

**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG**

In the matter between:

POLO MPHATSOI

and

PETRUS JACOBUS JOHANNES VAN STADEN



APPELLANT

RESPONDENT

JUDGMENT

COWEN AJ

1. The issue in this appeal is whether section 17(4) of the Extension of Security of Tenure Act 62 of 1997 ('ESTA') confers on a magistrate exercising ESTA jurisdiction the power to invoke the civil process for contempt of court when a court order made is disobeyed.
2. In May 2018, Mrs Polo Mphatsoi applied to the Magistrates Court for the District of Dewetsdorp for an order that the respondent be found in contempt of a court order made under case number 07/2016 dated 12 March 2018. The order was made by agreement between the parties in settlement of an application for restoration of rights in terms of section 14 of ESTA. Paragraph 5 of the settlement agreement provides that Mrs Mphatsoi '*can return to the farm.*' The alleged non-compliance with the order concerns whether Mr van Staden has permitted her to so return or not.
3. In the notice of motion, the appellant sought an order sentencing Mr van Staden to three years' imprisonment, suspended on various conditions being a) that the respondent shall

not, during the period of suspension, again be found guilty of contempt of the order of court, b) the applicant be given access to her dwelling on the respondent's property and c) the respondent pay the applicant's costs on an attorney and client scale within 14 days from the date of the order. The respondent opposed the application.

4. The respondent raised a preliminary point that the magistrates' court lacks jurisdiction to determine the application. On 30 January 2019, Magistrate AD van der Merwe delivered a judgment upholding the preliminary point and dismissing the application with costs including the costs of counsel. The magistrate found that where a high court may exercise jurisdiction to invoke the civil process for contempt of court, it does so pursuant to its inherent jurisdiction and not pursuant to the rules of court, which are the subject of section 17(4) of ESTA. The magistrates' courts are creatures of statute, and only have the powers that are conferred on them by statute. The remedy that was available to the appellant, he held, was to pursue the criminal contempt remedy provided for in section 106 of the Magistrates Court Act 32 of 1944.
5. The appellant then lodged this appeal, which came before the Land Claims Court on 17 February 2020. Mr Phalatsi appeared for the appellant and Mr van Rensburg appeared for the respondent. Mr Phalatsi's core submission was that the magistrate erred when concluding that section 17(4) of ESTA does not confer on magistrates the power to invoke the civil process for contempt of court.¹ He submitted that the court should interpret section 17(4) generously and purposively so as to include the power, and that such an interpretation will better protect the rights protected in ESTA and ensure that parties have effective remedies when accessing the court to vindicate their rights as contemplated by the

¹ The ground of appeal was framed thus in paragraph 3 of the notice of appeal: 'The learned Magistrate erred and misdirected himself in finding that the contempt of court procedure is not a procedural aspect implying that it is a substantive law remedy.' A related ground is in paragraph 4: 'The learned Magistrate erred in finding that the procedure in the High Court is only governed by the Uniform Rules.'

Constitution. Mr van Rensburg for the respondent, on the other hand, contended that the magistrate was correct in his conclusion regarding the scope of section 17(4).

Section 17 of ESTA

6. Section 17 of ESTA is entitled 'Choice of Court'. It forms part of Chapter V of ESTA, which is entitled 'Dispute Resolution and Courts'. In terms of section 17(1), a party may institute proceedings either in the magistrates' court within whose area of jurisdiction the land in question is situated or in the Land Claims Court. In terms of section 17(2) of ESTA, the high court within whose jurisdiction the land in question is situated may also assert jurisdiction provided all of the parties to the proceedings consent thereto.
7. Where ESTA matters are dealt with in the Land Claims Court, the procedure is regulated by the Land Claims Court Rules.² Sections 17(3) and (4) deal with the rules of procedure applicable where ESTA matters are dealt with in the high court or the magistrates' court. Section 17(3) provides that: 'The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act 107 of 1985 may make rules to govern the procedure in the high court and the magistrates' courts in terms of this Act.' Section 17(4) of ESTA provides as follows: 'Until such time as rules of court for the magistrates' courts are made in terms of subsection (3), the rules of procedure applicable in civil actions and applications in a high court shall apply *mutatis mutandis* in respect of any proceedings in a magistrates' court in terms of this Act.'
8. To date, the Rules Board for Courts of Law has not made rules to govern the procedure in the magistrates' courts in terms of ESTA and thus, section 17(4) is applicable. Accordingly, at this stage, the rules of procedure applicable in civil actions and applications in a high

² Published under Government Notice R300 in Government Gazette 17804 of 21 February 1997.

court shall apply *mutatis mutandis* in respect of any ESTA proceedings in magistrates' courts.

9. The question for decision is whether section 17(4) confers on magistrates' courts the power to invoke the civil process for contempt of court. In turn, that depends on whether the civil process is 'a rule of procedure applicable in civil actions and applications in a high court' as contemplated by that section.
10. In my view, the civil process is not a rule of procedure as contemplated by that section for reasons I elaborate on below. In summary, although the civil process for contempt of court inevitably entails the invocation of rules of civil procedure dealt with by section 17(4), the powers to invoke the process and grant the remedies available are not sourced in those rules but in the higher courts' inherent power to regulate their own process and develop the common law. Magistrates' courts do not have these inherent powers and their remedial powers are sourced in statute.

The nature of civil process for contempt of court

11. Section 173 of the Constitution provides: '*The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.*' Importantly, these are powers that reside with the higher courts and not the magistrates' courts. Magistrates courts' jurisdiction is determined by statute.³

³ Section 170 of the Constitution provides in relevant part: "Magistrates' Courts and all other courts may decide any matter determined by an Act of parliament ..."

12. In *Matjhabeng Local Municipality v Eskom Holdings Ltd*,⁴ the Constitutional Court considered the purpose of the civil contempt process.⁵ It found that the ‘purpose of a finding of contempt is to protect the fount of justice by preventing unlawful disdain for judicial authority’.⁶ It highlighted that under the Constitution, judicial authority is vested in the courts and no person or organ of state may interfere with the functioning of the courts. Section 165(5) of the Constitution specifically makes orders of court binding on ‘all persons to whom and organs of state to which it applies’ thereby ensuring that the courts’ authority is effective.⁷
13. Contempt of court is a crime under the common law.⁸ It can be punished by the State through its law enforcement agencies pursuant to the ordinary criminal procedures. However, in civil proceedings, the crime can also be sanctioned at the instance of a party or by a court *mero moto*. This power of courts is an aspect of the civil contempt process. Procedurally, a party can invoke the court’s civil contempt powers by motion proceedings or in proceedings that entail oral evidence.⁹
14. Importantly, however, the courts’ powers in the civil contempt process are not limited to criminal sanctions, which, when invoked, usually involve the imposition of a sentence suspended to enable the party in contempt to comply with the order. The relief that courts may grant can take a variety of forms other than criminal sanctions ‘such as declaratory orders, mandamuses, and structural interdicts.’¹⁰ Each of these remedies are sourced in the

⁴ 2018 (1) SA 1 (CC) (‘*Matjhabeng*’)

⁵ Prior to *Matjhabeng*, the leading case on the subject was the Supreme Court of Appeal decision in *Fakie NO v CCII Systems (Pty) Ltd* 2006(4) SA 326 (SCA) (‘*Fakie*’).

⁶ At para 48

⁷ At paras 47 and 48

⁸ In respect of contempt of court orders, the crime is unlawfully and intentionally to disobey a court order. See *Matjhabeng*, supra, at para 50.

⁹ See *Matjhabeng*, supra, at para 59 and *Burchell v Burchell* [2005] ZAECHC 35 (ECD 364/2005) (‘*Burchell*’).

¹⁰ *Matjhabeng*, supra, at para 54 and *Burchell*, supra, at para 27. And see *Fakie*, supra, para 42.5.

common law as developed by the higher courts and play an important part in the enforcement of court orders, this being their objective.¹¹

15. The higher courts have developed the law relating to the civil contempt process through the exercise of their inherent powers to regulate their own process and to develop the common law.¹² While the civil contempt process is regulated by the rules of civil procedure, the power to invoke it and to grant the relief it contemplates, whether criminal or civil in nature, does not find its source in those rules.

The scope of section 17(4)

16. Section 17(4) is, on its express terms, concerned with the *rules* of civil procedure, both in actions or applications. It determines which rules of procedure must be applied when a magistrate's court invokes its jurisdiction under ESTA.
17. In my view, section 17(4) does not purport to confer on magistrates' courts any remedial powers when dealing with ESTA matters. Rather, the scope of their jurisdiction in that regard is determined, at least centrally, by section 19 of ESTA.¹³ Section 19(1)(a)(i)

¹¹ See *Matjhabeng*, supra, at para 54. In *Matjhabeng* and *Fakie*, and in view of the criminal features of the civil contempt process, the courts have restated the law regarding *inter alia* the onus of proof, to ensure the protection of constitutional rights.

¹² *Dreyer v Wiebols and others* 2013 (4) SA 498 (GSJ) at para 4; *M v M* [2-17] ZAGPJHC 279 at para 12 and see *Matjhabeng* and *Fakie* for a description of the common law source of the remedial powers.

¹³ Section 19 is entitled 'Magistrates' courts' and reads as follows:

(1) A magistrate's court-

(a) shall have jurisdiction in respect of-

- (i) proceedings for eviction or reinstatement; and
- (ii) criminal proceedings in terms of this Act; and

(b) shall be competent-

(i) to grant interdicts in terms of this Act; and

(ii) to issue declaratory orders as to the rights of a party in terms of this Act.

(2) Civil appeals from magistrates' courts in terms of this Act shall lie to the Land Claims Court.

(3) Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in the *Gazette*, shall be subject to automatic review by the Land Claims Court, which may-

(a) confirm such order in whole or in part;

confers specific jurisdiction to deal with evictions and reinstatement. Section 19(1)(a)(ii) confers specific jurisdiction to deal with criminal proceedings in terms of ESTA.¹⁴ Section 19(2) specifically authorizes magistrates' courts to grant interdicts and declaratory orders 'in terms of this Act'. None the powers conferred on magistrates' courts by section 19 confer the power to grant the remedies available under the civil contempt process.

18. In interpreting section 17(4) of ESTA in this way, I am mindful of the court's duties that flow from the Constitution when interpreting ESTA in particular and legislation in general.

19. An important objective of ESTA is to protect people whose tenure to land is insecure as contemplated in section 25(6) of the Constitution.¹⁵ It is remedial legislation "umbilically linked to the Constitution".¹⁶ In *Klaase*, the Constitutional Court considered how courts must interpret ESTA and held:

'In construing the provisions of ESTA a "blinkered peering" at the language in the legislation must be avoided. An approach that will "afford [occupiers] the fullest possible protection of their constitutional guarantees" must be adopted. The court, in Goedgelegen, per Moseneke DJC, remarked:

'(W)e must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical

(b) set aside such order in whole or in part;

(c) substitute such order in whole or in part; or

(d) remit the case to the magistrate's court with directions to deal with any matter in such manner as the Land Claims Court may think fit.

(4) The provisions of subsection (3) shall not apply to a case in which an appeal has been noted by an occupier.
(5) Any order for eviction contemplated in subsection (3) shall be suspended pending the review thereof by the Land Claims Court.

¹⁴ See section 23 for the offences created by ESTA and the scope for private prosecution.

¹⁵ Section 25(6) provides: '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.'

¹⁶ *Klaase v Van der Merwe* 2016(6) SA 131 (CC) ('*Klaase*') at para 51 with reference to *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007(6) SA 199 (CC) (the latter case dealing with the Restitution of Land Rights Act 22 of 1994 ('*the Restitution Act*'))

background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statutes as a whole, including its underlying values.'

20. ESTA confers and regulates important rights and duties of occupiers and owners of land including how occupier's rights of residence may be terminated and how evictions can lawfully take place.¹⁷ As mentioned, the underlying dispute in this appeal concerned rights conferred by section 14 of ESTA. Section 14 is entitled 'Restoration of residence and use of land and payment of damages'. It confers various rights on persons who are evicted contrary to the provisions of ESTA. These provisions are all designed to give effect to constitutional rights including section 25(6) and it cannot be gainsaid that when interpreting ESTA, judicial officers must seek to give effect to these rights. This includes ensuring, subject to and within a court's power in any particular case, that a party is able to obtain just and equitable relief,¹⁸ and 'appropriate' relief as contemplated by section 38 of the Constitution.
21. As regards courts' duties to interpret legislation generally, I am mindful that the Constitutional Court has given clear direction as to how judicial officers should interpret legislation when a provision is reasonably capable of different meanings.¹⁹

¹⁷ See for example, sections 6 to 15 of ESTA.

¹⁸ Section 172 of the Constitution which requires that courts declare invalid conduct that is inconsistent with the Constitution and empowers courts to grant just and equitable orders.

¹⁹ In *Investigating Directorate: SEO v Hyundai Motor Distributors* 2001(1) SA 545 (CC) ('Hyundai') at paras 21 to 26, the Constitutional Court explained how Courts must interpret statutory provisions under the Constitution. It held that: '*The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values.*' (See paragraph 22.). The Constitutional Court, when considering when laws should be held to be unconstitutional, held further that '*where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved.*' (See para 26) In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and another* 2009(1) SA 337 (CC) ('Wary Holdings') at para 46 the Constitutional Court held that where two conflicting interpretations of a statutory provision could both be said to promote the spirit, purport and objects of the Bill of Rights and the decision to be made is whether the one interpretation is to be preferred over the other, '*the Court is required to adopt the interpretation that better promotes the Bill of Rights.*' In *Wary Holdings*, the Court went on to hold that where conflicting interpretations of a statutory provision could both be said to be reflective of the relevant structural provisions of the Constitution as a whole, read with other relevant statutory provisions, the interpretation which better reflects those structural provisions should be adopted.' (See para 47.)

22. However, I am of the view that section 17(4) is not reasonably capable of an interpretation that confers on magistrates the power to invoke the civil process for contempt and grant the associated remedies whether criminal or civil in nature. Although the rules of civil procedure that would be relied upon in that process (whether pursued through motion proceedings or oral evidence) are provided for in section 17(4), the section does not purport to confer the underlying remedial jurisdiction. In the result, the court is not called upon to determine whether and if so, how, the principles in either *Hyundai* or *Wary Holdings* should be applied. In my view, this conclusion is not the result of ‘blinkered peering’ at the language of ESTA that serves to undermine the protection of rights or prevent their fulfilment, but one that accords with the ordinary principles of law and procedure that constrain the exercise of judicial authority under the Constitution.

23. In this regard, I have considered whether the effect of this conclusion is that a party to civil proceedings under ESTA in the magistrates’ court is left without an effective remedy when another party is in contempt of an order that is made. In my view, a party is not without an effective remedy. First, parties may invoke the remedies contemplated by section 106 of the Magistrates Court Act.²⁰ Second, a party would, in an appropriate case, be able to approach this court (or the High Court where it asserts ESTA jurisdiction) for relief for civil contempt under the process-in-aid remedy.²¹ As regards the process-in-aid remedy, I am satisfied that this court would have jurisdiction to invoke it pursuant to the jurisdiction conferred on the Land Claims Court in terms of both section 20 of ESTA and section 22(2) of the Restitution Act.

²⁰ The appellant did not seek to rely on this provision in or prior to these proceedings and accordingly I do not consider its ambit.

²¹ *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) paras 20 to 23.

Other grounds of appeal

24. The appellant raised various other grounds of appeal in the notice of appeal. Mr Phalatsi did not pursue these grounds in argument. They are not factually sustainable.

Costs

25. Accordingly, the appeal is without merit and stands to be dismissed. The remaining issue is costs. The appellant has appealed against the costs award in the magistrate's courts and submitted that it should not be mulcted with costs in this court either.
26. Since the Land Claims Court deals with social legislation it will not ordinarily award costs save in exceptional circumstances. In my view, there were no such circumstances justifying a departure from the ordinary approach in the magistrates' court and none were considered. No such circumstances exist in this court. Furthermore, both in the magistrate's court and in this court, the appellant has raised important issues relating to the proper interpretation of ESTA in light of the Constitution. In the result, the appeal against the costs order made in the magistrates' court should succeed and be replaced with an order that each party carry their own costs. The same order should be made in this court.

Order

27. The following order is made:

- 27.1. The appeal against the costs order of the magistrate is upheld and replaced with an order that each party pay their own costs.
- 27.2. Save in respect of costs, the appeal is dismissed.
- 27.3. Each party is to pay their own costs in the appeal.


COWEN AJ

I agree.


YACOOB J

APPEARANCES:

Mr NW Phalatsi of NW Phalatsi and partners for the appellant

Mr Van Rensburg instructing by Symington & de Kock for the respondent