUPIERS OF IMMOVABLE PROPERTY
KNOWN AS PORTION 74 OF THE FARM ELANDSVLEI
249 I.Q. RANDFONTEIN — Third Respondent

Neutral citation: *Randfontein Municipality v Grobler and others* (543/08) [2009] ZASCA 129 (29 September 2009).

Coram: HARMS DP, LEWIS, PONNAN JJA, TSHIQI *et* WALLIS AJJA
Heard: 10 SEPTEMBER 2009
Delivered: 29 SEPTEMBER 2009
Summary: Eviction ─ referral to oral evidence on whether occupation with express or tacit consent ─ whether PIE or ESTA applicable.

ORDER

On appeal from: High Court, Johannesburg (Du Plessis AJ sitting as court of first instance).

The appeal is upheld with no order as to costs in this court and the order of the court *a quo* is set aside and replaced with an order in the following terms:

'(a) The application is postponed to a date to be determined by the Registrar of the South Gauteng High Court for the hearing of oral evidence.

(b) The issues to be resolved at such hearing are:

(i) whether or not any person, claiming to reside on portion 24 of the Farm, Elandsvlei, 249, IQ, Randfontein is an occupier thereon as contemplated in the Extension of Security of Tenure Act, 62 of 1997 (ESTA); and

(ii) whether such person had consent, as contemplated in ESTA, to reside thereon, and

(iii) in consequence of such findings, whether the provisions of ESTA or the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (PIE) are applicable to the eviction of such persons.

(c) The evidence to be adduced at the aforesaid hearing shall be that of any witnesses whom the parties or any of them may elect to call, subject however to what is provided below.

(d) Save in the case of any persons who have already deposed to affidavits in these proceedings, neither party shall be entitled to call any person as a witness unless─

(i) It has served on the other party, at least 14 days before the date appointed for the hearing, a statement by such person wherein the evidence to be given in chief by such person is set out; or

(ii) The court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his or her evidence.

(e) Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

(f) The fact that a party has served a statement or has subpoenaed a witness shall not oblige such party to call the witness concerned.

(g) Within 45 days of the making of this order, each of the parties shall make discovery on oath of all documents relating to the issues referred to above, which documents are, or have at any time been, in possession or under the control of such party.

(h) Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.

JUDGMENT

TSHIQI AJA (HARMS DP, LEWIS, PONNAN JJA *et* WALLIS AJA concurring):

[1] The issue in this appeal is whether the High Court had jurisdiction to order the eviction of certain occupiers from property under the provisions of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE). Mr Grobler, the owner of a farm described as Portion 74, Elandsvlei 249 IQ, Randfontein brought an application to the High Court, Johannesburg, for an order for the eviction of the second and third respondents (the occupiers) from the farm stating that none of them had a right to occupy it. The application was opposed by the respondents who challenged the jurisdiction of the court in that they alleged that the dispute fell to be determined under the provisions of the Extension of Security of Tenure Act 62 of 1997 (ESTA) because, as they alleged, the occupiers had consent to occupy the land. The court below accepted the version of the applicant that there was no consent and dealt with the matter under PIE. The court further found no real nor genuine dispute of fact and consequently held that no case was made for referral to oral evidence. The appeal is against both findings

and is brought with leave of the court below. The main issue is whether there was a real and genuine dispute that necessitated a referral to oral evidence.

[2] The occupiers commenced settling on the farm in 1959. They constitute a settled community of approximately 2000 people comprising 900 women, 54 pensioners and 500 children. They live in shelters consisting of approximately 133 shacks, 44 permanent structures, two caravans and by August 2006 there were said to be 261 dwellings. It is not in dispute that the land is classified as agricultural land.

[3] The appellant, Randfontein Local Municipality (the third respondent in the court below) was cited in its capacity as the state functionary obliged to give effect to the obligations of the state in terms of s 26 and 27 of the Constitution of the Republic of South Africa ('the Constitution'). Notice was duly served in terms of s 4(2) of PIE and the application was opposed by the occupiers who filed affidavits with the assistance of the Legal Aid Board.

[4] 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.[1] 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.[2] An order for the eviction of occupiers may be granted under ESTA by a competent

[1] PIE provides for the prohibition of unlawful eviction and provides procedures for the eviction of unlawful occupiers. ESTA aims to assist to facilitate long-term security of tenure but also recognises the right of land owners to apply to court for an eviction order in appropriate circumstances.

[2] Section 1 of PIE defines an unlawful occupier as 'a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of the Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996)'.

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.[3]

[5] 'Consent' and 'occupier' are defined in s 1 of ESTA as follows:

'"consent" means express or tacit consent of the owner or person in charge of the land in question, and in relation to a proposed termination of the right of residence or eviction by a holder of mineral rights, includes the express or tacit consent of such holder;

"occupier" means a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding . . ..'

[6] Section 2(1)(a) of ESTA provides:

'(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 ─

(a) any land within such a township which has been designated for agricultural purposes in terms of any law . . ..'

[7] ESTA envisages both express and tacit consent. The fact that express consent was not alleged does not mean there was no consent at all. In this case the occupiers assert consent. The lengthy period for which the occupiers had settled on the land, the size of the community and the fact that the municipality provides certain services are all relevant in determining the existence of tacit consent.

[3] Section 17(2) of ESTA.

[8] The provisions of s 3 of ESTA may also be relevant in the final determination of the dispute because this section creates a presumption of consent in favour of the occupiers in civil proceedings in terms of ESTA as follows:

'(4) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved.

(5) For the purposes of civil proceedings in terms of this Act, 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 person in charge.'

This section provides that once it is proved that occupiers have resided on the land classified as agricultural land for more than three years then the presumption becomes effective in their favour.

[9] In *Rademeyer and others v Western Districts Council and others*[4] Nepgen J had occasion to deal with the requirement of tacit consent in the context of ESTA. He accepted that the initial occupation of the respondent's property in that case took place without the prior consent of the respondent, a local authority. He found that it was clear that upon becoming aware of the presence of the occupiers, the attitude of the local authority was that the occupiers could remain on the property until alternative arrangements could be made to house them elsewhere. He then concluded as follows:[5]

'In my judgment, the conduct of the respondent in permitting the intervening respondents to remain on the respondent's property and resolving to provide them with water and sanitation (which has in fact been provided) constitutes at the very least tacit consent to the intervening respondents to reside on the respondent's property. It was not contended, and in my view rightfully so, that, if the provisions of the Act were applicable, the applicants could be granted any relief. As I have concluded that the Act does apply to these proceedings, the application cannot succeed.'

[10] The conclusion in that decision was debated at length by the Constitutional Court in *Residents of Joe Slovo Community, Western Cape v*

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[4] 1998 (3) SA 1011 (SECLD).
[5] 1017B-C.

Thubelisha Homes and others.[6] Three judges in that court (Moseneke DCJ, Sachs J and Mokgoro J) concluded that the surrounding circumstances seen as a whole allowed a reasonable inference that the owner had given the occupiers consent to occupy the land. Moseneke DCJ in his judgment found that the conduct of the municipality in providing substantial services over a lengthy period, occupation over a period of 15 years and the conditions of occupation imposed by the municipality were the overall factors from which such an inference may be drawn.[7] O'Regan J in her judgment found that as the upgrading of the settlement was welcomed by the inhabitants and the process of upgrading, which took place in 2002, went way beyond the provision of basic services it was clear that the municipality was consenting tacitly to the occupation of the land.[8]

[11] In order to determine the issue raised in this appeal it is necessary to analyse the evidence pertaining to the occupation of the farm. Grobler in his founding affidavit did not provide information on the circumstances in which the land was occupied. As proof of ownership he attached a Windeed Report from the Deeds Office database which reflects the purchase price as R100 000,00 and the date of transfer from an entity known as Patelsons Investments (Pty) Ltd on 17 February 2005. He simply stated that the occupiers did not occupy in terms of a lease agreement and that they were occupying without his consent. He also attached a document named 'site plan of 74 Elandsvlei' which shows that there was an established township on the land on the date of transfer into his name and he mentioned that since that date seven more shacks had been erected on the property. This implies that the majority of occupiers must have been in occupation before he became owner. Significantly, he failed to address the question whether, in terms of ESTA, the occupiers did not have prior consent, tacit or otherwise.

[12] The answering affidavits of the occupiers were also brief and did not deal with consent or the circumstances in which the land was occupied. They

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[6] [2009] ZACC 16.
[7] Para 151.
[8] Para 278.

simply gave personal details, the dates of occupation of the respective individuals and that they receive municipal services. These dates go back for many years.

[13] The affidavit by the municipal manager, Randfontein, simply recited details of the housing programme being implemented by the municipality in terms of the South African Housing Code and did not provide details pertaining to the occupiers other than stating that the property was 'first occupied in November 2005' which was palpable nonsense.

[14] It is not in dispute that the property was first occupied in 1959. It is furthermore clear that when Grobler purchased the property in February 2005, the occupiers had already been in occupation of the land for a lengthy period of time. The only contentious issue therefore is whether they remained in occupation with consent. As ESTA clearly recognises tacit consent which may be in the form of prior consent by other owners or people in charge, the allegations contained in later affidavits created real and bona fide disputes of fact with regards to consent. The approach to be adopted in an instance such as this is trite and was further clarified by this court in *Wightman t/a J W Construction v Headfour (Pty) Ltd and another*[9] as follows:

'Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon–Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)

A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be

[9] 2008 (3) SA 371 (SCA) paras 12 and 13.

instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[15] This approach is appropriate in this matter. The unsatisfactory manner in which the occupiers' defence was conducted is sketched in the judgment of the court below. But that does not dispose of the matter. Grobler bore the onus to establish that the high court had jurisdiction. He was faced with the fact that when he bought the land, there was a settled community there. He failed to address the issue of jurisdiction squarely in his founding affidavit in spite of all the indications that there must have been a real possibility of consent to occupy that preceded his purchase. He was surprisingly silent on why he bought the land despite this and on what he intended to do with the community.

[16] The parties filed supplementary affidavits. In his supplementary affidavit the municipal manager sought to retract the date of November 2005 and introduced hearsay evidence from some of the occupiers stating that according to them they occupied the land earlier than 1997 with the consent

of a certain Laher. Clearly the municipal manager could not provide independent information concerning the basis of occupation and no reliance may be placed on his affidavit with regard to the circumstances of the occupation.

[17] Mr Ben Msimanga, the second respondent (the first respondent in the court below), who was cited in his capacity as chairman of the community of occupiers, also filed an answering supplementary affidavit in which he made the bald allegation that they had occupied the property for a period of 35 years with the consent of the owner but gave no further details pertaining to the identity of the person who gave the consent, his capacity, nor the circumstances surrounding the consent and the occupation.

[18] In reply to the allegation of consent, Grobler filed an affidavit in which he denied the consent alleged and set out for the first time that he bought the property in February 2005 from a company known as Patelsons Investments (Pty) Ltd ('Patelsons'). It would appear that they in turn had bought it during February 1993. He denied that the previous owner had given consent to the occupiers. In support of this he attached confirmatory affidavits from a Mr Baboo Patel, a shareholder and director of Patelsons and a Mr Ismailjee, a son of Laher. These affidavits are still silent on the circumstances of the occupation prior to the purchase and have no probative value. A proper investigation of the circumstances is necessary.

[19] Another relevant consideration is the purchase price paid by Grobler for the land. The purchase price in 1993, when the land was transferred to Patelsons, was R100 000,00. Grobler in turn purchased the property from Patelsons in 2005 for the same amount. It is highly unlikely that the value of the land had not increased after so many years. This unusual factor suggests on the probabilities that everyone knew about the occupation and its probable implications.

[20] The common cause facts regarding the lengthy period of tenure on the land and the circumstances in which Grobler bought the land are such to give

credence to the occupiers' later allegation that they had the necessary consent entitling them to the protection under ESTA and that there is a real and bona fide factual dispute. This, coupled with the undisputed evidence that the municipality provided basic municipal services, show that it is necessary to clarify the circumstances around the occupation of the land through oral evidence. The court below took a too narrow view of the matter and overlooked the reality that the dispute of fact goes to the heart of the matter. In this regard the court below erred.

[21] The following order is accordingly made:

The appeal is upheld with no order as to costs in this court and the order of the court *a quo* is set aside and replaced with an order in the following terms:

'(a) The application is postponed to a date to be determined by the Registrar of the South Gauteng High Court for the hearing of oral evidence.

(b) The issues to be resolved at such hearing are:

(i) whether or not any person, claiming to reside on portion 24 of the Farm, Elandsvlei, 249, IQ, Randfontein is an occupier thereon as contemplated in the Extension of Security of Tenure Act, 62 of 1997 (ESTA); and

(ii) whether such person had consent, as contemplated in ESTA, to reside thereon, and

(iii) in consequence of such findings, whether the provisions of ESTA or the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (PIE) are applicable to the eviction of such persons.

(c) The evidence to be adduced at the aforesaid hearing shall be that of any witnesses whom the parties or any of them may elect to call, subject however to what is provided below.

(d) Save in the case of any persons who have already deposed to affidavits in these proceedings, neither party shall be entitled to call any person as a witness unless─

(i) It has served on the other party, at least 14 days before the date appointed for the hearing, a statement by such person wherein the evidence to be given in chief by such person is set out; or

(ii) The court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his or her evidence.

(e) Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

(f) The fact that a party has served a statement or has subpoenaed a witness shall not oblige such party to call the witness concerned.

(g) Within 45 days of the making of this order, each of the parties shall make discovery on oath of all documents relating to the issues referred to above, which documents are, or have at any time been, in possession or under the control of such party.

(h) Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.

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ACTING JUDGE OF APPEAL

Appearances:

Counsel for Appellant:	R T Sutherland SC G I Hulley Instructed by Maserumule Incorporated, Johannesburg Honey Attorneys, Bloemfontein
Counsel for Respondent:	C P Wesley Instructed by (1st): Truter Crous & Wiggill, Randfontein Naudes, Bloemfontein (2nd & 3rd): Mogale Justice Centre c/o Setlhodi Attorneys, Randfontein