IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 20 April 1999
before **Gildenhuys J** and **Bam P** **CASE NUMBER**: LCC50/99

In the case of

JOHANNES SKHOSANA	First Applicant
SOPHIE MALULEKA	Second Applicant
ABRAM SELLO	Third Applicant
SAMUEL CHAUKE	Fourth Applicant
SAMUEL (also known as small Samuel)	Fifth Applicant
CALVIN	Sixth Applicant
DANNY (also known as Danny-Boy)	Seventh Applicant
PHILLIP MOLWANTWA	Eight Applicant
SARA SKHOSANA	Ninth Applicant
KATRYN KHOZA	Tenth Applicant

and

C D ROOS T/A ROOS SE OORD	First Respondent
S BENADE	Second Respondent
M SMITH	Third Respondent
SHERIFF, BRITS	Fourth Respondent

JUDGMENT

GILDENHUYS J:

The facts

[1] This case came before the Court by way of urgent application. The ten applicants are erstwhile workers on portions of the farm Welgegund No 491, Registration Division JQ, Transvaal, the property of Mr C D Roos, the first respondent. They were dismissed after a labour dispute and evicted from the property. The second and the third respondents are both magistrates at the Magistrate's Court, Brits, who gave orders relating to the eviction. The fourth respondent is the Sheriff for Brits who executed a warrant for the eviction of the applicants.

[2] The first respondent issued summons in the Magistrate's Court for the eviction of the ten applicants. He based his action upon his ownership of the property and the alleged unlawful occupation thereof by the applicants - in other words, a vindicatory action founded on the common law. The ten applicants did not defend the action. In the papers before this Court, reasons were given why they did not defend. For purposes of this judgment, however, I need not comment on the reasons. Default judgment was given against the ten applicants by the third respondent on 26 February 1999. A warrant for their eviction was issued, and they were evicted by the fourth respondent on 29 March 1999.

[3] On 8 March 1999 the applicants' attorney, Mr Peete, lodged an *ex parte* application in the Brits Magistrate's Court for the rescission of the default judgment. In the rescission application the applicants alleged that they can only be evicted in terms of an order of court issued under the Extension of Security of Tenure Act [1] (hereinafter referred to as ESTA). The rescission application came before a different magistrate, the second respondent in this application. Mr Peete stated that when he lodged the rescission application, he provided the second respondent with a copy of ESTA. The second respondent, in reasons for judgment filed with this Court, described the sequence of events relating to the rescission application. According to her, she informed Mr Peete that she would hear the rescission application at 8:00 on 10 March 1999. By 8:15 on 10 March 1999, Mr Peete had still not arrived at the Court. Although the papers in the rescission application had not been served on the first respondent, his attorney, Mr van Rensburg, got to hear of the application and was present at the Court. To accommodate the applicants and in the absence of their attorney, the second respondent suspended the warrant for eviction until 24 March 1999. At 14:00 on 10 March 1999 Mr Peete appeared at the Court, and was informed both of the suspension of the warrant for eviction and of the postponement of the rescission application to 9:00 on 24 March 1999. On 24 March 1999 at 9:00 Mr Peete again failed to attend. Mr van Rensburg, on behalf of the first respondent, was present. He submitted an affidavit in which the first respondent alleged that ESTA is not applicable because the relevant portions of the farm Welgegund lie within a township. The second respondent struck the matter from the roll, and rescinded the suspension of the warrant for eviction. At 10:00 on the same

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1 Act No 62 of 1997, as amended.

day, Mr Peete arrived at the Court, whereupon he was told what had happened to the rescission application earlier that morning. At the hearing of the application before this Court, Mr Bokaba, who appeared for the applicants, confirmed that Mr Peete was not at Court at 9:00 on 24 March 1999, when the rescission application was due to be heard. I was informed from the bar that his lateness was caused by problems with the public transport on which he relied.

[4] In the written reasons for her decision, the second respondent dealt with the provisions of ESTA as follows:-

> "Geen bevinding is gemaak en spesifiek gemaak dat ESTA nie van toepassing is nie behalwe op 24/3/99, is bevind dat Esta nie op dorpsgebiede van toepassing is nie."

How that finding came to be made at the time when the second respondent struck the rescission application from the roll because Mr Peete was not present, baffles me.

[5] After the rescission application in the Magistrate's Court was struck from the roll by the second respondent, the applicants launched an urgent application to this Court for prayers which included the following:

- that this Court urgently review and set aside the order of the learned Magistrate S Benade of the Brits Magistrate's Court handed down on 24 March 1999;

- that this Court give an order restoring the applicants' rights of residence and use of land held before the eviction on 29 March 1999;

- that this Court orders the belongings of the occupiers impounded by the Sheriff of the Court to be returned;

S that this Court orders that the first respondent be interdicted from interfering with the applicants in the use of land they have always been entitled to use on or before 29 March 1999, by either express or tacit consent; and

S that this Court grants the applicants such further and/or alternative relief as the Court may deem fit.

[6] It must be noted that the order which the applicants seek to have reviewed is the order made by the second respondent on 24 March 1999, being the order striking the rescission application from the roll and rescinding the suspension of the warrant for eviction. There is no application for the review of the default judgment granted by the third respondent on 26 February 1999. During argument, Mr Bokaba intimated that he may wish to apply for an amendment of the Notice of Motion to include a review of the order granting the default judgment. No such application was made. I will deal with the implications thereof later in this judgment. The case before this Court was argued for the applicants on the basis that they want to bring under review the failure by one or both of the Magistrates to apply the provisions of ESTA. This failure, so it was argued, constitutes an irregularity which entitles the applicants to the relief set out in the Notice of Motion.

The jurisdiction of the Court

[7] Before dealing with the merits of the review application, I have to determine whether this Court has jurisdiction to adjudicate thereon. In terms of section 20(1)(c) of ESTA, this Court has jurisdiction

> "to review an act, omission or decision of any functionary acting or purporting to act in terms of this Act".

The third respondent granted the eviction order by default, pursuant to particulars of claim, the relevant portions of which read as follows:

> "Eiser is die eienaar van die eiendom bekend as Welgegund 491, distrik Brits . . . .
> Verweerders . . . is in onregmatige okkupasie van die eiendom."

The particulars of claim conform to what is required for an eviction order under common law, and contain no reference to ESTA. If it is found that the applicants are occupiers of the property (within the meaning given to the term "occupier" in ESTA) and entitled to protection against eviction under ESTA, the question arises whether this Court has jurisdiction to review an eviction order given under common law and without regard to ESTA. This Court's jurisdiction to review an act, omission or decision of a magistrate is limited to cases where the magistrate "acted or purported to act" in terms of ESTA.[2]

[8] The dictionary meaning of " in terms of " reads -

> "in the mode of expression or thought belonging to (a subject category); *loosely* as regards, with reference to".[3]

The phrase "in terms of", when it pertains to the applicability of a specific legal provision, ordinarily means authorised by or under that provision.[4] In the case of *Oosthuizen and Another v Standard Credit Corporation Ltd* [5] it was argued that, in addition to its ordinary meaning, the phrase "in terms of" has a wide meaning - namely "pursuant to" or " in accordance with". Nicholas AJA held that-

> ". . . the three phases 'in terms of', 'pursuant to' and 'in accordance with' are synonyms with slightly different shades of meaning. One or other may be appropriate depending on the context, but essentially they do not differ in meaning. The dictionary meaning of the phrase 'pursuant to' is 'consequent on and conformable to', and that of 'in accordance with' is 'in conformity with'. Similarly 'in terms of' contains the idea of 'in conformity with'."

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2 Section 20(1)(c) of ESTA.

3 *The New Shorter Oxford English Dictionary*, Brown (ed), Vol 2 (Clarendon Press, Oxford, 1993) at 3253.

4 *Ngqulunga and Another v Minister of Law and Order* 1983 (2) SA 696 (N) at 698G; *Enhanced Communications Networks (Pvt) Ltd v Minister of Information, Posts and Telecommunications and Others* [1998] 1 All SA 597 (ZH) at 608.

5 1993 (3) SA 891 (A) at 901A-B.

[9] The phrase "in terms of" also appears in other sections of ESTA. An analysis of some of these sections will be useful to determine what meaning should be given to the phrase. There is a presumption that where the same phrase is used in different portions of the same statute, the phrase is intended to bear the same meaning throughout, except where there are clear indications to the contrary.[6] I will deal with the sections which contain the phrase in turn.

[10] Section 2(2) of ESTA reads:

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

If a land owner brings an action for the eviction of a person living on his land and that person defends the action on the basis that he is an occupier and protected from eviction under ESTA, will the presumption apply? The plaintiff does not rely on ESTA for his cause of action. If the phrase "in terms of" has to be narrowly interpreted, the proceedings would not be proceedings in terms of ESTA and the presumption will not apply. Narrowly interpreted, the presumption will only apply if the cause of action is based on ESTA, and not if ESTA is raised as a defence. Such an absurdity could hardly have been intended by the legislature. Therefore the phase "in terms of" must be given a wider meaning.[7] The same reasoning will apply to the presumptions contained in sections 3(4)[8] and 3(5)[9] of ESTA . I need not deal with them separately.

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6 *S v Ffrench v Beytagh* (1) 1971 (4) SA 333 (T) at 334E; *Durban City Council v Shell and BP Southern Africa Petroleum Refineries (Pty) Ltd* 1971 (4) SA 446 (A) at 457A.

7 *Interpretatio quae parit absurdam non est admittenda.* See *Spinnaker Investments (Pty) Ltd v Tongaat Group Ltd* 1982 (1) SA 65 (A) at 76H.

8 Section 3(4) reads:

> "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."

9 Section 3(5) reads:

> "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."

[11] Section 19(2) of ESTA reads as follows:

> "Civil appeals from magistrates' courts in terms of this Act shall lie to the Land Claims Court."

If the phrase "in terms of" has a narrow meaning, the following anomaly can arise. If a plaintiff brings an action based on ESTA, the defendant pleads that ESTA does not apply, and the magistrate upholds the defence, the appeal will clearly lie to the Land Claims Court. On the other hand, if the plaintiff brings an action for eviction based on common law, the defendant pleads that the action cannot succeed because he or she is an occupier protected from eviction under the provisions of ESTA, and the magistrate finds that the matter lies outside the scope of ESTA , an appeal would, on a narrow interpretation of the phrase "in terms of", have to be brought to the High Court.[10] If the High Court, on appeal, finds that ESTA is applicable, the case may then have to find its way to a court which has jurisdiction to issue orders under ESTA. The High Court (subject to some exceptions) has no jurisdiction to issue orders under ESTA. It was said by Nicholson J in *Khumalo v Potgieter* [11] that -

> "There are dangers inherent in requiring an applicant to seek certain relief from the Land Claims Court and other relief from the High Court. In the first instance such would be prohibitively expensive and beyond the pocket of most litigants who are not on Legal Aid. Secondly it would lead to a multiplicity of actions where the same facts are canvassed in different tribunals investigating basically the same issues."

I might add a third danger, namely that it could lead to conflicting interpretations by different Courts, something which the legislature in the past was anxious to avoid. All of this indicates that the legislature did not contemplate a narrow meaning to be given to the phrase "in terms of".

[12] Section 19(3) of ESTA reads as follows:

> "Any order for eviction by a magistrate's court in terms of this Act . . . shall be subject to automatic review by the Land Claims Court . . ."

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10 This is so because the Magistrate did not make the eviction order under any provision of ESTA.

11 [1999] 1 All SA 10 (N) at 18.

Where, in an action for eviction under common law, the defendant raises a defence based on ESTA and the magistrate finds that ESTA is not applicable and grants the eviction order, must the magistrate send the order to the Land Claims Court for automatic review? On a narrow interpretation of "in terms of this Act" it will not be necessary, because the eviction order was made under common law. However, the legislature in providing for the automatic review of ESTA cases clearly intended that the Land Claims Court must scrutinise the records of those cases to ensure that the provisions of ESTA were correctly applied. It would be absurd if, on the one hand, an eviction order made under the provisions of ESTA has to be reviewed by this Court while, on the other hand, an eviction order under common law consequent upon a decision that ESTA does not apply, is not subject to such review.

[13] Reverting to section 20(1)(c), in terms of which this Court has jurisdiction -

> "to review an act, omission or decision of any functionary acting or purporting to act in terms of the Act",

the words "purporting to act" might provide an indication of how far the legislature intended the jurisdiction of this Court to extend. If a magistrate should make a decision professing it to be in terms of ESTA, this Court will have jurisdiction to review that decision on the grounds that it is not in terms of ESTA; in other words, this Court will have jurisdiction even if the Magistrate did not "act in terms of ESTA" but only "purported" to do so. In a reverse situation, where a magistrate, either knowingly or unwittingly, fails to apply ESTA under circumstances where ESTA should have been applied, and if the decision is brought under review on the basis that the Magistrate committed an irregularity by not applying ESTA, I can think of no logical reason why the legislature would have intended that the review must not be justiciable in this Court.

[14] A further indication of how far the legislature intended the jurisdiction of this Court to extend, can be found in section 20(3) of ESTA, which reads:

> "If in any proceedings in a High Court at the date of commencement of this Act that court is required to interpret this Act, that Court shall stop the proceedings if no oral evidence has been led and refer the matter to the Land Claims Court."

This subsection is indicative of the general intention of the legislature that the Land Claims Court must be the only Court which adjudicates on issues concerning the interpretation or application of ESTA.[12] Such an intention is in line with legislative policy which recognises and gives effect to the desirability, in the interests of the administration of justice, of creating specialist courts (such as the Land Claims Court) to the exclusion of the ordinary courts.[13]

[15] From the above, it is evident that the phrase "acting in terms of ESTA" in section 20(1)(c) may have to be purposively interpreted so as to give this Court jurisdiction to review cases which fell to be dealt with in conformity with ESTA, but were not so dealt with.[14] So interpreted, the phrase "in terms of ESTA" would be descriptive of the sphere of law applicable to the magistrate's actions or omissions. The phrase "in terms of" was, albeit in a different context, given a similar meaning in *C Ltd v Commissioner of Taxes* [15] in order to avoid a result which would be "so absurd that the Legislature could never have intended it".

[16] On the other hand, giving the phrase "in terms of" a wide meaning may also give rise to anomalies. If, in an appeal against, or a review of, a judgment of a magistrate granting an eviction order under common law, one of the points at issue is the failure by the Magistrate to apply ESTA,

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12 In drafting the subsection, the drafter seems to have been under the impression that after the commencement date of ESTA, cases requiring the interpretation of ESTA will no longer find their way to the High Courts. This is a wrong impression.

13 See *Paper, Printing, Wood and Allied Workers' Union v Pienaar NO and Others* 1993 (4) SA 621 (A) at 637B.

14 In the unreported matter of *Retief v Dladla*, LCC10R/99 20 April 1999, Meer J held [with regard to an automatic review under section 19(3) of ESTA]:

> "In order for me to review the eviction order, I must therefore find that the eviction in this case fell to be dealt with in terms of the Act (ESTA)."

15 1962 (1) SA 42 (SR) at 44G and 45C-D.

and other points are also raised which do not relate to ESTA, the question arises whether this Court must hear the appeal or review on the ESTA issue only, and the High Court on the other issues? Such a duplication is not in the public interest, nor does ESTA provide for it. The jurisdiction given to this Court to adjudicate on issues under ESTA takes away the jurisdiction of the High Courts also to adjudicate on those issues .[16] The consequence of a wide interpretation of the phrase "in terms of", where it is used to demarcate the confines of this Court's jurisdiction, could therefore be that, apart from some exceptions contained in ESTA, the High Courts have no jurisdiction where an issue under ESTA comes up for decision. The High Courts could possibly treat such a restriction on their jurisdiction as an absurdity or a repugnance and remove it by judicial pronouncement.[17] The result could then be that, under some circumstances, both this Court and the High Court will have jurisdiction to adjudicate on the interpretation and scope of ESTA. The legislature was at pains to avoid such a result, because it could lead to conflicting decisions.

[17] However the phrase "in terms of" is interpreted, there will be anomalies and uncertainties. Some of these anomalies and uncertainties might have been avoided through better legislative drafting. Others are inherent in the situation of having different courts for different eviction orders.[18] This Court must interpret ESTA in a manner which will, as far as possible, avoid uncertainties and absurdities.[19] It is likely that many of the uncertainties and absurdities to which the various possible interpretations of the phrase "in terms of" could lead, did not come to mind when the particular sections of ESTA were drafted and considered by Parliament. Otherwise, the sections might well have read differently.

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16 By virtue of section 20(2) of ESTA.

17 This was done with a similar restriction contained in the Land Reform (Labour Tenants) Act No 3 of 1996 by the full bench of the Transvaal High Court in *Makhomboti v Klingenberg* 1999 (1) SA 135 (T). See the judgment of Le Roux J at 141.

18 The High Courts have jurisdiction to grant eviction orders under common law and under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No 19 of 1998, but not under ESTA (subject to some exceptions) and not under the Land Reform (Labour Tenants) Act No 3 of 1996.

19 *Hatch v Koopoomal* 1936 AD 190 at 209; *Van der Walt and Others v Lang and Others* 1999 (1) SA 189 (LCC) at 194I-195A.

[18] Having regard to ESTA as a whole and taking into account its purpose and scope, I have come to the conclusion that the phrase "in terms of", where used in the sections of ESTA from which this Court derives its jurisdiction, must be interpreted in a manner which will entitle this Court to adjudicate in a case where the provisions of ESTA are at issue. So interpreted, the phrase "in terms of this Act" will mean "within the sphere of law established by this Act". That does not mean that this Court will have jurisdiction to decide every issue which might arise in such cases. The issue must have some relationship with ESTA.[20] Where the boundaries lie, I will not venture to determine. Suffice to say that the existing uncertainties in regard to the exact limits of this Court's jurisdiction are an impediment for the Court and practitioners alike. Because this review application is brought on the basis that the second respondent committed an irregularity by striking the rescission application from the roll when it appeared from the application that the applicants wanted to raise a defence under ESTA, and because it was argued that the default judgment should not have been granted by the third respondent in that the applicants were protected against eviction by ESTA, and because this Court has jurisdiction to adjudicate on issues falling within the sphere of law established by ESTA, I hold that this Court has jurisdiction to adjudicate on the review application.

Grounds for review

[19] As I have indicated before, the order for the eviction of the applicants from the properties was granted by default in the Magistrate's Court by the third respondent. After the default judgment was given, the applicants applied to the Magistrate's Court for rescission of the default judgment, on the grounds that they could only have been evicted by an order of court issued under ESTA. This was the correct procedure to adopt. Unfortunately, on the date and time for the hearing, when the rescission application was called, Mr Peete was absent. It was quite proper for the second respondent

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20 The jurisdiction of this Court has recently been expanded through an amendment to section 22(2) of the Restitution of Land Rights Act No 22 of 1994 by section 7(b) of the Land Restitution and Reform Laws Amendment Act No 18 of 1999, so that this Court now has -

> "(c) the power to decide any issue either in terms of this Act or in terms of any other law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the Court considers it to be in the interests of justice to do so."

(the Magistrate allocated to hear the rescission application) in those circumstances to strike the matter from the roll. By striking the matter from the roll, the Magistrate did not necessarily bring an end to the proceedings. Mr Krüger (for the first respondent) pointed out, with reference to the judgment in *Ensign-Brickford (South Africa) (Pty) Ltd and Others v AECI Explosives & Chemicals Ltd*,[21] that it remained open for the applicants to seek condonation and reinstatement of the rescission application. Instead of following this course, the applicants brought a review application to this Court under section 20(1)(c) of ESTA.[22] Save in exceptional circumstances, an order of a Magistrate's Court will not be reviewed by a superior court before the aggrieved party has exhausted his or her remedies in the Magistrate's Court.[23] This the applicants have not done. For this reason alone, unless I could have found exceptional circumstances, which I did not find, the review application to this Court cannot succeed.

[20] I now turn to the order for default judgment made by the third respondent. Assuming (without deciding) that I am entitled to review the third respondent's order under the applicants'claim for alternative relief, I will proceed to examine whether anything untoward was done by the third respondent in granting the default judgment. The only irregularity suggested by Counsel for the applicants is third respondent's failure to consider and apply ESTA.

[21] The eviction order was granted pursuant to a *rei vindicatio* brought by the owner of the property (the first respondent) under common law. In *Chetty v Naidoo* [24] the Appellate Division held:

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21 1998 (2) SA 1085 (SCA) at 1090F.

22 The power of this Court under a review application in terms of section 20(1)(c) must be distinguished from the powers of this Court under automatic review in terms of section 19(3) of ESTA. The latter powers are much wider. An exposition of this Court's powers on automatic review is contained in *Lategan v Koopman en Andere* 1998 (3) SA 457 (LCC) at 463H-464C, [1998] 3 All SA 603 (LCC) at 607h-608c and *Atkinson v Van Wyk and Another* 1999 (1) SA 1080 (LCC) at 1085D-1086B.

23 *Pretorius v Fourie NO en 'n Ander* 1962 (2) SA 280 (O) at 284H-285A; *Serole and Another v Pienaar* [1999] 1 All SA 562 (LCC) at par [8] at 563.

24 1974 (3) SA 13 at 20C.

> "It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a *reivindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the onus being on the defendant to allege and establish any right to continue to hold against the owner."

This rule has been constantly applied in South Africa.[25]

[22] Where legislation provides protection to people against eviction, people who wish to avail themselves of that protection will have to allege and prove that the legislation applies to them, unless, of course, the legislation expressly or by necessary implication provides otherwise. In the case of *Myaka v Havemann and Another*, [26] the Appellate Division, relying on *Pillay v Krishna and Another*,[27] held that, in so far as the Rents Act provides protection to people faced with actions for eviction, it is up to those people to allege and prove that the protection applies to them.

[23] ESTA is a statute which provides a specific class of people, called "occupiers", with a range of special defences against common law claims for eviction. ESTA also prescribes an elaborate procedure which a land owner must follow before an eviction order can be granted.[28] An "occupier"-

> "means a person residing on land which belongs to another person, and who has or on [sic] 4 February 1997 or thereafter had consent or another right in law to do so, but excluding -
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> (a) a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996);
> (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 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;" [29]

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25 See, for example, *Akbar v Patel* 1974 (4) SA 104 (T) at 109G-H and *Ontwikkelingsraad Oos-Transvaal v Radebe and Others* 1987 (1) SA 878 (T) at 886I-J.

26 1948 (3) SA 457 (A) at 466.

27 1946 AD 946 at 951.

28 See section 9 of ESTA.

29 The description is contained in section 1 of ESTA.

The "land" to which the definition refers, is described in ESTA [30] as -

> ". . . 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; and
> (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"

[24] Had ESTA been legislation directed towards regulating evictions in respect of a category of land instead of a class of persons (namely occupiers), it might have been possible to conclude, where it is apparent from the description of the land that it falls within the category concerned, that because the common law right of the owner to possession of the land has been curtailed, the owner must allege and prove that the applicable legislation had been complied with before an eviction order can be given. This seems to have been the approach followed by Broom JP in the case of *Andrews v Pillay*.[31] A close reading of ESTA indicates, however, that the protection is directed towards a specific class of persons (called "occupiers") residing on a specific category of land (described as "land" in ESTA).[32] Not all persons residing on "land" are entitled to protection against eviction under ESTA. The protection is restricted to "occupiers". However, no person can be an "occupier" unless that person also resides on "land".

[25] The preamble to ESTA contains the following:

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30 Section 2(1) of ESTA.

31 1954 (2) SA 136 (N). In contrast, however, Margo J upheld an appeal in the matter of *Lovisa and Another v Le Ray* 1974 (1) SA 702 at 704H, where a tenant (the respondent in the appeal) sought to rely on the provisions of the Rents Act as a defence to a claim by the landlord, because -

> ". . . the Respondent, upon whom the burden of proof rested in the court below, failed to show that the provisions of the Rents Act to which I have referred had any application at the relevant times to the premises in question."

32 Section 2(1) of ESTA.

> "AND WHEREAS it is desirable -
>
> that the law should promote the achievement of long-term security of tenure for occupiers of land, where possible through the joint efforts of occupiers, land owners, and government bodies;
>
> that the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners;
>
> that the law should regulate the eviction of vulnerable occupiers from land in a fair manner, while recognising the right of land owners to apply to court for an eviction order in appropriate circumstances;
>
> to ensure that occupiers are not further prejudiced;"

The limitation on eviction contained in section 9(1) of ESTA reads:

> "Notwithstanding the provisions of any other law, an occupier maybe evicted only in terms of an order of Court issued under this Act;"

All this confirms that the protection against eviction is directed towards "occupiers" (as defined), and not towards every person residing on "land" whom the owner may choose to evict.

[26] Some components of the definition of "occupier" (particularly the question of whether the person concerned is a labour tenant, and also the income of the person concerned) falls within his or her peculiar knowledge. This supports a conclusion that a person who claims to be an occupier must prove that he or she complies with all components of the definition. There are presumptions contained in ESTA which will assist such a person to establish some components of the definition. These presumptions include a presumption that land in issue in any civil proceedings in terms of ESTA falls within the scope of ESTA (unless the contrary is proved) [33] and also a presumption that, for the purposes of civil proceedings in terms of ESTA, 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.[34] There is furthermore a deeming provision that, for the purposes of civil proceedings in terms of ESTA, a person who has continuously and openly resided on land for a period of three years shall be

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33 Section 2(2) of ESTA, quoted in par [10].

34 Section 3(4) of ESTA, quoted in footnote 8.

deemed to have done so with the knowledge of the owner or person in charge.[35] These provisions would not have been necessary if it fell upon the land owner to prove that a person whose eviction is sought under common law, is not an "occupier" under ESTA.

[27] In the present case, the first respondent was fully entitled to formulate the particulars of claim in his action for eviction the way he did. There was no need for him to make any allegations relating to ESTA.[36] The Magistrate (third respondent), in the absence of a plea by the applicants that they are occupiers, was also fully entitled to grant the default judgment. A judicial officer must decide a case on the issues raised by the parties.[37] His failure to raise or consider the possibility that the applicants could be occupiers under ESTA before granting default judgment against them is not irregular.[38] Of course, once it is conceded or established that the person sought to be evicted is an occupier, the papers under which the land owner seeks the eviction order must contain the necessary factual allegations required for such an order under ESTA. Those allegations must then be proved by the land owner.[39]

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35 Section 3(5) of ESTA, quoted in footnote 9.

36 Comrie J reached a similar conclusion in regard to the formulation of particulars of claim in an action for the eviction of tenants entitled to certain protections under the Rent Control Act in the case of *Worcester Court (Pty) Ltd v Benatar* 1982 (4) SA 714 (C) at 721F-G and 723E-F.

37 *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635F-636E. Because the Land Claims Court may conduct its proceedings on an inquisitorial basis [Section 32(3)(b) of the Restitution of Land Rights Act No 22 of 1994], the position in proceedings before the Land Claims Court could possibly be different.

38 In the matter of *Atkinson v van Wyk and Another* [1999 (1) SA 1080 (LCC)], the plaintiff applied for the eviction of the defendants under common law. No appearance to defend was entered. When applying for default judgment, the plaintiff's attorney filed a certificate at the request of the Magistrate from which it appeared that the defendants could possibly be occupiers as defined in ESTA. Dodson J held that it was incumbent upon the Magistrate, once that certificate was before him with the concessions it contained, to call for evidence in terms of the relevant magistrate's court rule. In my view, this decision casts no duty on a magistrate, in the absence of a concession which raises the applicability of ESTA, to enquire whether or not a person sought to be evicted under common law is an occupier as defined in ESTA.

39 *Karabo and Ohters v Kok and Others* 1998 (4) SA 1014 (LCC) at 1019C-D, [1998] 3 All SA 625 (LCC) at 630E-F; *Lategan v Koopman en Andere* 1998 (3) SA 457 (LCC) at 461C-E, [1998] 3 All SA 603 (LCC) at 605E.

[28] The defence of the applicants that they are occupiers under ESTA and entitled to protection under ESTA, was extensively debated during the hearing before this Court. Save for saying that the defence does not appear to be frivolous or without merit, I do not intend (nor am I required) to make any finding thereon. In a review application, the emphasis is on whether the procedure adopted by the Magistrate whose decision is brought under review, was just and correct.[40] In other words, whether justice was done. Both the decisions (that of granting the default judgment, and that of striking the review application from the roll) are procedurally just and correct. Apart from the complaint that the Magistrates did not apply ESTA, the applicants did not put forward any other grounds for review. I have already found that, given the papers before him, the third respondent was, on those papers, not required to apply ESTA. The decision of the second respondent to strike the application for rescission of the default judgment from the roll when Mr Peete failed to attend the hearing is also procedurally just and correct. Had Mr Peete been present at the Magistrate's Court on 24 March 1999 and argued the matter, the second respondent might well have found that the applicants established a *prima facie* defence under ESTA and have set the default judgment aside. It is not the function of this Court to adjudicate on that defence in these proceedings.

[29] Upon consideration of the facts of this case and the conclusions to which I have come in this judgment, I find no reason why this Court should intervene in the decisions of the second and third respondents, rather than leave it to the applicants to apply for condonation and reinstatement of their rescission application in the Magistrate's Court. Because the other orders for which the applicants applied in this Court, as set out in the Notice of Motion, are dependant upon the eviction order being set aside, which cannot happen on the papers before me, those prayers must also be dismissed.

Costs

[30] In considering what costs order will be appropriate in this matter, it must be born in mind that the applicants have attempted to enforce rights under social legislation. In such cases this Court has,

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40 Gering *et al* "Civil Procedure: High Court" in Joubert (ed) Vol 3, Part 1, *Law of South Africa*, 1st Reissue (Butterworhts, Durban 1997) at par 394.

in the past, usually not made any cost order.[41] This is because parties must not be discouraged from enforcing or defending their rights under such legislation for fear of running the risk of having to pay the costs of their adversaries. There may also be other reasons. Unfortunately in this case the applicants, instead of seeking condonation and reinstatement of their rescission application, applied to this Court for the review of an order or orders which were quite properly given in the Magistrate's Court. In so doing, they were wrong. They acted, however, on the advice of their attorney, who might not have appreciated the import and effect of ESTA. In my view, the mistakes committed by their attorney are not sufficient to cause us to depart from the practice of not making costs orders in cases where parties seek to enforce their rights under ESTA.

Order

[31] The applicants' application is hereby dismissed. No order is made as to costs.

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JUDGE A GILDENHUYS

I agree

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JUDGE F BAM

Heard on: 20 April 1999 **Handed down:** 10 May 1999

For the applicants:
Mr Bokaba instructed by *Mlebye & Peete Attorneys*, Pretoria.

For the respondents:
Mr Krüger instructed by *Jan van Rensburg Attorneys*, Brits.

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41 See for example, *Hlatshwayo and Others v Hein* [1997] 4 All SA 630 (LCC) at 639E-644C; *Serole and Another v Pienaar* [1999] 1 All SA 562 (LCC) par [19] at 570.