IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
CASE NO: 220/2001

In the matter between:

KATAZILE MKANGELI AND 241 OTHERS
Appellants

and

JOSHUA JOHANNES JOUBERT **First Respondent**

VILLAGE FARM ADMINISTRATORS (PTY) LTD **Second Respondent**

JUKSKEI CROCODILE CATCHMENT AREA FORUM **Third Respondent**

THE DUTCH REFORMED CHURCH NOORDRAND **Fourth Respondent**

CORAM: SMALBERGER ADP, HOWIE, OLIVIER, MPATI et BRAND JJA

Date Heard: 21 February 2002

Delivered: 25 March 2002

Extension of Security of Tenure Act 62 of 1997 - also applies where eviction of "occupier" sought by someone other than owner of the land.

J U D G M E N T

BRAND JA

BRAND JA

[1] In the semi-rural area northwest of Johannesburg lies a property, some 23 hectares in extent, which became known in this matter as 'Itsoseng'. It is registered in the names of 'The trustees for the time being of the Itsoseng Community Development Trust' ('the trust'). The 242 appellants are nominated in the trust deed as beneficiaries of the trust.

[2] Until 6 June 2000 the appellants were informal settlers on another property in the vicinity of Itsoseng which belonged to Fedsure Life Assurance Limited ('the Fedsure property'). On 6 June 2000 the appellants relocated en masse to Itsoseng where they erected their informal dwellings of iron and wood with the express consent of the trustees of the trust ('the trustees') as registered owners of the property. It emerges form the papers that the relocation was brought about by an unknown benefactor who donated a substantial amount of money to the informal settlers, subject to the condition that they evacuate the Fedsure property and settle elsewhere. The donation was utilised to purchase Itsoseng. The trust was formed for the specific purpose of becoming the registered owner of this property on behalf of the erstwhile occupants of the Fedsure property, while the latter were nominated as beneficiaries of the trust.

[3] The respondents are either property owners or representatives of property owners in the immediate area of Itsoseng. Shortly after 6 June 2000 they brought an urgent application in the Witwatersrand Local Division, essentially for an order compelling the removal of the appellants and their informal dwellings from Itsoseng. Originally the appellants were not joined as parties to the application. Various other parties were cited as respondents. Amongst these were the trustees in their capacities as owners of Itsoseng as well as their former attorney, Mr NLJ van Rensburg, who was responsible for establishing the trust as the original donor. He was cited as the first respondent.

Subsequently the appellants were joined as the 14th to the 255th respondents in the application at the direction of the Court *a quo*. In a judgment that has since been reported *sub nom Joubert and Others v Van Rensburg and Others* 2001 (1) SA 753 (W), the Court *a quo* (Flemming DJP) held against the trustees and the present appellants. In essence the Court's order enjoined the trustees to break down all structures erected on Itsoseng after 9 June 2000 within a period of one month from the date of the order while appellants were ordered to vacate Itsoseng during the same period. Only appellants sought and obtained leave from this Court to appeal against the order of the Court *a quo*.

[4] As the basis for their application, the respondents relied on two causes of action. The first was that the appellants occupied and used the land comprised by Itsoseng contrary to the provisions of the applicable town-planning scheme. The second was that the appellants caused unlawful nuisance to the respondents which was of such a nature that it could only be abated by their removal from Itsoseng. In support of their first cause of action respondents relied mainly on the provision in the applicable town-planning scheme that no more than one dwelling house could be erected on the property, except with the written consent of the local authority. The nuisance relied upon by the respondents fell into two categories. The first category included the predictable problems occasioned by the settlement of 242 households - comprising approximately 1500 people - without any provision for sanitation, running water, electricity or refuse removal. These problems include pollution of the underground water and the run-off streams in the vicinity, pollution of the atmosphere by smoke, solid waste pollution and littering. The second type of nuisance complained of consisted mainly of criminal activities ranging from trespassing to break-ins and robberies on the neighbouring properties.

[5] The appellants admitted that they used the land comprising Itsoseng contrary to the applicable town-planning scheme. They also conceded that their occupation of the land in itself brought about the nuisance that fell into the first category of the respondents' complaints. With reference to the alleged nuisance of the second kind the appellants denied that they were responsible for these criminal activities. Consequently, the respondents could not rely on these disputed allegations as part of their case.

[6] The appellants' main answer to the application - in the Court *a quo* as well as in this Court - was, however, that they were protected against eviction from Itsoseng by the provisions of the Extension of Security of Tenure Act 62 of 1997 ('Esta'). Moreover, they contended, since the matter was governed by the provisions of Esta, the High Court had no power to order their eviction from the property. Although the constitutionality of Esta was not raised by any of the

parties in the Court *a quo*, the learned Judge devoted a substantial part of his judgment to a determination of this non-existent dispute (para 29 - 43 at 787F - 798E) which eventually led him to the conclusion that Esta as a whole is unconstitutional (see para 44.1 at 798F). In this Court the respondents disavowed any reliance on this finding in their favour by the Court *a quo*. In the circumstances I will refrain from embarking on the evaluation of a contention which was never raised.

[7] What the respondents did rely on as the basis for their argument in this Court was the further finding by the Court *a quo*, that Esta is in any event not applicable on the facts of this case in that Esta only applies where the application for eviction of occupants is brought by the owner of the land concerned and not where the eviction of occupants is sought by non-owners such as the present respondents (see para 28.2.8. at 787 E).

[8] The issue between the parties therefore turns on the applicability of the provisions of Esta. Turning to a consideration of these provisions, it must be borne in mind that Esta is the Legislature's response to the constitutional imperative in ss 25(6) and (9) of the Constitution. These subsections provide:

> '(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 for by an Act of Parliament, either to tenure which is legally secure or to comparable redress.'

and

> '(9) Parliament must enact the legislation referred to in subsection (6).'

[9] Generally speaking Esta protects a particular class of impecunious tenant on rural and semi-rural land against eviction from that land. The underlying basis for their protection is that they acquired their tenancy with the consent of the owner. The term used by Esta to describe the class of tenants protected by it, is 'occupiers'. **[10]** In this Court it was conceded by the respondents that the appellants were 'occupiers' of Itsoseng as defined in s 1(1) of Esta. In the Court *a quo* they took up the contrary position that the appellants were not

'occupiers' because the trustees, who consented to the appellants' occupation, did not qualify as 'owners' of Itsoseng. This contention by the appellants led the Court *a quo* (paras 8 - 9 at 767 - 772) into an investigation of the legal validity of a longstanding practice in the Deeds Office, which was followed in this case, that allows for the registration of trust property in the name of 'the trustees for the time being' of the particular trust. As a result of this investigation the learned Judge came to the conclusion, which he himself described as ' likely to rock the boat' (see para 10.8 at 772 A), that the longstanding practice referred to has no legal validity. The investigation was in my view unnecessary, the conclusion clearly *obiter* and *prima facie* wrong. Ownership of trust property depends on the terms of the trust instrument. (See e g *Honoré's South African Law of Trusts*, 4th ed by Honoré and Cameron, 222-3.) According to the trust deed of the Itsoseng trust, Itsoseng vests in the trustees. In any event, even if the trustees were technically not the owners of Itsoseng they clearly were the persons 'in charge of the land' as envisaged by Esta. Their consent was therefore sufficient to qualify the appellants as 'occupiers'. (See the definitions of 'consent', 'occupier' and 'person in charge' in s 1(1).) In the circumstances the correctness of the findings by the Court *a quo* regarding the validity of the deeds office practice in question, does not require the consideration of this Court.

[11] Since the appellants are occupiers of Itsoseng, s 6(1) of Esta confers the

right upon them to reside and use the property while ss 6(2) and 7 protect them against certain forms of interference with their rights of residence and use. Because these rights are founded on the consent of the owner, Esta recognises that they may be terminated by the owner's withdrawal of that consent. (See the definition of 'terminate' in s 1(1).) The owner's freedom to do so is however limited by the provisions of s 8. The general rule under s 8(1) is that an occupier's right of residence may only be terminated on lawful grounds and - in addition - only if it is just and equitable to do so. When the court determines what is just and equitable, it has to take account of the factors enumerated in s 8(1), together with all other relevant factors. Section 8(4) deals with occupiers who are particularly vulnerable. Included amongst them are occupiers who have reached the age of 60 and those who have resided on the land in question, or any other land of the owner, for more than 10 years. Their right of residence may only be terminated if they are guilty of a material breach of the rules that govern their relationship with the owner.

[12] Once an occupier's right to reside has been duly terminated, his refusal to vacate the property is unlawful. Nevertheless, it does not mean that the remedy of eviction will necessarily be available. This remedy is limited by those provisions of Esta to which I will presently return. On the other hand, Esta places no limitation on the other remedies attracted by unlawful occupation. It must therefore be accepted, I think, that the other remedies such as the owner's delictual claim for his patrimonial loss caused by the unlawful occupation of his land (see eg *Hefer v Van Greuning* 1979 (4) SA 952 (A)) are still available to him.

[13] As to the remedy of eviction s 9(2) provides that a court may only issue an eviction order if certain conditions are met. The first such condition is that the occupier's right to residence must have been properly terminated under s 8. Other conditions prescribed by s 9(2) include the giving of two months notice of the intended eviction application after the right to reside has been terminated under s 8 (s 9 (2)(d)). In a case such as the present, where the appellants took occupation of Itsoseng after 4 February 1997, s 11 also finds application. This section provides that a court may only grant an eviction order if it is of the opinion that it is just and equitable to do so. In deciding whether it is just and equitable to grant an eviction order the court must have regard to the considerations listed in s 11(3), but it is not limited to them. Included amongst these is the consideration 'whether suitable alternative accommodation is available to the occupier' (s 11(3)(c)) and 'the balance of the interests of the owner, ... the occupier and the remaining occupiers on the land' (s 11(3)(e)).

[14] When the court has granted an eviction order, the consequences of the order are determined by ss 12 and 13. *Inter alia*, the court must decide on a just and equitable date on which the occupier shall vacate the land (s 12(a)) and the court must order the owner to pay compensation for structures erected and improvements made by the occupier as well as standing crops planted by the occupier, to the extent that it is just and equitable to do so (s 13(a)).

[15] In terms of ss 17, 19 and 20 of Esta the application of its provisions at first instance are entrusted to the exclusive jurisdiction of the magistrate's court and the Land Claims Court, with the limited exception that the High Court may exercise jurisdiction with the consent of all the parties to the proceedings (s17(2)). Save for the exception, the jurisdiction of the High Court to apply the terms of the Act is expressly excluded by s 20(2).

[16] There is no suggestion that any of the parties to the present matter consented to the jurisdiction of the High Court. It follows that if the appellants are correct in their contention that the matter is governed by the provisions of Esta, it must be accepted that the Court *a quo* had no jurisdiction to grant an order for the eviction of the appellants and that for that reason alone the appeal must succeed.

[17] From the synopsis of the provisions of Esta it is apparent that the Legislature, in an obvious endeavour to comply with the directives of ss 25(6) and 9 of the Constitution, intended to ensure security of tenure for occupiers by affording them comprehensive protection against eviction from the land upon which they reside. It seems to follow that as a corollary to this comprehensive protection of occupiers, the Legislature intended to impose extensive limitations on any right to seek the occupiers' eviction from that land. This intention

appears to be emphasised by the plain wording of ss 9(1) and 23(1) of Esta. These sections provide:

> '9(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act'

and

> '23(1) No person shall evict an occupier except on the authority of an order of a competent court'

[18] A literal interpretation of these provisions appears to indicate an intention on the part of the Legislature that any right to have an occupier evicted, regardless of who may be the holder of such right and whatever the source of such right may be, should be subject to and limited by the provisions of Esta. Respondents conceded that the provisions of ss 9(1) and 23(1) are of wide import. Their contention was, however, that these provisions are to be understood in the context of Esta as a whole and that, so understood, it becomes apparent that Esta does not apply where the eviction of an occupier is sought by someone other than the owner of the land. Their argument in support of this contention was essentially twofold. First that, since all the provisions of Esta relate exclusively to the relationship between owner and occupier, the inference is justified that the purpose of Esta as a whole is to govern this relationship and that it is not concerned with the relationship between occupiers and outside parties. Secondly that, since an occupier can only be evicted under Esta with

the co-operation of the owner, the owner can frustrate a non-owner's common law or statutory right to have an occupier evicted if the owner sides with the occupier, as has happened in this case. The application of Esta to non-owners, so the argument went, will therefore deprive non-owners of their common law and statutory rights to have an occupier evicted. That, so the argument concluded, could not have been the intention of the legislature.

[19] The respondents are correct in their argument that the express provisions of Esta are exclusively aimed at the relationship between owners and occupiers and that there is no specific reference to third parties. However, this in itself does not justify the inference that ss 9(1) and 23(1) should be restrictively construed. On the contrary, the context of Esta as a whole appears to support a literal interpretation of these sections. According to the provisions of Esta as a whole, the justification for affording occupiers security of tenure is that they occupy the land with the owners consent. As long as the owner has not withdrawn his consent, the occupier may stay. The notion that the occupiers' right to reside can be terminated without the withdrawal of the owner's consent therefore appears to be in conflict with the scheme of Esta as a whole.

[20] Moreover, having regard to the provisions of Esta as a whole, there appears to be no reason why the Legislature would not expressly have excluded evictions of occupiers at the behest of non-owners from the ambit of the Act, if it intended to do so. It did so, for instance, in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('Pie') which was enacted within months after the enactment of Esta. Pie also imposes restrictions on the eviction of persons who are in unlawful occupation of the land of another. But it expressly provides in s 4(1) that those restrictions apply only 'to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier'.

[21] This bring me to the respondents' second argument, that an interpretation of Esta which confines a non-owner's right to have an occupier evicted to an application under this Act will result in the non-owner being deprived of his rights if the owner refuses to co-operate. For the reasons I have stated, I believe that respondents are correct in their argument that an eviction under Esta requires the co-operation of the owner. Until the occupier's right to reside has been terminated through the withdrawal of the owner's consent, the occupier

cannot be evicted. The question arises, however, whether it follows from this that a non-owner can never succeed in causing the occupier's eviction under Esta if the owner refuses to co-operate. I think not. On the assumption that the non-owner/applicant has the right to seek the eviction of an occupier, but that he can only do so with the co-operation of the owner, I can see no reason why he cannot join the owner in an eviction application under Esta. His relief sought against the owner will effectively be for an order compelling him to withdraw his consent - in accordance with the provisions of Esta -and to take such steps as he can under Esta to cause the eviction of the occupiers from his land. Thus understood, the application of Esta to evictions of occupiers at the behest of non-owners will not deprive the latter of rights that they may otherwise have had.
[22] We know that in this matter the appellants were not even joined in the original application for their eviction. That only came later. The original order sought by the respondents was to compel the trustees as owners of Itsoseng to have the appellants removed from their land It was also conceded by counsel for the respondents in this Court that, apart from the provisions of Esta, an application for the eviction of the appellants could not have been brought without joining the owners of the property as parties thereto. In my view, this concession was rightly made. As indicated, the two causes of action relied upon by the respondents were nuisance and non-compliance with the applicable town-planning scheme. I know of no authority that would entitle a non-owner, relying on either of these two causes of action, to seek the eviction of occupiers from his neighbour's land without joining his neighbour in the proceedings. Even on the facts of this matter it is therefore apparent that the provisions of Esta would not deprive the respondents of rights that they previously might have had.
[23] The fact that the provisions of Esta would limit the rights to seek an occupier's eviction that third parties might previously have had, would not justify an inference that the Act was not intended to apply to them. On the contrary, such limitation would be entirely consistent with the legislative intent that appears from the background, the scheme and the wording of Esta. The interpretation of Esta contended for by the respondents would mean that the rights of an owner to evict occupiers are severely limited while those of non-owners are not. Such result would, in my view, be anomalous. Our common law affords the strongest protection against unlawful occupation to the owner of the land. It is therefore difficult to imagine why the Legislature would so severely curtail the rights of owners of land, but refrain from imposing any restrictions on the rights of third parties to seek the eviction of an unlawful occupier from land that does not belong to them. It would conversely be anomalous for the Legislature to protect occupiers against eviction at the behest

of owners but to leave them exposed to eviction at the behest of third parties. The fact that in the case of owners prior consent to occupation has been given does not detract from this anomaly.

[24] A further anomaly that will result from the interpretation of Esta contended for by the respondents is clearly illustrated by the order granted by the Court *a quo*. The trustees, as owners, were directed to summarily evict the appellants from their land. Esta, on the other hand forbids them to do so. In my view it goes without saying that a Court cannot order someone to act in direct contravention of a statutory provision.

[25] In all the circumstances I am therefore of the view that there is every reason to accept that the wide wording of ss 9(1) and 23(1) was literally meant and that all applications for eviction of occupiers, whoever the applicant may be, must be brought under and in accordance with the provisions of Esta. It follows that the Court *a quo* had no jurisdiction to grant an order for the eviction of the appellants from Itsoseng and that the appeal must therefore succeed with costs. Although the trustees did not appeal against the order of the Court *a quo* it is apparent from the foregoing that in as much as they were compelled by the order to cause the eviction of the appellants, the order cannot stand.

[26] Finally, there are certain comments by the Court *a quo* that I unfortunately need to refer to lest it be thought to be condoned by this Court. After the learned Judge came to the conclusion 'on where the law leads' (par 3.4 at 764), i e that Esta does not find any application on the facts of this case, he proceeded to express his disapproval of the provisions of Esta and its whole underlying philosophy. It is sufficient to give the following three examples, although there are more:

> 'Some interventions and discriminations of the Tenure Act [i e Esta] are packaged as if they are protective of that which in fact required no additional statute. Section 5 commences by stating rights which would have existed in any event. Section 5 adds nothing to the Constitution. It subtracts. The constitutional right to privacy must now tolerate hordes of "unlawful" occupiers who are protected by the Tenure Act.' (paras 36.1 and 36.2 at 792G)

and

> 'Then comes the Tenure Act to protect occupation which is unlawfully and arbitrarily taken and held to the same extent as occupation about which the occupier has some moral high ground. Thus it is a law which permits arbitrary depriving of property'. (para 39.3.4.at 795 G)

and

> 'An overseas property investor cannot see possible justness in protecting 'I want what you have' and the person who has been ejected thrice because of inability to pay rental has no conception of the effort involved in trying to save and to build up something for the future; to own property only proves to him that some delict was committed somewhere in history'. (para 41.1.3 at 796 D)

[27] I do not suggest that judges are precluded from expressing any view on the inequity and unfairness of statutory provisions, which they are, by their oath of office, bound to apply. This has been done many times by South African judges in the past. However, judges must avoid creating the impression, particularly in dealing with a statute of a socially contentious nature, that they are using their judgments as an opportunity to give vent to their own dissatisfaction with a political decision or that they are insensitive to the existence of conflicting views or interests in the community that they serves. Nor must judges create the impression, either through the content or the tone of their expressions, that they have so aligned themselves with a particular political

point of view that they are not prepared to approach the interpretation of the statute dispassionately and with an open mind. Statements by the learned Judge in the Court *a quo* such as those that I have referred to may give the impression that he failed to approach the question regarding the applicability of Esta in an intellectually disciplined way and with an open mind. These statements should therefore have been avoided.

[28] For these reasons:

(a) The appeal is allowed, with costs against the respondents jointly and severally.

(b) Paragraphs 2 to 6 of the order of the Court *a quo* are set aside and substituted with the following:

'The application against the 14th to the 255th respondents is dismissed.'

(c) Paragraph 8 of the order of the Court *a quo* is set aside and for it is substituted the following:

'(i) The third to ninth respondents, are ordered jointly and severally to pay the applicants' costs, including the costs of proceedings prior to 1 August 2000.

(ii) The applicants are ordered jointly and severally to pay the costs of 14th to 255th respondents.'

FDJ BRAND

JUDGE OF APPEAL

CONCURRED
SMALBERGER ADP
HOWIE JA

OLIVIER JA

MPATI JA