IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: LCC 11R/2023
MAG CASE NO:1390/2020

Before the Honourable Flatela J
Delivered on: 8 May 2023

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: YES / NO

8/05/2023
DATE

SIGNATURE

In the matter between:

SKYLINE INVESTMENTS (PTY) LTD	**1st Applicant**
TERRE PAISIBLE (PTY) LTD	**2nd Applicant**
WALDO KELLERMAN	**3rd Applicant**
and	
PIETER SWARTS	**1st Respondent**
SARAH PIEDT	**2nd Respondent**
AREND SWARTS	**3rd Respondent**
ALL UNKNOWN PERSONS RESIDING WITH OR UNDER 1ST TO 3RD RESPONDENTS ON THE FARM	**4th Respondent**

KNOWN AS VIGNE D'OR FARM FRANSHOEK

STELLENBOSCH MUNICIPALITY **5th Respondent**

DEPARTMENT OF AGRICULTURE RURAL DEVELOPMENT AND LAND REFORM **6TH Respondent**

JUDGMENT

FLATELA J

Introduction

[1] This is an automatic review emanating from the Magistrate Court, Paarl, Western Cape in terms of section 19(3) of the Extension of Security of Tenure Act 62 of 1997 ("ESTA"). The Magistrate granted an eviction order against the first to the fourth respondents from the dwelling which is situated on the farm Vigne D'Or Franschoek fully described in the title deed as the remaining extent of the Farm Moddervalley No.1417 situated in Stellenbosch Municipality, Paarl Division, Western Cape, Cape Province (the property).

The Parties

[2] The first applicant is Skyline Investments (PTY) LTD, a company registered in terms of the of the laws of South Africa with registered address at 10 Badger Street, Fourways, Gauteng, Province. The first applicant is a registered owner of the property.

[3] The second applicant is Terre Paisible (PTY) LTD a private company with limited liability registered in terms of the laws of South Africa with registered address at Farm known as Vigne D'Or, Wemmershoek Road, Franschoek, Western Cape Province. The second applicant is currently renting the farm from the first applicant.

[4] The third applicant is a male farmer of farm Vigne D'Or, Franschoek, Western Cape Province. He is the person in charge of the daily activities of the farm as well as the person in charge of the human resources of the applicants. The third applicant is also responsible for concluding employment and housing agreements with the farm workers.

[5] The first respondent is Pieter Swarts, an adult male occupier of 50 years of age and currently residing in a worker's dwelling on the farm.

[6] The second respondent is Sarah Piedt, an adult female occupier of 42 years of age and currently residing in a worker's dwelling on the farm with the first respondent. The second respondent is the life partner of the first respondent.

[7] The third respondent is Arend Swarts, an adult male occupier and currently residing in a worker's home on the farm with the first respondent and second respondent. The first and third respondents are siblings.

[8] The fourth respondent is a minor, a 10-year-old son of the first and second respondent. At time of the Probation Officer's report in 2021, he was 8 years and in grade 2.

[9] The fifth respondent is Stellenbosch Municipality, properly constituted as such with its main place of business at Plein Street, Stellenbosch, Western Cape. The fifth respondent is a Municipality contemplated in section 155 of the Constitution of the Republic of South Africa, 1996, established by the Provincial Minister of Local Government under section 12 and 14 of the Local Government, Municipality Structures Act 117 of 1998.

[10] The sixth respondent is the Department of Agriculture, Rural Development and Land Reform.

Factual Background

[11] The first applicant is the registered owner of the property having purchased it from the previous owner around 30th March 2017. The second applicant is currently farming olives and grapes and produces wine and olive oil.

[12] It was a term or condition of the purchase agreement that the first applicant will take over the workers from the previous owner. The first to the third respondents were never employed by the applicants.

[13] The first respondent came to live on the farm with his father, Piet Samson who worked for the previous owner as a general worker and resided on the farm from 1987 until his death in 2019. A house was allocated to the first respondent's father as a result of his employment by the previous owner. The applicants never concluded a housing contract with the respondents and their father. The applicants are not aware if the previous owner concluded a housing contract with the respondent's father.

[14] The applicants contend that the respondent's right to reside on the property is derived from their late father's right to family life in terms of section 6(2)(d) of ESTA. It is further contended that the respondents have been residing on the farm since or around 2010 with their father. The first and third respondents father retired from his employment and continued to stay on the farm until April 2019 when he passed away.

[15] On 2 July 2019 a notice in terms of section 8(1)(e) of ESTA was sent to the respondents inviting them to make representations on why their right of residence should not be terminated. There was no response from the respondents, and on 25th July 2019 a letter of termination of residence was served upon the respondents.

[16] It is alleged by the third applicant that the second respondent is stealing fruits from the neighbouring farms and selling it at the road in front of the farm.

[17] The applicants state that the respondents do not contribute to the growth and the development of the applicant's business. The respondents work on other farms and for other employers and expect to live rent and obligation free on the farm. Also, none of them have ever been employed by the applicants. However, the first and second respondents averred that they offered their services to the applicants but were refused work. In their reply, the applicants averred that the respondents were refused work because they bring bad elements to the farm.

[18] The applicants require more land to expand their operations. They need to demolish the property that the respondents are currently residing in.

[19] The applicants aver that they have complied with the requirements of section 8, 9 and 11 of ESTA.

The respondents' submissions

[20] The respondents opposed the application on the basis that the termination of their right to residence was not just and equitable in terms of section 9(2)(a), read with section 8(1)[1] of ESTA. Secondly, the first respondent contended that the

[1] **8.Termination of right of residence.**—(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to— (*a*) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies; (*b*) the conduct of the parties giving rise to the termination; (*c*) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated; (*d*) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and (*e*) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.

requirements of section 9(2)[2] read with section 10[3] of ESTA have not been complied with. Therefore, the application ought to be dismissed.

[21] The first respondent avers that he has been granted consent to reside on the farm since 1987 when came to stay with his father as a child. The first respondent states that he worked on the farm as a seasonal worker when he was 18 years old up until 2005 when he was denied seasonal work.

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[2] **9. Limitation on eviction** - (2) A court may make an order for the eviction of an occupier if— (*a*) the occupier's right of residence has been terminated in terms of section 8; (*b*) the occupier has not vacated the land within the period of notice given by the owner or person in charge; (*c*) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and (*d*) the owner or person in charge has, after the termination of the right of residence, given— (i)the occupier; (ii) the municipality in whose area of jurisdiction the land in question is situated; and (iii) the head of the relevant provincial office of the Department of Rural Development and Land Reform, for information purposes, not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.

[3] **10. Order for eviction of person who was occupier on 4 February 1997.**—(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if— (*a*) the occupier has breached section 6 (3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach; (*b*) the owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar month's notice in writing to do so; (*c*) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or (*d*) the occupier— (i) is or was an employee whose right of residence arises solely from that employment; and (ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act. (2) Subject to the provisions of subsection (3), if none of the circumstances referred to in subsection (1) applies, a court may grant an order for eviction if it is satisfied that suitable alternative accommodation is available to the occupier concerned. (3) If— (*a*) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8; (*b*) the owner or person in charge provided the dwelling occupied by the occupier; and (*c*) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge, a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to— (i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and (ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted.

[22] The second respondent was born on the farm. The second respondent's parents were general workers on the farm and after her parents passed away during 1997 and 1999 respectively, she continued to reside on the farm. The first and second respondent met at the farm and entered into a romantic relationship. They moved in together about 20 (twenty) years ago. A son was born out of their relationship. He is still a minor .The second respondent was previously employed on the farm as a seasonal worker for more than 5 (five) years. She is now employed as a seasonal worker on different farms in the area where she earns an income of R150 per day of which she works on average two days per week. She further receives R450.00 per month as a state grant for the minor child, the fourth respondent.

[23] The second respondent has been living on the property since birth. She was born in 1978 and she regards the farm as her home; other than the seasonal work she takes up in different farms, she effectively has no stable employment.

[24] The third respondent is the younger brother of the first respondent. The third respondent has never been employed and suffers from tuberculosis and is currently under treatment from the farms clinic. The third respondent does not have an identity number. However, attempts were made to the Department of Home Affairs with no success. As a result, he has no birth certificate and therefore receives no social grant. The minor child attends Wemmershoek Primary school which is approximately 15 minutes away. He walks to and from school.

[25] It is averred that the respondents would be homeless and destitute should the eviction order be granted against them.

The Probation Officer's report

[26] On 12 May 2021 the Probation Officer's Report **(the "Report")** was provided to the Magistrate in terms of Section 9(3) of ESTA. The report paid regard to the following:

a. The availability of suitable alternative accommodation to the respondents.
b. Indication on how the constitutional rights of the respondents will be affected by an eviction order, including the right to education of the child.
c. Undue hardship which an eviction order would cause the respondents.
d. Recommendations.

[27] The Probation Officers report made the following findings on the strength of the information given by the respondents.

a. The first respondent came to stay and work on the farm with his parents, now deceased, at the age of either 9 or 10. The officer concluded the age on the strength of the information that the first respondent was in sub B (grade 2) and supposed to have progressed to grade 3 at the time he came to stay with this father. It therefore concluded that the first respondent derived his right of residence by virtue of association with his father.
b. The second and third respondent's derived their right of residence by virtue of being born on the farm.
c. The first and third respondents worked for the previous owners of the farm but never for the applicants. After their father passed away in April 2019, they (and the second respondent) received notices to vacate in July 2019.
d. The third respondent suffers from tuberculosis.
e. The fourth respondent, being the minor child, has been diagnosed with a serious heart condition which can be life-threatening if confirmed. A referral to Tygerberg Hospital was made by the local clinic and the appointment was scheduled for the end of May 2021.

[28] With regards to the relationship between the applicants and the respondents, the respondents stated that they do not know the applicants. They could associate with the predecessors of the applicants, but not the applicants themselves, and neither could they ascertain who the landowner is.

[29] The Report held that there was no evidence that the first and third respondents were given notices in terms of section 8(5). This section contemplates that on the death of an occupier contemplated in subsection 8(4), the right of residence of an occupier who was his or her spouse or dependant may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependant has committed a breach contemplated in section 10(1).

[30] On suitable alternative accommodation, the Probation Officer held that the first to third respondents do not have access to suitable alternative accommodation except for the house they occupy in the farm and neither do they have means to afford rental accommodation. However, the respondents informed the Probation Officer that they looked for alternative accommodation in the nearby residential area and on other farms but were unsuccessful in finding any place.

[31] Finally, the Probation Officer recommended that the eviction order be not granted.

The Municipality's Report

[32] The Stellenbosch Municipality submitted a well narrated policy outline and its current position in respect of its responsibility to provide emergency accommodation. The policy makes broad consideration for three classes of people, being a) persons who are homeless and require immediate assistance; b) persons who may become homeless in the immediate to short-term; and c) persons who may be expected to become homeless in the medium to long-term.

[33] The Municipality' submissions relevant to this matter is that the serviced sites earmarked for emergency accommodation are adjacent to informal structures, and the following difficulties arise:

a. Homeless people are accommodated in Weltevrede Park, Klapmuts in prefabricate structures (commonly known as Wendy houses) with access to tap water, and toilets. These houses are superior to many of the informal structures. This often elicits jealousy and resentment from

the residents of the informal structures and has led to threats, intimidation, and even violence against the persons being accommodated in the emergency housing.

b. Recently, (as of date of the report, June 2021), four families were evicted from Idas Valley, Khayamnandi and Jamestown and settled in La Rochelle, Klapmuts. The Municipality provided emergency accommodation as described above as well as transport to Klapmuts. A couple of days later these families were physically removed from their dwellings by other residents of Weltevrede Park, threatened and had to be evacuated the same evening.

c. The families were moved to Jamestown where they were again threatened, and plans were made to move them again. However, intervention by community leaders prevented another move, but these families are still not necessarily accepted by the community.

d. When the construction of top structures (earmarked for emergency accommodation) was proceeding in Klapmuts, the contractor was threatened and could not come on site for approximately three weeks.

e. A particular difficulty experienced by the Municipality is the fact that residents do not want "outsiders" to be housed in their areas whether on a temporary accommodation basis or not. Such residents usually insist that any opportunities, including emergency housing, be reserved for existing residents and violence often ensues when the Municipality attempts to move in so-called "outsiders".

f. Another result of the above situation is that, both for costs reasons, but also because such accommodation would inevitably be either vandalized or invaded and taken over by existing residents, it is impossible for the Municipality to erect emergency housing in advance.

[34] The Municipality further stated that unlike, for instance, in Cape Town, it has consciously decided to put all displaced persons as close to as possible to their pre-existing homes so to minimize disruption in respect of matters such as schooling, family connections etc. Given that emergency housing, as is the case with all other forms of housing is meant to be provided in a dignified and

sustainable manner, this means that the presence of serviced sites is necessary before such accommodation can be provided.

[35] Stellenbosch Municipality considers it prudent to seek to house people who are rendered homeless as close as possible to their pre-existing homes. This is because the location of housing opportunities for persons considered "outsiders" is a volatile issue within Stellenbosch and its environs which has led to clashes and violence in the past. Hence, housing people rendered homeless as close as to their pre-existing homes as possible is not only less disruptive but makes it less likely that they will be considered "outsiders", forced out and be subjected to violence. This consideration, inevitably however, means that the emergency housing provided is located within existing areas and settlements, as opposed to a self-standing location or site only intended for emergency housing, and this means too that its services form part of those of an existing area or site.

[36] Under the circumstances, and in accordance with the Municipality's policy, in the event of a person or family being rendered homeless and thus requiring emergency accommodation and who qualifies under the policy, the Municipality can supply and erect a Wendy house with connected services such as water, and a toilet.

[37] Regarding the respondents, the Municipality submitted that it is not able to provide alternative accommodation at this point. An influx of unlawful occupiers in the open spaces which the Municipality had designated as sites to provide alternative accommodation to people who, as a result of a court order for their evictions, hamstrung the Municipality's ability to provide alternative accommodation at the designated areas of Jamestown and Klapmuts.

[38] Furthermore, the Municipality is now over-subscribed in the provision of its emergency housing and indicated that its future housing construction projects would only come in the 2022/3 financial year. (I do not know if this came to fruition or not.)

[39] However, should emergency housing units in Jamestown and Klapmuts become available, the Municipality would probably be able to assist the respondents with alternative accommodation. But insofar as Klapmuts is concerned, the Municipality qualified that the community of Klapmuts is refusing to allow the Municipality to relocate people to Klapmuts for emergency accommodation. But it hopes that once this issue which is under mediation is resolved, the Municipality would be accommodate the respondents there as well.

[40] In its final take of the matter, the Municipality reiterated once more that it is not able to provide alternative accommodation at the time of the institution of these proceedings. However, in the event of an eviction order being granted, it would adhere to its responsibility of providing alternative / emergency accommodation in the nearest informal settlement that is close to a municipal housing construction project and is nearest to where the respondents are currently residing. This however, due to social dangers that took place during previous relocations of evictees into the informal settlement, is subject to the local community accepting the respondents.

Dispute of facts

[41] On the papers there was a dispute of facts regarding the date of occupation of the respondents. The first respondent contended that he has been staying in the farm since 1987 when he came to stay with his father whilst the applicant states that the respondents has been occupying the dwelling from 2010.

[42] The date of occupation is of paramount importance in evictions in terms of ESTA because different sections apply when evicting occupiers depending on the date of occupation.

[43] The Magistrate accepted the applicant's version that the respondents became ESTA occupiers after 4 February 1997 without explaining how he arrived at his decision.

[44] Therefore, I shall first deal with this dispute having regard to the Plascon-Evans principle laid out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty).*[4] The first respondent's argument is that an incorrect procedure was followed in these eviction proceedings.

[45] The first to third respondent contend that they have lived on the property before 4 February 1997. The second respondent was born on the farm. Therefore, they contended that the requirements of sections 8, 9 and 10 of ESTA were not complied with.

[46] In reply the applicant stated, for the first time, that the respondent vacated the farm at some stage for several years and only returned in 2018 and therefore the right of residence only began in 2018 and section 11 of ESTA is applicable. The

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[4] 1984 (3) SA 623 (A). Also see *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA), paras 11 – 13 where Heher JA, in discussing the principle said:

> "The first task is accordingly to identify the facts of the alleged spoliation on the basis of which the legal disputes are to be decided. If one is to take the respondents' answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant's application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine, or bona fide. For the reasons which follow I respectfully agree with the learned judge.
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> Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers...
>
> A real, genuine, and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

applicant filed a confirmatory affidavit signed by the farm manager Marthinus Andrews.

[47] In terms of the Plascon–Evans principle, when final relief is sought in motion proceedings, the court must accept the respondent's evidence unless it is clearly far-fetched or untenable that the court is justified in rejecting them merely on the papers.[5] In this case, the respondents have raised a dispute of facts regarding the consent to reside on the land and raised a dispute regarding the date of occupation and the compliance with relevant sections of ESTA.

[48] In their founding papers the applicant alleges that the respondents only lived with their late father in 2010. In their reply they avoided the allegation that the first respondent has been residing in the farm since 1987 when he came to stay with his late father; the second respondent was born in the farm and has been residing in the farm with her late parents since 1978 and when her parents passed on during 1997 and 1999 respectively the second respondent continued to live in a farm and she moved with the first respondent and occupied the dwelling for approximately 20 years.

[49] In reply, the applicants alleged for the first time, that the respondents left the farm for few years to work in Normandie Farm in Somondium and only returned in 2018.

[50] The applicant does not admit or deny the allegations regarding that the first respondent has been residing on the farm since 1987and that second and third respondents of being born on the farm. The only issue they are raising in reply is that at some stage the respondents left the farm to work in somewhere and came returned in 2018.

[51] It is trite that in motion proceeding the applicant stands and fall on its founding papers and the courts will not allow an applicant to make or supplement his or her case in his or her replying affidavits and will order any matter appearing

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[5] *Wightman t/a JW Construction v Headfour and Another* 2008 (3) SA 371 (SCA).

therein which should have been in the founding affidavits to be struck out.[6] This rule is however not absolute the court has the discretion to allow new material in reply .[7]

[52] The test in deciding whether to allow new material in reply was set out in *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*,[8] the court held as follows:

> "In consideration of the question whether to permit or to strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant. In the latter type of case the Court would obviously more readily allow an applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom."

[53] The third respondent stated that he is a person in charge of the daily activities of the farm as well as the person in charge of the human resources of the applicants. The applicant ought to have anticipated that this issue was going to be contested by the first respondent and they should have dealt with it in their founding papers instead of dealing with it in their replying affidavit.

[54] The first respondent's version is not so clearly untenable that the Court would be justified in rejecting it merely on the papers. I accept the version of the first respondent that he has been in occupation of the property since he was a teenager and that the second respondents were born on the farm and that they would work on other farms but would come back home after work.

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[6] See *MAN Financial Services (SA) (Pty) (RF) Ltd v Elsologix (Pty) Ltd and Others* (36672/2020) [2021] ZAGPJHC 655 (24 August 2021) and the cases cited there, paras 6 – 9.
[7] In *Kleynhans v Van der Westhuizen N.O.* 1970 (1) SA 565 (O) at 568E-G De Villiers J stated the following: "Normally the Court will not allow an applicant to insert facts in a replying affidavit which should have been in the petition or notice of motion ... but may do so in the exercise of its discretion in special circumstances...".
[8] 1976 (2) SA 701 (D) at 704H-705B.

[55] Having considered the matter, I found that the respondents resided on the farm with the consent of the previous owner before 4 February 1997. Therefore, section 10 of ESTA applies.

Issue

[56] For the applicants to succeed in evicting an occupier who occupied the property on or before 4 February 1997, they must show that they have complied with the mandatory requirements of section 9. Section 9(2) requires that the right of residence must have been terminated in terms of Section 8.

[57] The question that must be answered is whether the termination of the right of occupation of the respondents was in accordance with section 8 and whether an order of eviction would be just and equitable in terms of section 8 read together with the provisions of section 10.

Case law

[58] Nkabinde J in *Molusi and Others v Voges N.O. and Others*[9] said the following regarding the balancing of the competing rights of the landowner and that of the occupier:

> '...ESTA requires that the two opposing interests of the landowner and the occupier need to be taken into account before an order for eviction is granted. On the one hand, there is the traditional real right inherent in ownership reserving exclusive use and protection of property by the landowner. On the other there is the genuine despair of our people who are in dire need of accommodation. Courts are obliged to balance these interests. A court making an order for eviction must ensure that justice and equity prevail in relation to all concerned. It does so by having regard

[9] 2016 (3) SA 370 (CC) para 39-40.

to the considerations specified in s 8 read with s 9, as well as ss 10 and 11, which make it clear that fairness plays an important role.

In *PE Municipality* this Court remarked that it is necessary *'to infuse elements of grace and compassion into the formal structure of the law' and courts need 'to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern'* because *'we are not islands unto ourselves'.* One immediately agrees that— *'[t]he Judiciary cannot, of itself, correct all the systemic unfairness to be found in our society. Yet it can, at least, soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails.'* (Footnote omitted)

Discussion

[59] With this contextual background of the judicial philosophy of ESTA outlined, it now suffices to delve into the balancing exercise of the 'the traditional real right inherent in ownership reserving exclusive use and protection of property by the landowner. [And on the other hand] ...the genuine despair of our people who are in dire need of accommodation.'[10] It therefore follows, that a Court deciding eviction ought to properly apply itself, with due care, exercise and diligence of its judicial function and scrutiny, to the case at hand without merely accepting at face value the applicants, or in fact, any of the parties' submissions, if it is to reach a just and equitable decision that is fair to both parties on the eviction matter at hand. Justice must not only be done, but it must be seen to be done – this is the hallmark in which Court orders can and be expected to command legitimacy and respect of their judgments from the public, litigants, and practitioners alike.

[10] Id.

[60] Other than the fact that the Magistrate has found, and incorrectly so, that section 11 of ESTA applies, there are a number of disconcerting features of his judgment that warrant some censure from this Court.

[61] If one were to put side by side paragraphs 1 to 40 of the Magistrate's judgment with paragraphs 1-50 of the applicant's heads of argument (pages 1 to 13 of the applicants' submissions) and if one were to put it in academic terms, from sequence, structure to content, the inescapable finding would be that of plagiarism. But I shall empathetically say that had this copy and paste been a mere reiteration of the applicants' submissions and similarly followed with the respondents' submissions as is normal in judgment writing, the Magistrate would have escaped such a censure, granted that in his discussion and evaluation, his finding is made independently from the parties' submissions but of course paying regard to them and the law.

[62] In this case, the judgment is written as follows. The applicant's' submissions are put as they are from paragraphs 1 to 40 of the judgment. The respondents' submissions are not reflected in the judgment, except insofar as they featured in the applicants' submissions. And then, discomfortingly thereafter, a section follows title-headed, **"Facts found to be proved".** In this section, 10 points amounting to no more than 20 page lines, accept as they are the applicant's version. Prior to these facts found to be proved, there has not been an evaluation of the parties' submissions, and there could not have been because the submissions of the respondents' do not feature in the Magistrate's judgment except insofar as they are reflected in the applicant's submissions. There is also no indication that the Magistrate paid any heed to the law nor the established jurisprudence of the courts except insofar as accepting as gospel truth the extracted passages of the applicants' cases as put in their heads of argument.

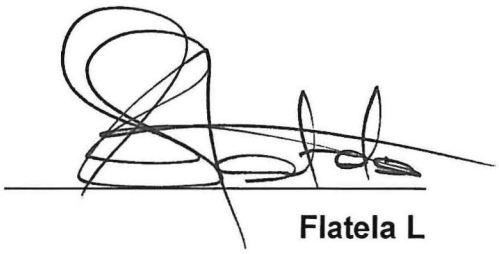
[63] The Probation Officer's report was merely *"noted"* in the *"facts found to be proved".* Thereafter, ***"Reasons of Judgment"*** follow. In the reasons of judgment, from paragraph 1 to 5 the applicant's submissions are summarized once more. From paragraph 6 to 8, in fifteen lines, the Magistrate outlined the duties of the Court when considering ESTA matters. I stress to say that this was

not an evaluation of the facts, but rather a re-statement of the trite principles. In paragraphs 9 to 12, the applicants' version is summarized once more. Then in 20 lines thereafter, paragraphs 13 to 20, the applicants' version is transformed into findings of the Court. Finally, on the issue of homelessness, and as the applicants argued by hinging on only part of the Municipality's report that it would adhere to its obligations to provide alternative suitable accommodation should the eviction order be granted, so did the Magistrate in his finding that the respondents would not be rendered homeless if the eviction application were to be granted.

[64] Having found that an incorrect section was applied and that the Magistrate paid no regard to the respondent's submissions; the matter must be remitted back to the Magistrate's court for a hearing *de novo* before a different Magistrate.

[65] Therefore, in the result I make the following order.

1. The order of the Magistrate's court, Paarl, under case number **1390/2020** is set aside.
2. The matter is remitted to the Magistrate's court for a hearing *de novo* before a different Magistrate.
3. There is no order as to costs.



Flatela L

Judge of the Land Claims Court

May 2023