Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***11th February 2022*** Signature:

CASE NO: 38224/2020

DATE: 11TH FEBRUARY 2022

In the matter between:

HOHL, RICHARD WERNER N O	First Applicant
HOHL, BIRGIT	Second Applicant
HOHL, UWE	Third Applicant

and

DALCOS, CHRISTOPHER JOHN	First Respondent
DALCOS, MARCO	Second Respondent
THE OTHER OCCUPIERS OF […], GAUTENG PROVINCE	Third Respondent
MOGALE CITY LOCAL MUNICIPALITY	Fourth Respondent

Coram: Adams J

Heard: 22 November 2021 – The matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 11 February 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 11 February 2022.

Summary: Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) – relationship with Extension of Security of Tenure of Land Act 62 of 1997 (ESTA) – 'occupier' as defined in ESTA – evidentiary burden on evictee to demonstrate that he is such 'occupier' –
Application for eviction under PIE – onus on applicant to establish that evictee is an unlawful occupier –– unlawful occupation – under an oral lease – termination – right of occupation terminated – just and equitable to grant an eviction order – eviction order granted

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ORDER

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(1) The first and third respondents are granted leave to file their 'supplementary answering affidavit' dated 27 July 2021, and the said affidavit is received and accepted by the court.

(2) The first, second and third applicants are granted leave to file their 'supplementary replying affidavit' dated 13 August 2021, and the said affidavit is received and accepted by the court.

(3) The costs of both the applications for leave to file further affidavits shall be in the course of this, the main application.

(4) The first and third respondents and all other persons occupying through or under them the applicants' property, being […], Gauteng Province ('the property'), be and are hereby evicted from the said property.

(5) The first and third respondents and all other occupiers of the property shall vacate the property on or before the 30th of April 2022.

(6) In the event that the respondents and the other occupiers of the premises not vacating the premises on or before the 30th of April 2022, the Sheriff of this Court or his lawfully appointed deputy be and is hereby authorized and directed to forthwith evict the respondents and all other occupiers from the property.

(7) Once evicted, the respondents are interdicted and restrained from entering the property at any time after they have vacated the property or have been evicted therefrom by the sheriff of the court or his lawfully appointed deputy.

(8) In the event that any of the unlawful occupiers contravene the order in para (7) above, the sheriff of the court or his lawfully appointed deputy, is authorised and directed to remove them from the property as soon as possible after their reoccupation thereof.

(9) The first and third respondents jointly and severally, the one paying the other to be absolved, shall pay the applicants' costs of this opposed application, including the costs relating to the applicants' *ex parte* application in terms of section 4(2) of the Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act ('the PIE Act').

JUDGMENT

Adams J:

[1]. The first applicant acts herein in his official capacity as the duly appointed Executor in the deceased estate of his late wife, Edeltraud Hohl ('the deceased'), who is the registered owner of […], Gauteng Province ('the property'). The deceased died on 17 January 2015. The second and third applicants, the children of the first applicant and the deceased, are the sole heirs to the estate of the deceased. The respondents are in occupation of the property, unlawfully so, according to the applicants, who has already obtained an eviction order by this Court (per Senyatsi J) on 19 July 2021 against the second respondent.

[2]. In this opposed application, the applicants apply for the eviction of the first and third respondents, including all other occupiers, from the property, which, as its description suggests, is designated as agricultural land. The first and third respondents oppose the application in the main on the following bases: (1) Firstly, that they are not unlawful occupiers as envisaged by the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, Act 19 of 1998 ('the PIE Act'); and (2) Second, that they are 'occupiers' as defined in the Extension of Security of Tenure of Land Act, Act 62 of 1997 ('ESTA'). Additionally, the first respondent claims that he has a claim against the owner of the property for improvements effected to the property, the fair and reasonable costs of which amounted to about R200 000, which he is now claiming back from the owner of the property.

[3] The case of the applicants is that the first respondent took occupation of the property during 1996 and remained in occupation until during or about 2008, when he and his family vacated the property. At that stage, they (the first respondent and his family) required a larger house and the first applicant undertook to renovate the existing house. And it was for this reason that the first respondent vacated the property, namely to afford the applicants an opportunity to effect the renovations to the residence on the property.

[4] During 2015, so the first applicant alleges, at a time when the renovations were not yet completed, the first respondent approached him (the first applicant) with a request that he and his family be allowed to return to the property. He agreed, but subject to certain express conditions, notably that the first respondent and his family would occupy the house on the property in terms of an oral lease agreement in terms of which rental of R3 500 per month, plus all electricity charges, would be payable to the first applicant by the first respondent.

[5] Pursuant to this oral lease agreement, the first respondent on 6 June 2016 paid an amount of R2300 and a further R6000 on 5 February 2018. Subsequently, and during 2019 and 2020, the first respondent made further payments totalling R17 913.06. These were the only payments made by the first

respondent to the first applicant in terms of the lease agreement. According to the first applicant, the first respondent was therefore hopelessly in arrears with the monthly rental and related and ancillary charges by the time legal proceedings were instituted during November 2020 for their eviction.

[6] In the interim, and in view of the first respondent's failure to effect payment of the monthly rental, the first applicant on 23 July 2020 demanded payment of all arrears and simultaneously gave the first respondent notice to vacate the property on or before 30 September 2020. This demand was not complied with and the first applicant cancelled the oral lease agreement and required of the first respondent to vacate the property, which, not surprisingly, the first respondent failed to do.

[7] The case of the first respondent, which is a convoluted one and at times rather confusing, in sum is to the effect that he and his family occupy and have since 1996 occupied the property in terms of and pursuant to an oral lease agreement. During his tenancy, so the first respondent claims, he effected, at the instance of the first applicant, on at least three occasions improvements and running repairs to the property. The first applicant had also allegedly undertaken to compensate him for the expenses he incurred in effecting those improvements.

[8] The first respondent also makes the claim that, during 2008, he concluded an oral agreement with the deceased in terms of which the property would be subdivided and he would acquire a portion of the property. Pending his acquisition of the property, he and his family would be allowed to occupy rent-free a new house, which the deceased and presumably the first applicant had agreed to erect on the property for him and his family. This claim is denied by the first applicant. I need not dwell on this factual dispute too long, for the simple reason that the claim is not only bad in law but is also so far-fetched, if regard is had to the other undisputed facts in the matter, that it can be rejected out of hand.

[9] The claim is bad in law because of section 2(1) of the Alienation of Land Act, Act 68 of 1981, which provides as follows:

‘**2 Formalities in respect of alienation of land**

(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority’.

[10] The oral agreement, as alleged by the first respondent, is therefore of no force and effect. This part of the first respondent’s version is also so far-fetched as to render it untenable. Why, I ask rhetorically, would the deceased and the first applicant agree to allow the first respondent and his family to occupy a newly-built house rent-free for an indefinite and indeterminable period of time? Moreover, it is common cause that from 2016 to 2020 the first respondent made payments to the first applicant, who explains that these payments were in respect of rental and other ancillary charges pursuant to an oral lease agreement. The first respondent, who agrees that he made those payments, does not proffer an explanation for it.

[11] To complicate matters further, the first respondent, in his answering affidavit contends that their right to occupation is founded on ‘an agreement of set off and sale of the Eastern portion of the property, to [him], in lieu of the expenses that [he] had personally incurred at the property’. I reject this contention for the reasons mentioned in the aforegoing paragraphs. If indeed such agreement was entered into, it can and should be regarded as *pro non scripto*. Also, if regard is had to all of the other facts in the matter, it can safely be said that that version is far-fetched and not sustainable.

[12] This may be a convenient juncture at which to deal with the issue raised by the first respondent relating to ESTA. The first respondent contends that the proceedings are governed by and ought to have been brought in terms of the provisions of the ESTA Act. The applicants contend, however, that the first respondent failed to make out a proper case or to lead any evidence in support of his assertion that the ESTA Act is applicable. Pertinently, so the applicants argue, he omitted to produce evidence relating to his own income.

[13] Section 1 of the PIE Act 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 this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996).'

[14] In terms of s 2 of PIE, the Act applies to all land throughout the Republic. In terms of s 4(1) of PIE the provisions of that section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

[15] Section 1 of ESTA defines an occupier as follows:

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

(a) ... … …

(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.'

[16] The other relevant portions of s 2 of ESTA provide as follows:

'(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; 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.

(2) 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.'

[17] It is trite that an owner or person in charge of land who wishes to evict another person who resides on that land must comply with s 26(3) of the Constitution. That section requires that a court order first be obtained. It also provides that legislation may not permit arbitrary evictions. The principal legislation regulating eviction from land is PIE.

[18] PIE serves to regulate evictions from 'all land' in the Republic. It does so by prescribing its application only to 'unlawful occupiers' as defined and sets out both procedural and substantive safeguards to avoid arbitrary eviction. Finally, it provides that the court dealing with an eviction must be satisfied that the eviction is just and equitable.

[19] A party relying on PIE must bring its case for eviction within the ambit of its provisions. It bears an onus to establish, as an essential jurisdictional requirement, that the person sought to be evicted is an unlawful occupier. This means that it must be established that the occupier is not an 'occupier' as defined by ESTA. This much is clear from a reading of the plain language of PIE read with ESTA.

[20] The question therefore is simply whether ESTA applies.

[21] The sum total of the evidence relating to this issue is that the property in question is 'land designated for agricultural purposes'. The first respondent also alleges that he is not 'disqualified' as an 'occupier' in terms ESTA, as, so he avers, he earns less than the R13 625 per month prescribed as a minimum monthly income by s 1 of ESTA. The first respondent then also goes on to state in his 'supplementary answering' affidavit as follows:

'16 I wish to place on record that I am indeed an occupier in terms of the ESTA Act as I earn a monthly salary below the prescribed amount'.

[22] The first applicant disputes this averment by the first respondent primarily on the basis that the first respondent ought to have produced more convincing evidence than his personal bank account statements for a few months. The inference to be drawn from this, so I understand to the applicants' case, is that the first respondent does indeed earn in excess of the prescribed minimum monthly income. There appears to be merit in this contention by the applicants.

[23] I am persuaded that the first applicant discharged the onus on him to prove that the ESTA does not find application *in casu*.

[24] In that regard, I am supported in this conclusion by and I adopt the approach in the decision in *Skhosana and Others v Roos t/a Roos Se Oord and Others*[1], in which the Land Claims Court held as follows:

'[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) fall 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) 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. 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 deemed to have done so with the knowledge of the owner or person in charge. 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'.

[25] The simple point is that, in my view, the first respondent failed to prove, in his case, the existence of all the components of the definition of 'occupier'. He fell short in producing evidence proving his income, which falls peculiarly within his knowledge, and he therefore failed to convince me that he is an 'occupier' as envisaged by s 1 of the ESTA.

[26] As was held by the Full Court of this Division in *Pieterse v Venter and Another*[2], in claiming that he or she is an 'occupier' as defined in ESTA, a party is under a duty to present evidence relating to his or her income, which, as I

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1 *Skhosana and Others v Roos t/a Roos Se Oord and Others* 2 All SA 652 (LCC).

2 *Pieterse v Venter and Another* (A5016/2011) [2012] ZAGPJHC 7 (10 February 2012).

have already indicated, falls peculiarly within his or her knowledge. Claassen J, writing for the Full Court, commented as follows:

'The absence of any evidence as to appellant's monthly income sounded the final death knell to this defence. In fact, Mr Botha acknowledged this fact in a concession contained in paragraph 3.27 of his heads of argument:

"3.27. The appellant did not disclose his income and has not discharged the onus to show that he is an ESTA occupier. The court a quo therefore correctly found that he is not an ESTA occupier.'

[27] Therefore, in my view, the first respondent has failed to prove that he is an occupier as envisaged by ESTA. This application should therefore be decided in terms of PIE. It is settled law that ESTA and the PIE Act are mutually exclusive. It is either the one or the other that is applicable, but not both[3].

[28] This defence of the first and third respondents should therefore fail.

[29] The next question is whether the applicants should be granted the relief claimed in view of the factual disputes between the parties, which, according to the first respondent, cannot be resolved on the papers.

[30] I have already above alluded to the difficulties with the version of the first respondent. I reiterate that, in my view, his story is far-fetched. Moreover, as correctly pointed out by Mr Lubbe, who appeared on behalf of the applicants, the first respondent pleaded three different and mutually exclusive bases on which he claims his right to occupy the property. All of these bases are bad in law.

[31] On the flipside of the coin is the version of the applicants, which is corroborated by contemporaneous and subsequent events, notably the fact that the first respondent made payment to the first applicant of amounts totalling about R26 000 during the period from 2016 to 2020. If the first respondent was entitled to set off the cost of improvements to the property, which he supposedly effected during 2008 and 2015, then why did he not withhold these payments as set-off against amounts due to the first applicant.

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[3] *Agrico Masjinerie (Edms) Bpk v Swiers* 2007 (5) SA 305 (SCA) at pg 308B-C.

[32] The aforegoing translates into an oral lease agreement, as averred by the first applicant, in terms of and pursuant to which the first respondent and his family took occupation of the residence on the property. This lease was validly cancelled by the first applicant due to the fact that the first respondent, in breach of the said tenancy, failed to make payment of the monthly rental and other ancillary charges due under the lease. This, in turn, means that the first and second respondents are in unlawful occupation of the property and the first respondent is entitled to an order evicting them.

[33] The remaining issue relates to whether or not it is 'just and equitable' to evict the first respondent and his family.

[34] Mr Lubbe submitted that it is and he says so for the following reasons. The respondents were first given notice to vacate on 17 December 2019, which notice and demand they have to date not complied with. The respondents presently occupy and have, for the last approximately seven years occupied the property, lawfully owned by the appellants, for all intents and purposes rent-free. The total arrear rental and related and ancillary charges at present amount to R281 340.31, according to the applicants' calculations. To add insult to the injury, so the appellants argue, when faced with an eviction application, the first respondent raised spurious defences aimed at further avoiding having to pay rental – not the type of behaviour which deserves the sympathy of the court.

[35] I agree with these submissions. It is for the first respondent to put up facts or circumstances relevant to the eviction order, which, notwithstanding that the first respondent's occupation is unlawful, would result in the court exercising its discretion in his favour in not granting an order for his eviction on the basis that to evict him and his family would be unjust and iniquitous. Except to baldy state that his eviction would not be just and equitable, the first respondent does not draw to the attention of the court any factors to be considered when exercising its discretion.

[36] What is more, is that during 2020 the first respondent made a substantial offer to purchase the property from first applicant. This suggests to me that he

has the financial resources to easily find alternative accommodation and be able to pay rental thereon.

[37] I am accordingly of the view that, all things considered, it would be just and equitable to issue an eviction order against the respondents.

[38] The point about this matter is that it has been more than seven years during which the respondents occupied the applicants' property almost rent-free. They are in flagrant breach of the lease agreement. And they have adopted the attitude that they will milk this cow for as long as they possibly can. Therefore, in my judgment, the applicants have made out a case for an eviction order. They have also complied with the procedural and substantive requirements of s 4 of the PIE Act.

[39] On the point of the 'just and equitable' requirement, it requires emphasising that the risk of any one occupier being rendered homeless is slim to non-existent. In *The Occupiers, Berea v De Wet NO and Another*, 2017 (5) SA 346 (CC), the Constitutional Court remarks as follows at par [48]:

'[48] The court will grant an eviction order only where: *(a)* it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and *(b)* the court is satisfied that the eviction is just and equitable, having regard to the information in *(a)*. The two requirements are inextricable, interlinked and essential. An eviction order granted in the absence of either one of these two requirements will be arbitrary. I reiterate that the enquiry has nothing to do with the unlawfulness of occupation. It assumes and is only due when the occupation is unlawful.'

[40] The respondents should be given sufficient time to vacate the premises. I am of the view that it would be just and equitable to afford the respondents until the end of April 2022 to vacate the premises.

[41] It is necessary to deal briefly with a few other issues. Firstly, the respondents raised a point *in limine* to the effect that the first applicant lacks the necessary *locus standi in iudicio* ostensibly because the Last Will and Testament of the deceased, in terms of which the first applicant was appointed as the Executor in the estate, was invalid as it did not comply with the formalities prescribed by s 2(1) of the Wills Act, Act 7 of 1953. Therefore, so the

argument goes on behalf of the first and third respondents, the first applicant's appointment in invalid.

[42] There is no merit in this contention. The first applicant is the duly appointed executor in the estate of his late wife. That appointment stands until set aside by a court of law. He is therefore fully empowered to act herein on behalf of the estate. That, in my view, is the end of that legal point, which should be rejected.

[43] The second issue relates to the filing by the first respondent of a 'supplementary answering affidavit', to which the appellants objected on the basis that the leave of the court was not requested nor granted and that that affidavit should therefore be disregarded. The first applicant, I suppose out of an abundance of caution, nevertheless filed a 'replying affidavit to the first respondent's supplementary affidavit'. The supplementary affidavit dealt briefly with the ESTA issue and the first respondent desired to place before the court additional information relating to whether or not he is a 'occupier' as defined in ESTA. I have above dealt with and alluded to the issues raised by the first respondent in the supplementary affidavit.

[44] It is so that a party in motion proceedings cannot without the leave of the court, file affidavits other than those provided for in the Uniform Rules of Court. A court should allow the filing of additional and/or supplementary affidavits if the interest of justice requires same, as is the case, in my view, in this matter, in which arises a fundamental issue relating to a person's right not be arbitrarily evicted from his place of residence. I therefore believe that the first respondent should be granted leave to file his supplementary answering affidavit and the first applicant should similarly be granted leave to file a supplementary reply.

[45] I have therefore had regard to what was said by the parties in the aforementioned affidavits, which allowed for a proper ventilation of the disputes between the parties.

[46] For all of these reasons, the application should be granted.

Cost

[47] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[4].

[48] I can think of no reason why I should deviate from this general rule.

[49] I therefore intend awarding costs against the first and third respondents in favour of the first, second and third applicants.

Order

Accordingly, I make the following order:

(1) The first and third respondents are granted leave to file their 'supplementary answering affidavit' dated 27 July 2021, and the said affidavit is received and accepted by the court.

(2) The first, second and third applicants are granted leave to file their 'supplementary replying affidavit' dated 13 August 2021, and the said affidavit is received and accepted by the court.

(3) The costs of both the applications for leave to file further affidavits shall be in the course of this, the main application.

(4) The first and third respondents and all other persons occupying through or under them the applicants' property, being […], Gauteng Province ('the property'), be and are hereby evicted from the said property.

(5) The first and third respondents and all other occupiers of the property shall vacate the property on or before the 30th of April 2022.

(6) In the event that the respondents and the other occupiers of the premises not vacating the premises on or before the 30th of April 2022, the Sheriff of this Court or his lawfully appointed deputy be and is hereby authorized and directed to forthwith evict the respondents and all other occupiers from the property.

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4 *Myers v Abramson* 1951(3) SA 438 (C) at 455.

(7) Once evicted, the respondents are interdicted and restrained from entering the property at any time after they have vacated the property or have been evicted therefrom by the sheriff of the court or his lawfully appointed deputy.

(8) In the event that any of the unlawful occupiers contravene the order in para (7) above, the sheriff of the court or his lawfully appointed deputy, is authorised and directed to remove them from the property as soon as possible after their reoccupation thereof.

(9) The first and third respondents jointly and severally, the one paying the other to be absolved, shall pay the applicants' costs of this opposed application, including the costs relating to the applicants' *ex parte* application in terms of section 4(2) of the Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act ('the PIE Act').

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L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	22nd November 2021 – The matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013
JUDGMENT DATE:	11th February 2022 – judgment handed down electronically
FOR THE FIRST, SECOND AND THIRD APPLICANTS:	Advocate Jan Lubbe
INSTRUCTED BY:	Louw & Heyl Attorneys, Roodepoort
FOR THE FIRST AND THIRD RESPONDENTS:	Advocate R A More
INSTRUCTED BY:	Hamilton Attorneys, Johannesburg
FOR THE SECOND RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance