IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case number: **LCC 2022/139**

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

3 February 2023

In the matter between:

PIETERS, J	1st Applicant
PIETERS, C	2nd Applicant
and	
STEMMETT, SC	1st Respondent
STEMMETT, PG	2nd Respondent

JUDGMENT

SPILG, J

INTRODUCTION

1. In September 2018 Mr S Stemmett brought an application in the Bellville Magistrates' Court for the eviction of Mr and Mrs Pieters in terms of the

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("*PIE*")

2. In late May 2019 the Pieters brought an urgent spoliation application in the same court. They alleged that additional locks had been placed on a gate, that movement to and from their dwelling on the property was being curtailed, that they were prevented from having certain visitors and that access to water and electricity had been cut. In this application both Mr Stemmett and his father (who was the predecessor in title to the property), were cited as first and second respondents respectively.

   The application was in two parts. The first part sought an urgent interim interdict pending the outcome of a declarator (contained in the second part), that the Pieters' occupation is governed by the Extension of Security of Tenure Act 62 of 1997 ("*ESTA*"), not by PIE.

   In his answering affidavit, which was filed in October 2019, Stemmett contended that the majority of events predated January 2019 and that none amounted to a spoliation.

3. The Pieters' ESTA application as well as Stemmett's eviction application were heard on the same date by Magistrate Mohamed. The court found that the Pieters were not ESTA occupiers. In the result, the Pieters' application for a declarator that their rights of occupation were subject to ESTA was dismissed. The court also found that the relevant provisions of PIE had been complied with and granted an eviction order against the Pieters.

4. The Pieters bring the decision to dismiss their ESTA declarator on appeal to this court. They have also brought a separate appeal before the High Court against the granting of the eviction order under PIE.

   The manner in which the appellants have brought the appeals is to be commended. This court has exclusive jurisdiction to hear civil appeals from a

Magistrates' Court and exclusive jurisdiction to interpret ESTA legislation[1]. If this court determines that ESTA applies, then the pending appeal before the Full Bench of the High Court becomes moot. If this court finds that ESTA does not apply then the appeal before the High Court can proceed on the basis of a PIE eviction.

PRELIMINARY

5. The appellants apply for condonation in respect of the late filing of their notice of appeal. Good and proper grounds for granting condonation have been provided PLS STATE VERY BRIEFLY WHAT THESE ARE.and the respondents do not oppose. Condonation is therefore granted

THE ISSUES

6. At the heart of the dispute between the parties is whether the land on which the Pieters reside is or is not in a township, and if it is in a township whether the specific land they are on has been designated for agricultural purposes.

7. If it is not in a township (or despite being in a township is land designated for agricultural purposes) then the regime under which the Pieters may be evicted is determined by ESTA and not PIE.

8. Although the issue may be crisply framed, the determination of what constitutes a township and land designated for agricultural purposes under ESTA requires the court to delve into the meaning to be given to these terms.

9. The point of departure between the able arguments presented by each counsel is that *Adv. Adhikari* for the appellants contends that the enquiry requires an exclusive jurisprudential analysis devoid of factual orientation while *Adv. Beviss-*

[1] See ss 19(2) and 20(3) of ESTA

Challinor for the Respondents, submits that the legislation directs us through its wording to consider the specific attributes of the land which is identified in order to determine whether it falls within a township or not.

10. "*Words exist because of meaning*". This was said some 2300 years ago.[2]

Legislation requires the distillation of concepts into concise and manageable, but possibly an imprecise or ambiguous, series of words into printed form. Imprecision may arise internal to the document itself or externally when applied to a set of given circumstances.

11. Historically courts grappled with whether ambiguity or absurdity and the like were a pre-requisite before being entitled to embark on a broader enquiry in order to ascertain the meaning of words in documents[3] . By the time of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC),* Ngcobo J (at that time) was able to confirm the proper approach to statutory interpretation (at para 90):

> *"The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous."*

The court also cited the passage in *University of Cape Town v Cape Bar Council and Another 1986 (4) SA 903 (A) at 914D-E* where the then Appellate Division said that:

> *"I am of the opinion that the words of s 3(2)(d) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature."*

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[2] The Chinese philosopher Zhuangzi (Zhuang Zhou). See Zhuangzi: Basic Writings", Burton Wallace.

[3] In *Jaga v Donges NO & Another, Bhana v Donges NO & Another* 1950 (4) SA 653 (A) at 662G to 663A Schreiner JA considered that a court could either split the enquiry by first considering whether the language was clear and considering its context only if the language was ambiguous, or from the beginning to simultaneously consider the context and language

The words, "*in the light of the subject matter*" are emphasised because, aside from the legislation being concerned with the protection of ESTA occupiers, the Act took the deliberate step of identifying the line where ESTA did not apply- namely to townships unless s 2(1)(a) applied.

12. Nonetheless the enquiry into the legislative intent is not one dimensional. In a definitive judgment on the interpretation of any written instrument Wallis JA said in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12 noted that interpretation is a unitary exercise. [4]

The considerations to be taken into account have regard to the words used in their setting, the context in which they are used and the purpose for which the words are intended and taking into account all relevant and admissible circumstances in which the document came into existence, *"including the material known to those responsible for its production"*[5], the mischief sought to be addressed, and in respect of legislation with particular regard to the values of the Constitution purposively interpreted[6]. This process will obviously have regard to time tested and pragmatic aids to interpretation when considering the words in their context.

At para 12: *"The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'*

[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18

[6] *Klaase and another v van der Merwe NO and others* 2016 (6) SA 131 (CC) at para 51; *Bato Star* at para 90; *Bothma-Batho Transport* at para 12; *S v Dzukuda* 2000 (2) SACR 443 (CC) at para 38, *Brandt v S* [2005] 2 All SA 1 (SCA) at para 9; *Ferreira v Levine; Vreyenhoek v Powell* 1996 (1) SA 984 (CC) at paras 52, 54, 57, 70 and 170. Compare *Cool Ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 at para 28, which although commencing with the traditional approach to interpretation identified what it termed three interrelated riders. They are that statutory provisions are to be interpreted purposively, the relevant statutory provision must be contextualised and that all statutes must be construed consistently with the Constitution so that where reasonably possible legislative provisions should be interpreted to preserve their constitutional validity.

THE LEGISLATIVE FRAMEWORK

13. The scheme of ESTA is to;

    a. facilitate long term security of land tenure for occupiers;

    b. regulate the conditions of residence on certain land by defining the rights and duties of both occupier and owner

    c. only permit the termination of a right of residence or use of the land on which the occupier resides in certain prescribed circumstances;

    d. only permit the eviction of a person whose rights of residence have been lawfully terminated in certain prescribed circumstance.[7]

14. In *Klaase* at para 51, and *Molusi v Vogels NO and others 2016* (30 SA 370 (CC) at para 7 the Constitutional Court explained that ESTA is remedial legislation unbilically linked to the Constitution which seeks to protect those whose tenure to land is insecure. The legislation must be interpreted so as to afford the fullest possible protection , limit homelessness and promote the realisation of the right to access housing.[8]

    It will be observed that PIE has much the same objectives, save that ESTA affords greater protection and allows for the on-site or off-site acquisition of land on behalf of an occupier. This is because an ESTA occupier had at some stage a lawful right to reside on land which was not then a township with or without the entitlement to use the land for agricultural purposes.

    In both *Goedgelegen* and *Molusi* the Constitutional Court had regard to the social and historical background to the legislation and in the latter case the court added that the objective of ESTA is to:

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[7] See the preamble and the individual chapter headings to Chapters II, III and IV

[8] Compare *Department of land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at para 53 in relation to the remedial nature of the Restitution of Land Rights Act

"improve the condition of occupiers of premises on farmland and to afford them substantive protections that the common law remedies may not ..." [9]

15. It is evident that the Constitution Court itself understood ESTA to apply to farmland and to improving conditions of occupiers on farmland. It is submitted that this would be the ordinary understanding of ESTA as a whole unless there are anomalies either in the legislation itself or in its application. As I hope to demonstrate, the legislation does not create anomalies.

SECTIONS 2 and 29 OF ESTA

16. ESTA delineates land to which its provisions apply and those to which PIE applies[10]. This must therefore be the starting point of the enquiry

17. Section 29(2) provides that:

"The provisions of the Prevention of Illegal [Squatting Act, 1951 (Act 52 of 1951)] Eviction from and Unlawful Occupation of Land Act, 1998, shall not apply to an occupier in respect of land which he or she is entitled to occupy or use in terms of this Act."

18. It is evident from this provision that ESTA requires two qualifiers; that the occupation is on land to which ESTA applies and that the person was entitled to reside there when such right of residence was terminated.

Accordingly;

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[9] Molusi at para 7.

[10] PIE mirrors this in its s1 definition of an unlawful occupier:

'unlawful occupier' means 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

a. A person entitled to occupy land to which ESTA applies cannot rely on the provisions of PIE;

b. A person entitled to occupy land to which ESTA does not apply is subject to the common law and on termination of the right to occupy is entitled to protection under PIE if he or she is rendered homeless and earns less than the prescribed minimum;

c. A person who was never entitled to reside on land to which ESTA applies cannot rely on ESTA but is afforded protection under PIE.[11]

d. A person who is in occupation of land to which ESTA does not apply is subject to the common law and, if the occupation is or becomes unlawful, will be entitled to the protection of PIE if he or she is rendered homeless and earns less than the prescribed minimum;

19. The land envisaged by s 29 which a person is entitled to occupy or use under ESTA, is determined under s 2(1). It reads

2 Application and implementation of Act

(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

[11] *Droomer NO and another v Snyders and others* [2020] ZWAWCHC 72

immediately prior to such establishment, approval, proclamation or recognition."

(emphasis added)

20. There is also a deeming provision under s 2(2) which presumes any land in issue in civil proceedings under ESTA "*to fall within the scope of the Act unless the contrary is proved*".

21. ESTA does not define the terms "*township*" or "*agricultural purpose*".

However an obvious observation is that land does not have to be specifically "*established, approved* (or) *proclaimed* "under law to qualify as a township under the ESTA exclusion. It will suffice if the land is "*otherwise recognised as such in terms of any law*", or is encircled by a township unless that piece of land has been designated for agricultural purposes.

22. An illustration of what the legislature had in mind by the phrase "*otherwise recognised as such in terms of any law*" arose in respect of the Electricity Supply Commission's (now Eskom) development of Redan village in the late 1930s but had not been proclaimed as a township pursuant to the provisions of any Provincial Ordinance or Municipal Bye-Law relating to township development.

In *Greeff and 21 Others v Eskom Holdings SOC Ltd and Others* [2021] ZALCC 22 the court found that the 1922 Electricity Act conferred extensive functions and powers on Eskom which included land acquisitions for the purpose of erecting homes for its employees. It considered that these powers were consistent with such ancillary rights as would enable it to set up housing projects in the nature of a township as contemplated by Provincial Ordinances or Municipal Bye-laws.

The court concluded that the drafters of ESTA had the situation of Eskom in mind, and possibly other large public utility projects, since it did not limit s 2 exclusions to only "*land in a township established, approved (or) proclaimed*" but added a township that was otherwise "*recognised as such in terms of any law*". It found that s 4 of the Electricity Act was a law which recognised that Eskom could

establish, and enabled it to establish, what is in fact a township without having to duplicate the process of engaging a provincial or local administration for approval or to pass a proclamation.[12]

23. In *Greeff* I commented at paras 32 and 33 that:

> *[32] The drafters of ESTA clearly had the situation of Eskom in mind, and possibly other large public utility projects since it did not limit s 2 exclusion to only "land in a township established, approved (or) proclaimed" but added a township that was otherwise "recognised as such in terms of any law".* [13]

> *[33] While this may require both a factual enquiry as to whether the land in question has the attributes of a township and also an enquiry as to whether it was developed under some lawfully exercised power, in the present case it is evident that s 4 of the Electricity Act is a law which recognised that Eskom could establish, and enabled it to establish, what is in fact a township without having to go through the process of engaging a provincial or local administration for approval or proclamation."*

The reason for giving an extended meaning to "*township*" beyond that of a proclaimed, established or approved township was as follows:

> *"... aside from a township which is expressly established, approved or proclaimed under legislation expressly dealing with township development, the drafters of ESTA also envisaged as falling into the exceptions under s 2(1) a township which was established or recognised as such under law. It is a well recognised aid to interpreting legislation that surplusage is unintended; rather that a meaning must be given to every word. See Attorney-General, Transvaal v Additional Magistrate for Johannesburg 1924 AD 421 at 436 and*

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[12] *Greeff* at paras 27 to 35

Cornelissen v Universal Caravan Sales (Pty) Ltd 1971 (3) SA 158 (A) at 174E. In my respectful view the decision in Ngwenya and Others v Grannersberger 1999 (4) SA 62 (LCC) is not in point since it was only concerned about whether a township in the process of development could come into existence prior to it being actually established, approved or proclaimed (see at para 12). The present case is concerned with whether such a township had actually been established or recognised in terms of any law."[14]

24. In *Greeff* the court found that there existed express legislation in the form of s 4 of the Electricity Act which enabled Eskom to develop a township under some lawfully exercised power. The respondent accepted that the village had all the attributes of a township and that it never was used for agricultural purposes. It was therefore unnecessary to engage in any factual enquiry as to whether the land in fact had the attributes of a township and the comments to that effect were *obiter.*

The question now arises: Is there a twofold test which has regard to whether the land has the attributes of a township *and* if so whether it was developed under some lawfully exercised power or does the word "*township*" have some constant meaning for the purposes of ESTA irrespective of any factual matrix.

25. In order to answer the question, it is first necessary to consider the decisions of Bam P and Gildenhuys J in *Ngwenya* and of Cowen J in *Stellenbosch University v Richard Retolla and others* [2022] ZALCC 27.

THE HISTORIC RECOGNITION OF TOWNSHIPS IN THE WESTERN CAPE

26. These cases are relevant because they found, for reasons going back to the early development of towns in the Cape, that Western Cape legislation dealing with townships and their lawful establishment did not follow the same requirements adopted in the other provinces.

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[14] Greeff at ftn 5

27. In *Ngwenya* the Full Bench held that the term "*approved township*", or derivatives of that term," is *a defined term in three of the four provincial ordinances currently in force. It is clear from the definitions that it means a township which has actually been established, and not land in respect of which an application for the future establishment of a township has been approved. Section 2(1) of ESTA excludes land in a township "established, approved, proclaimed or otherwise recognised" from the operation of the Act."* [15]

    However, in reaching its conclusion the court noted that the procedure for establishing a township in the Cape Province "*differs substantially from that of the other provinces*". It mentioned s 6 of Ordinance 15 of 1985 (Cape) and provided some illustrations. The full bench also mentioned that the prevailing legislation governing townships in the Cape was the Land Use Planning Ordinance.[16]

28. Noting *Ngwenya's* differentiation of township laws in the Cape from that of other provinces, in *Stellenbosch University* Cowen J undertook the unenviable task of comprehensively tracing the successive regimes which applied in the Cape Province to the establishment of townships.

    The issue before the court concerned the town of Stellenbosch founded in 1692 and property occupied by the respondents which was located on its urban edges.

    The evidence was that the land in issue was legally recognised as a township in 1927 when the Township Ordinance of 1927 came into force, that it was and remains zoned "*Education*" and in fact is used for that purpose. Moreover there was nothing before the court to suggest that it ever was designated for agricultural purposes.

    In finding that the land in issue was part of a township with the result that the provisions of ESTA did not apply, Cowen J observed that "*in the Western Cape, it makes sense to speak of the establishment of townships by way of subdivision.*"

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[15] Ngwenya at para 12

[16] Ngwenya at para 11 and 12. See also ftn 13.

29. The case before us is concerned with land which the respondent alleges became a township in 1955. This was well before the appellants commenced residing on the property. [17]

In *Schaapkraal Community v Cassiem* [2010] JOL 25016 (LCC) Bam JP considered it sufficient to look to the Land Survey Act 8 of 1987 ("*LSA*") for the purposes of finding a township to be one "*otherwise recognised as such in terms of any law*". The court said at para 15 that the Land Claims Court:

> *"had no qualms in using the Land Survey Act No 8 of 1997's definition of 'township' as a point of departure and determination for purposes of section 2 (l)(a) of the Act."*

The LSA defines a township to mean:

> *"a group of pieces of land, or of subdivisions of a piece of land, which are combined with public places and are used mainly for residential, industrial, business or similar purposes, or are intended to be so used."*[18]

The definition of a public place:

> *"includes any street, road, thoroughfare, sanitary passage, square or open space shown on a general plan of a township or settlement, filed in any deeds registry or Surveyor-General's office ....*

while "*a general plan*" is defined as;

> *"a plan which, representing the relative positions and dimensions of two or more pieces of land, has been signed by a person recognised under any law then in force as a land surveyor, or which has been*

[17] The Pieters resided on the property in January 1988
[18] The same definition was used in the previous Land Survey Act 9 of 1927

approved or certified as a general plan by a Surveyor-General and includes a general plan or a copy thereof prepared in a Surveyor-General's office and approved or certified as such or a general plan which has, prior to the commencement of this Act, been lodged for registration in a deeds registry or Surveyor-General's office in the Republic or any area which became part of the Republic at the commencement of the Constitution, 1993

30. This court heard argument which had regard to specific Cape Ordinances of 1927 and 1934, the Land Use Planning Ordinance 15 of 1985 (LUPO), its successor being the Land Use Planning Act 3 of 2014 (LUPA) as well as the national Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA).

Cowen J in *Stellenbosch University* observed that LUPA generally follows LUPO in respect of land use development and they both require a subdivision plan to be submitted to the Surveyor-General for approval[19]. However neither legislation concerned itself with the procedures for establishing a township, but rather made provision for the development of land as towns by way of approved subdivisions supported by zonings.[20]

Cowen J also noted that SPLUMA does not purport to regulate township development in any detail. Although defining a '*township*' it delineates "what *related functions vest with provincial and municipal government respectively and determines certain procedures. Put generally, provincial legislation may regulate matters relating to township establishment and subdivision of land, amongst others. As regards municipal government, SPLUMA recognises applications for township establishment and subdivisions of land as municipal matters and details certain related procedures. Thus, under SPLUMA, it is largely to provincial and-municipal laws that one must turn to understand current decision making about township development."* [21]

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[19] Id at para 22
[20] *Stellenbosch University* at para 18
[21] Id at para 21

31. Cowen J also pointed out that LUPA defined both a township and a general plan in accordance with SPLUMA save that a road was not included in the LUPA definition.[22]

32. Of significance is the degree of consistency now established between LSA, SPLUMA and LUPA with regard to the definitions of words which are integral to the present enquiry.

The definition of township in SPLUMA is:

> "an *area of land divided into erven, and may include public places and roads indicated as such on a general plan"*

The definition of a public place in SPLUMA means:

> *"any open or enclosed place, park, street, road or thoroughfare or other similar area of land shown on a general plan or diagram which is for use by the general public and is owned by or vests in the ownership of a Municipal Council, and includes a public open space and a servitude for any similar purpose in favour of the general public*"

The definition of a general plan in SPLUMA is most basic; it simply refers the reader to the definition contained in the LSA.

33. The jurisprudence of this court since at least *Leon Bosworth v Tradeprops 106 (Pty) Ltd [2007] ZALCC 8* has been to recognise that the definition of a township in the LSA satisfies the requirement of a township *"otherwise recognised as such in terms of any law"* for the purposes of s 2(1) of ESTA.

This does not mean that cases cannot arise where the absence of a general plan is fatal to the existence of a township recognised under law. *Stellenbosch University* is precisely such a case and Cowen J found that the 1927 and 1934 Ordinances preserved the recognition of townships which came into existence

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[22] Id at para 22

without the requirement of a general plan. Moreover, *Greeff* is a case where there was no general plan since the township's recognition under law did not arise from any Provincial Ordinance or Municipal Bye-Law but the 1922 Electricity Act.

34. In summary, the LSA is at least one of the laws which recognises a township provided it comprises;

    a. *"a group of pieces of land, or of subdivisions of a piece of land, used mainly for residential, industrial, business or similar purpose, or are intended to be so used;* (part of the definition of a township)

    b. *which are combined with public places, constituted by any street, road, thoroughfare, sanitary passage, square or open space shown on a general plan of a township or settlement, filed in any deeds registry or Surveyor-General's office; (*balance of the definition of township and the definition of a public place)

    c. such general plan includes one "…. *which has, prior to the commencement of this Act, been lodged for registration in a deeds registry or Surveyor-General's office in the Republic … "(*part of the definition of a general plan)

35. However it must be recalled that Bam JP in *Schaapkraal* qualified the outcome reached by stating that the court could find no indication that *"peculiarly local or municipality considerations, such as zoning, might have an impact on whether land falls within a 'township' or not."*

    This statement by the court recognises that various spheres of government are concerned with township planning including the zoning of land. Cowen J in *Stellenbosch University* put it as follows:

    Under the Constitution, municipal planning is designated as a local government matter, which the Constitutional Court has held 'includes the

zoning of land and the establishment of townships. 'However, it is listed in Part B of Schedule 4 which means that it is also a functional area of concurrent national and provincial competence to the extent set out in section 155(6)(a) and (7) of the Constitution."[23]

36. Accordingly, unless there are local zoning laws to the contrary, land which has the attributes identified in the LSA and is subject to a general plan as described and registered in terms of that Act will be within a township. Such land will therefore fall outside the provisions of ESTA.

37. The analysis undertaken also reveals that Adv. Beviss-Challinor is correct in contending that the phrase "*a township ... otherwise recognised as such in terms of any law*" requires a factual orientation when it directs the enquiry to the LSA or other legislation which in its terms defines the word under consideration to certain attributes present in the vicinity of or on the land itself as well as certain processes that factually must be complied with.

In the present case the enquiries would be:

a. Whether the property under investigation is part of a subdivision

b. Whether the property is used mainly for residential purposes

c. Whether, within all the subdivided parts, there are public places in the form of streets or roads.

d. Are such streets or roads shown on a general plan of a township registered in any Deeds Registry or Surveyor-General's office?

e. Does the municipal zoning of the property take it out the ambit of a township?

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[23] *Stellenbosch University* at para 20

THE FACTUAL ENQUIRY

38. The property formed part of the farm Joostenberg Vlakte no 728 which was subdivided in May 1995.On subdivision the property was registered at the Deeds Registry as Erf 728/81.

39. One of the documents placed before the Magistrate was Diagram no 4544/1955. It is a diagram of the property showing its boundaries and the properties on three of its sides, the fourth side being along a line identified as a road.

    The diagram also identifies the property as portion 81 of portion 78 of the farm Joostenberg Vlakte 726. It also describes the property as lot 45 of block E situate at Kraaifontein Division of Paarl.

    The diagram was itself annexed to D/T 17003/66 at the Deeds Registry and was approved by the Surveyor General under his signature on 3 August 1955.

    Finally the diagram also identifies the land by reference to the General Plan.

    This document was provided under cover of a letter form the Surveyor-General's Office and describes the document as part of a layout identified in s 102 of the Deeds Act 47 of 1937.

40. The property described as erf 728/81 was transferred to the second respondent and in 1972 it was again transferred through the Deeds Registry from the second to the first respondent. None of the transfers could have been effected unless the property had been properly sub-divided under law and in accordance with the requirements of the LSA and the Deeds Registries Act 47 of 1937 ("*Deeds Act*"). It also bears mention that other public roads , such as Owl Street, are located within the subdivision of which the first respondent's property formed part.

41. The other evidence before the Magistrate was the street address given to the property. The founding affidavit of Mr Pieters confirms that he resides on the property being situate at 29 Kestrel Street Joostenberg Vlakte.

42. Adv. Adhikari however referred to the actual zoning of the property which is "*Rural*" and submits that rural equates with agricultural.

43. This is countered by the City of Cape Town's Development management scheme ("DMS") which draws a distinction between agricultural and rural zonings, albeit fact dependant.

44. The DMS is the instrument which determines land use rights in the Metropolitan area. It distinguishes between some eleven zoning groups.

    One of the groups is "Agricultural, Rural and Limited Use". Within this group a distinction is drawn between large farms which are zoned AG and smallholdings which are zoned RU, the latter accommodating for a range of per-urban activities. The DMS describes RU zoned erven as lying at the urban edge. It will be recalled that Cowen J was faced with a similar situation in Stellenbosch University where the property was also on the urban-edge.

45. Chapter 13 of the DMS goes into detail with regard to the scheme and the purpose of zoning land Agricultural (13.1), Rural (13.2) and Limited Use (13.3)

46. Chapter 13 commences with a general statement of intent and explains why land already zoned for agricultural should be maintained as such:

    "Agricultural land should generally be protected from developments that render the land less suitable for agriculture... Aside from sustaining a valuable economic sector, agricultural land can help promote stability of the urban edge, conserve naturally sensitive areas and maintain rural characteristics which are valued by the community. Unnecessary subdivisions of farms should be avoided and economically viable units must be maintained. ..."

47. The essential distinction between agricultural and rural zonings is explained under the heading "*Purpose*" which is found at the preamble to each zoning description.

    The purpose of the agricultural zone (i.e. properties identified under the DMS as AG) is that it:

    > *".. promotes and protects agriculture on farms as an important economic, environmental and cultural resource. Limited provision is made for non-agricultural use to provide owners with an opportunity to increase the economic potential of their properties without causing a significant negative impact on the primary agricultural resource."*

    By contrast the purpose of the rural zone (i.e. properties identified under the DMS as RU) is that it:

    > "*accommodates smaller rural properties that may be used for agriculture, but which may also be occupied as places of residence by people who seek country lifestyle, and who view agriculture as a secondary reason for occupying their property. Such properties may occur inside or outside a recognised urban edge"*

48. The permitted use of land marked as an agricultural zone is for agriculture, intensive horticulture, equestrian or environmental use as well as rooftop-base telecommunications. It is evident from the last description that the reference to a dwelling house is to enable a person who is engaged in the permitted activity to live on the land in question[24]. There are additional permissible uses but they are strictly circumscribed so as to preserve the land for its primary agricultural use. [25]

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[24] See the correlation between a dwelling unit and agricultural workers or person engaged in agricultural activity set out in para 13.1.2(i) and (ii) and 13.1.4 (c)

[25] DMS paras 13.1.1 and 13.1.2

The overarching consideration is that irrespective of any other activity which might be permitted on it, the land will remain protected from development and will remain suitable for agriculture (or not maintain its aesthetic and cultural value- which is not here in issue).

49. The purpose of land zoned Rural is that it:

> *"... accommodates smaller rural properties that may be used for agriculture, but which may also be occupied as places of residence by people who seek a country lifestyle, and who view agriculture as a secondary reason for occupying their property. Such properties may occur inside or outside a recognised urban edge".* [26]

The primary use of the property can be residential or for agriculture. Additional uses are allowed but once again subject to certain restrictions.

50. The distinction between agricultural and rural is evident. The former cannot lose its character as agricultural land whereas the other, once subdivided into a small holding, may never have the attributes of agricultural.

Once land is zoned agricultural it cannot lose its identity or character as such unless of course the owner or a developer successfully applies for a rezoning. Land marked rural may or may not be residential, may or may not be agricultural and can be both- however rural zoned land is capable of losing its identity as agricultural if it in fact is only residential.

The significant distinction arises from a pragmatic appreciation that urban expansion is natural and ingresses on agricultural land. The expansion is not uniform and depends on commercial viability and opportunity. Accordingly pockets of township developments may come up initially in a rather haphazard

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[26] DMS para 13.2

pattern. Furthermore a Rural zoning is flexible and leaves it to the landowner to decide how he or she wishes to use it and permits a change of use.

51. It is common cause that the properties to the west of Kestrel street (which includes the first respondent's home) are zoned rural (RU) whereas the large piece of land on the western side of this street, which is described as *"Paarl Farms"*, bears the identification AG (i.e. agricultural).[28]

52. The evidence that 29 Kestrel Street on subdivision was never agricultural land or used for agricultural purposes is overwhelming. It is common cause that no agricultural activity took place on the property, it has always been purely a residential family home and even Mr Pieters employment there was as a gardener.

53. Furthermore, the municipal utility bills as well as correspondence from the City of Cape Town reflect that, as far as the local authority is concerned, the property is used for residential and not agricultural purposes. In correspondence going back to 2013 the City of Cape Town recognised that the property was subject to rates as determined on residential property and residential rebates have been applied to it by the City. The City has never appeared to regard the property as agricultural or designated it as used for agricultural purposes.

SUMMARY

54. The property in issue falls within land which was sub-divided pursuant to the approval of a general plan which incorporated public roads and streets under the control of the metropolitan council and which general plan was approved by the Surveyor General and registered at the Deeds Registry. These attributes render the property as falling within the boundaries of a township for purposes of s 2(1) of ESTA since, at the least, the LSA and the Deeds Act are laws which recognise such attributes to constitute a township.

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[28] This is evident from the City of cape Town's planning map.

55. However, s 2(1)(a) also provides that if land within a township is designated for an agricultural purpose then the land will nonetheless fall under ESTA.

The first difficulty in relying on s 2(1)(a) is that every other property in the subdivision is zoned rural. On the appellant's argument not one of those subdivided pieces of land can therefore constitute a township.

Assuming that the property is nonetheless within a township but is zoned rural, it is clear from the analysis of the DMS that an erf zoned rural does not equate with land designated for agricultural purposes as required by the s 2(1)(a) proviso.

However it should be accepted that, if land zoned rural is in fact used for agricultural purposes then on a purposive interpretation of ESTA the occupier should be entitled to rely on its provisions. It is unnecessary to resolve the question of whether it is required that the land be primarily used for agriculture, since it may not be, despite the occupier being engaged in an agricultural activity and being entitled to graze livestock or plant crops in an area of the small holding.

56. Section 2 of ESTA directs us, depending on where the land is situated, to apply legislation such as the LSA and Municipal bye-laws or Schemes such as the DMS. In turn the DMS recognises a rural zoning which allows the land to be used for agricultural purposes or residential purposes determined by reference to actual use (and reflected in the way municipal levies are calculated).

Unless the factual situation is considered, hardship may arise for those who in fact perform agricultural work on small holdings. This is because land designated for agricultural purposes cannot be equated with land zoned rural since in the former case there are restrictions which prevent its character from changing but not so in the case of a rural zoning. Cases which suggest that the facts should be ignored either were not confronted with this type of situation created by the laws referenced by s 2(1) or else on analysis the outcome did have regard to the underlying facts.

FURHER CONSIDERATIONS

57. In view of the broader interpretational exercise a court is required to undertake even if the words and their application appear to be clear[29], it is also necessary to consider whether the outcome is consistent with Constitutional values, other legislation which the legislature would have had in mind and other relevant provisions of ESTA which have not already been addressed.

The Constitutional Prism

58. Section 25 (9) of the Constitution pertinently requires Parliament to enact legislation to redress "*tenure of land*" which is "legally *insecure as a result of past racially discriminatory laws or practices*" as contemplated in s 25(6) while s 25(7). This section required the legislature to redress issues arising from land dispossession as a result of past racially discriminatory laws and practices.

Parliament passed the Restitution of Land Rights Act to address the latter and ESTA and the Land Reform (Labour Tenants) Act 3 of 1996 ("*Labour Tenants Act*) to expressly address its Constitutional obligation under s 26(9) read with s 25(6). ESTA and the Labour Tenants Act dovetail while the Restitution Act may provide relief in cases where factually a right in land had been diluted through past racially discriminatory laws and practices as in the *Goedgelegen* case. [30]

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[29] See *Klaase* at para 51, *Molusi* at para 7, *Bato Star* at para 90 and *Bothma-Batho Transport* at para 12

[30] The relevant portions of s 25 are from ss (5).

> *(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*
> *(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*
> *(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*

59. By contrast PIE, from the perspective of an occupier, is legislation which addresses the need to prevent evictions without a court order which in turn can only be obtained after a consideration of all relevant circumstances including the need to provide shelter for the homeless, the State's obligations in relation to the progressive realisation of housing and the right of property owners not to be deprived of property save by a law of general application. [31]

60. Each provision in the Bill of Rights is an illustration of the individual's rights enjoyed, or to be enjoyed, and protected and must be understood not only purposively but holistically.

Nonetheless both ESTA and PIE constitute legislation carefully moulded to balance competing rights with the focus of ESTA being to redress the vulnerability of persons on agricultural land whose true relationship with the owner was not given proper legal recognition because of apartheid laws in particular. ESTA and the Labour Tenants Act give protection to the symbiotic relationships which were established where in broad terms the owner and the occupier understood that the relationship once cemented should be of long duration and with consent, would enable the occupier to use a part of the land for crops or livestock, to enable family members to continue residing there and also to allow the burial of family on the land.

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[31] The Preamble to PIE reads:

WHEREAS no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;
AND WHEREAS no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances;
AND WHEREAS it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances;
AND WHEREAS special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered;

Section 26 of the Constitution provides:

Housing
(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

61. The dividing line is that ESTA addresses issues arising from property rights and past inequalities under s 27 while PIE addresses matters of housing and the need to ensure the fairness of evictions under court supervision. While both seek to prevent homelessness, the manner of achieving it and the resources that can be utilised differ. [32]

62. An eviction of the Pieters from the dwelling they occupied on 29 Kestrel Street does not constitute the diminution of a right exercisable in respect of agricultural land or its utilisation for agricultural purposes. It would however engage issues concerned with the fairness of evictions under law and homelessness with which PIE is concerned.

Other legislation

63. Consideration has already been given to legislation such as the LSA, the Deeds Act, past and present provincial and municipal laws concerning town planning as well as SPLUMA.

64. However it bears noting that Chapter IV of the Deeds Act is also concerned with townships and settlements. It suffices to mention only ss 46(1) to (4) and (7)

> *46 Requirements in the case of subdivision of land into lots or erven*
> *(1) If land has been sub-divided into lots or erven shown on a general plan, the owner of the land sub-divided shall furnish a copy of the general plan to the registrar, who shall, subject to compliance with the requirements of this section and of any other law, register the plan and open a register in which all registrable transactions affecting the respective lots or erven shown on the plan shall be registered.*

[32] By way of illustration PIE has no comparable provision to a direct involvement by national government to provide for the planning and implementation of on-site and off-site developments catered for in s 4 of ESTA

(2) For the purposes of registration of such a general plan the title deed of the land which has been sub-divided shall be produced to the registrar together with the diagram thereof and any mortgage bond endorsed on the title deed and the mortgagee's consent to the endorsement of such bond to the effect that it attaches to the land described in the plan.

(3) If the land sub-divided as shown on the general plan forms the whole of any registered piece of land held by the title deed, the registrar shall make upon the title deed and the registry duplicate thereof an endorsement indicating that the land has been laid out as a township or settlement, as the case may be, in accordance with the plan, and that the lots or erven shown on the plan are to be registered in the relative register.

(4) If the land sub-divided as shown on the general plan forms a portion only of any registered piece of land held by the title deed the registrar shall, on written application by the owner of the land, issue a certificate of township or settlement title in his favour in respect of the said portion as nearly as practicable in the prescribed form and in accordance with a diagram thereof.

.....

(7) Where a general plan has been registered in terms of subsection (1), it shall not be necessary, where a whole erf is transferred, to produce a diagram thereof: Provided that where a diagram has not been produced, a reference shall be made to the general plan in the relevant deed of transfer: Provided further that the provisions of this subsection shall apply only with reference to general plans lodged for registration on or after the date of commencement of the Deeds Registries Amendment Act, 1965.

65. In *Leon Bosworth v Tradeprops* 106 (Pty) Ltd [2007] ZALCC 8 Gildenhuys J and Pienaar AJ had regard to the Deeds Act and pointed out that a general plan also meant;

"a plan which represents the relative positions and dimensions of two or more pieces of land"

66. The wording of s 2(1) recognises a township which may be promulgated, also one that may have been established or only approved as well as one otherwise recognised as such in terms of any law.

This indicates that the drafter of ESTA were aware of the plethora of legislation from bye-laws through provincial laws and national legislation going back to the 19th century, if not earlier, which meant that one size could not fit all.

The further extensions and qualifiers contained in s 2(1) in relation to land which may be designated for agricultural purposes also recognised the reality of pockets of land within a township which may or may not be regarded as falling into a township.

67. The analysis by reference to the Deeds Act also demonstrates that a consistent outcome is achieved when referencing other legislation comparable to the LSA; the diagram produced in respect of the property by the Surveyor-General's Office accords with the Deeds Registry requirements for a township. [33]

68. There is therefore a consistency of purpose and objective in the application of s 2(1) of ESTA when considering other legislation relevant to this case.

Internal consistency

69. All the other provisions of ESTA are consistent with its application being directed at vulnerable persons who occupy land used for agricultural purposes as opposed to residential purposes.

70. In this regard Chapter II of ESTA (s 4) would make little sense in relation to "*on-site development*" where the property is in fact a residential small holding. So too the provisions of s 4 in respect of *"off-site development*".

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[33] Record p 95. Annex PGS1 to the answering affidavit.

In each case the State assumes an obligation to provide funding to facilitate the planning and implementation of such developments and enable occupiers and other persons who need long-term security of tenure to acquire land or rights in land.[34]

71. Furthermore, neither the word "*township*" nor the term "*agricultural purpose*" appear in any section other than s 2(1) although the term "*agricultural use*" does.

The last mentioned term appears in an important set of provisions concerned with protecting the rights ESTA occupiers.

In broad terms (provided there was a lawful right to terminate residence on or use of the land) these provisions are concerned with allowing an eviction based on whether or not the occupier can obtain suitable alternative accommodation in circumstances where;

a. a person was already an occupier on 4 February 1997 and has not committed an act which materially breaches, undermines or voluntarily ends his or her relationship with the land owner as set out in s 10(1).[35]

It will be convenient to refer to such a person as a "*long term occupier*"

In such a case it is not competent to grant an eviction order unless the long term occupier is provided with suitable alternative accommodation by the owner or the State, or in the further limited circumstances provided

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[34] In terms of s 1:

'off-site development' means a development which provides the occupants thereof with an independent tenure right on land owned by someone other than the owner of the land on which they resided immediately prior to such development;
'on-site development' means a development which provides the occupants thereof with an independent tenure right on land on which they reside or previously resided;

[35] Section 10(1) only applies if the occupier has not remedied a material breach of the peace, has not remedied a material breach of a fair term in the agreement with the owner, has committed such a fundamental breach of the relationship between owner and occupier or who has voluntarily resigned from employment with the owner (where residence arose solely from such employment) in the circumstances set out in that section.

under s 10(3) if such alternative accommodation is still available nine months after the right of residence was lawfully terminated;[36] Accordingly the availability of suitable alternative accommodation is a *sine qua non* to the lawful eviction of a long term occupier unless, after the lapse of nine months, the special circumstances provided for in s 10(3) apply.

b. If the person only came to occupy after 4 February 1997;

   i. then in order to determent if it is just and equitable to evict in cases where consent to reside was terminable on a fixed or determinable date (which had passed), among the factors which the court is obliged to consider is whether suitable alternative accommodation is available to the occupier;[37]

   ii. then in order to hold the opinion that it is just and equitable to evict in cases where consent to reside was not terminable on a fixed or determinable date, the availability of suitable alternative accommodation still remains a factor which must be considered.[38]

72. This consideration is of significance because s 1 of ESTA defines "*suitable alternative accommodation*" to mean:

> *"alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to—*

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[36] See s 10(2) and (3) as read with s 9(3)(a) and its application to s 9(2)(c)
[37] See ss 11((1) and (3)
[38] See ss 11(2) and (3)

(a) the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services;

(b) their joint earning abilities; and

(c) the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active;

73. A further consideration is that ESTA in its terms can only apply to an occupier. This term is defined in s 1 as follows:

"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—

(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;

74. Perhaps of equal significance is the distinction drawn between s 2(1) and the s 2(1)(a) and (b) provisos

It is common cause that the proviso contained in s 2(1)(b) does not apply since Stemmett relies on the existence of a township on which the land is situated predating 4 February 1997.

Part of the Pieters' argument brought in the proviso to s 2(1)(a) which in its context reads:

> *(1) .... this Act shall apply to all land other than land in a township ...., 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;*

75. This means that land will be included under ESTA if, despite falling within a township it is nonetheless "*designated for agricultural purposes*".

Three considerations arise which therefore should be to be taken into overall consideration.

The first is that the wording of s 2(1)(a) gives an indication of an attribute the land must possess in order to fall within ESTA, even if the land in question would otherwise fall within a township.

Secondly, the phrase used to describe the quality or attribute of the land itself is "*designated for agricultural purposes*" and the right of the occupier on such land may include the right to use the land.

Finally, the legislature itself recognises that individual pieces of land designated for agricultural purposes may be found in the heart of a township, not just adjacent to one.

If the land is encircled by a township then it will not be regarded as falling within ESTA. Nonetheless ESTA also recognises that it is not anomalous if next door in the same suburb there is land to which its provisions apply (because it is designated for agricultural purposes) despite the rest of the neighbourhood comprising a township. As has been demonstrated, the converse is also not anomalous; land falling under a township can exist cheek to jowl within the same area as land to which ESTA applies.

The recognition of this state of affairs gives practical effect to what the legislature must have known to be the case from the bread baskets of the Limpopo and

Mphumalanga through the sugarcane fields of KwaZulu-Natal and the vineyards of the Cape to dairy farming within large metropolitan areas; towns and cities have grown up around and alongside agricultural land for well over a century and a half.

76. This leaves the case of *Baron and others v Claytile (Pty) Ltd and another* 2017 (4) SA 180 (LCC) for consideration in the context of applying s 2(1).

The reason is that the court was concerned with another property in Joostenberg Vlakte on which a brickworks was now located and which it accepted fell under ESTA. On the facts, the occupiers were asserting the exercise of an accrued right which pre-dated the establishment of the brickworks and the landowner accepted that the property was subject to ESTA at the time relevant to the rights asserted. Accordingly this was not an issue which the court had to address.

But even if it was, the earlier analysis of s 2(1) and its provisos demonstrate that the drafters were alive to property within the same location or area being designated or used for agricultural purposes despite being within a township. The Surveyor-General's plan produced in the present case is a vivid illustration that land alongside a built up area separated only by a road can be designated for agricultural purposes or is in fact used for agricultural purposes. Many dairy farm are now in the heart of residential suburbs which have sprung up around them. Perhaps most glaring are the vineyards located in the heart of the built up residential and commercial suburb of Constantia in Cape Town.

CONCLUSION AND ORDER

77. The provisions of s 2(1) have been considered by reference to all relevant factors which weigh with a court when interpreting legislation.

The interpretation applied is consistent with the jurisprudence of this court established since 2007 in full bench decisions such as *Bosworth* and *Schaapkraal*. It is also consistent with the meaning ascribed to a township which is not promulgated, established or approved yet is recognised as such in law.

78. Once the applicable legislation is referenced to the property in question, it may in its terms identify the attributes which the land must possess or the procedures which must be followed to render it a township in the eyes of the law, or may permit one or other use through zoning laws such as the DMS. It is then for the court to determine whether the use of the zoning is applied for agricultural purposes, non-agricultural commercial use or residential use.

79. The parties made use of experts but the conclusion reached has been by reference to the Act, its interpretation and the factual matrix which has been presented in evidence. All are matters which the court itself is required to assess. There is nothing extraneous that has been provided by the experts which affect the outcome.

Costs

80. In keeping with this Courts practice not to award costs unless there are exceptional circumstances, of which I find there to be none, I intend making no order as to costs.

Order

81. In the result the decision of the Magistrate to refuse the declarator brought by the appellant under case number 3700/2019 in the Bellville Magistrates' Court is upheld.

I grant the following order

1 The appeal is dismissed

2 *It is declared that the land occupied by the appellants is excluded from the Extension of Security of Tenure Act 62 of 1997 by reason of s 29 read with s 2(1) of that Act.*

3 *There is no order as to costs.*

SPILG, J

I agree

MEER, AJP

DATE OF HEARING:	10 November 2022
DATE OF JUDGMENT:	3 February 2023
FOR APPELLANTS:	Adv. M Adhikari
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