

**IN THE LAND CLAIMS COURT OF SOUTH AFRICA**

**HELD AT RANDBURG**

**CASE NO: LCC 113/2020**

In the matter between:

**JACOBUS ABRAHAM PEPLER N.O.**

**First Applicant**

**TERESA PEPLER N.O.**

**Second Applicant**

**HEIKE VAN DER BERG N.O.**

**Third Applicant**

**(In their capacity as trustees for the time  
being of the Kotie Pepler Children's Trust)**

**KOTIE PEPLER CHILDREN'S TRUST  
(IT 755/2003)**

**Fourth Applicant**

**and**

**SOPHIE LOMBAARD**

**First Respondent**

**LEIGH-ANN LOMBAARD**

**Second Respondent**

**JANINE LOMBAARD**

**Third Respondent**

**CLINTON LOMBAARD**

**Fourth Respondent**

**ALL THOSE HOLDING TITLE THROUGH  
1<sup>ST</sup> – 4<sup>TH</sup> RESPONDENTS OR OCCUPYING  
UNITS 7, 7A, 7B ERF 231, RAITHBY,  
STELLENBOSCH, WESTERN CAPE)  
STELLENBOSCH MUNICIPALITY**

**Fifth Respondent**

**Sixth Respondent**

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**JUDGMENT**

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**COWEN J:**

1. The fourth applicant, the Kotie Pepler Trust (the Trust), applies to evict the first to fifth respondents from property in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA). The property is known as 'In die Wingerd' farm and is located near Somerset West and Stellenbosch in the Western Cape (the property).<sup>1</sup>
2. The first to third applicants – Jacobus Pepler NO, Teresa Pepler NO and Heiker Van Den Berg NO – are the trustees of the Trust, which has owned the property since 2003. The first to fifth respondents are a family. They commenced residing on the property in the mid-2000s. Their initial connection came about when the Trust employed the now late Mr David May as a gardener. He moved onto the property with his wife, Mrs May – referred to in the proceedings as Mrs Sophie Lombaard, the first respondent – and their three children, the second to fourth respondents. According to the first to fifth respondents, they arrived in 2004. The children were then minors, but they are now adults. Ms Lee-Ann Lombaard, the

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<sup>1</sup> Erf 231, Raitby, Cnr R44 and Klein Helderberg Road, Stellenbosch, Western Cape.

second respondent, has two minor children, Zaylee, born on 29 November 2011 and Xavier. Only Zaylee resides at the property. The third respondent, Janine Lombaard has a minor child, Leighton Lombaard, born on 2 February 2007. The fourth respondent has a minor child, Lyle Bunding, who is seven years old, but Lyle lives with his mother on a neighbouring farm.

3. The applicants approach the application on the basis that the first to fifth respondents are occupiers under ESTA, which the evidence supports, and that ESTA applies to the property in question. Zaylee and Leighton occupy the property through the respondents as family members.<sup>2</sup> To obtain an order of eviction under ESTA, the requirements of section 9 must be complied with.<sup>3</sup> In this case, the main issues that arise for determination are whether there has been compliance with sub-sections 9(2)(a) and (c) of ESTA, in other words whether the occupiers' rights were terminated in accordance with section 8 of ESTA<sup>4</sup> and whether the conditions

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<sup>2</sup> *Hattingh and Others v Jutta* [2013] ZACC 5; 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC).

<sup>3</sup> 9. Limitation on eviction

(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.

(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) For the purposes of subsection (2) (c), the Court must request a probation officer contemplated in section 1 of the Probation Services Act, 1991 (Act 116 of 1991), or an officer of the department or any other officer in the employment of the State, as may be determined by the Minister, to submit a report within a reasonable period-

(a) on the availability of suitable alternative accommodation to the occupier;

(b) indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education;

(c) pointing out any undue hardships which an eviction would cause the occupier; and

(d) on any other matter as may be prescribed.

<sup>4</sup> 8. Termination of right of residence

for an order for eviction in terms of section 11 have been complied with. Section 11 is applicable because the respondents commenced their occupation after 4 February 1997.<sup>5</sup> If an eviction is ordered, then the Court must, in terms of section 12 of ESTA, determine a just and equitable date for the respondents to vacate the

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(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.

(2) The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.

(3) Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act.

(4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and-

- (a) has reached the age of 60 years; or
  - (b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge,
- may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.

(5) On the death of an occupier contemplated in subsection (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).

(6) Any termination of the right of residence of an occupier to prevent the occupier from acquiring rights in terms of this section, shall be void.

(7) If an occupier's right to residence has been terminated in terms of this section, or the occupier is a person who has a right of residence in terms of subsection (5)-

- (a) the occupier and the owner or person in charge may agree that the terms and conditions under which the occupier resided on the land prior to such termination shall apply to any period between the date of termination and the date of the eviction of the occupier; or
- (b) the owner or person in charge may institute proceedings in a court for a determination of reasonable terms and conditions of further residence, having regard to the income of all the occupiers in the household.

<sup>5</sup> 11. Order for eviction of person who becomes occupier after 4 February 1997

(1) If it was an express, material and fair term of the consent granted to an occupier to reside on the land in question, that the consent would terminate upon a fixed or determinable date, a court may on termination of such consent by effluxion of time grant an order for eviction of any person who became an occupier of the land in question after 4 February 1997, if it is just and equitable to do so.

(2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.

(3) In deciding whether it is just and equitable to grant an order for eviction in terms of this section, the court shall have regard to-

- (a) the period that the occupier has resided on the land in question;
- (b) the fairness of the terms of any agreement between the parties;
- (c) whether suitable alternative accommodation is available to the occupier;
- (d) the reason for the proposed eviction; and
- (e) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land.

property and for any eviction in the event of a failure timeously to vacate.<sup>6</sup> The Constitutional Court, the Supreme Court of Appeal and this Court have frequently considered and applied these provisions.<sup>7</sup>

4. The proceedings have a protracted history. They were instituted formally in August 2020 when the notice of motion was issued. The first to fifth respondents only delivered opposing affidavits in July 2023, to which the applicants promptly replied, the same month. The seventh respondent, the Western Cape Provincial Department of Agriculture, Land Reform and Rural Development (the Department) delivered a probation officer's report in terms of section 9(3) of ESTA on 12 February 2021. The sixth respondent, the Stellenbosch Municipality (the Municipality) delivered a report on availability of accommodation during May 2023. I refer hereafter to the first to fifth respondents collectively as the respondents. On the direction of the Court dated 24 August 2023, the respondents delivered a supplementary affidavit providing further information germane to their income and circumstances including those of the minor children and their schooling. The Court

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<sup>6</sup> Section 12 is titled 'Further provisions regarding eviction' and provides:

- (1) A court that orders the eviction of an occupier shall –
  - (a) Determine a just and equitable date on which the occupier shall vacate the land; and
  - (b) Determine the date on which an eviction order may be carried out if the occupier has not vacated the land on the date contemplated in paragraph (a).
- (2) In determining a just and equitable date the court shall have regard to all relevant factors, including –
  - (a) The fairness of the terms of any agreement between the parties;
  - (b) The balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land; and
  - (c) The period that the occupier has resided on the land in question.
- (3) A court may, at the request of the sheriff in question, authorize any person to assist the sheriff to carry out an order for eviction, demolition or removal, subject to the conditions determined by the court as to the execution thereof: provided that the sheriff shall at all times be present during such eviction, demolition or removal.
- (4) Any order for the eviction of an occupier in terms of section 10 or 11 shall be subject to reasonable terms and conditions for further residence which may be determined by the court, having regard to the income of all of the occupiers in the household.
- (5) A court may, on good cause shown, vary any term or condition of an order for eviction made by it.
- (6) Notwithstanding the provisions of sections 10 and 11, the court shall not order the eviction of an occupier if it is of the opinion that one of the purposes of such intended eviction is to prevent the occupier from acquiring rights in terms of section 8(4).

<sup>7</sup> See generally, *Mkangeli and others v Joubert* [2002] 2 ALL SA 473(A); 2002(4) SA 36 (SCA) at paras 12 and 13;

requested this information in circumstances where the respondents had been less than forthcoming in supplying relevant information, either in their opposing affidavits or in their engagements with the Department and Municipality and the Court considered it necessary to obtain further information in order duly to perform its functions under ESTA<sup>8</sup> read with section 26(3) of the Constitution.<sup>9</sup> The applicants replied in a supplementary replying affidavit. Both parties delivered heads of argument and were represented at the hearing of the matter, and I have considered their submissions.

5. The material background facts are largely common cause although there are certain factual disputes. These being motion proceedings, I determine material factual disputes in accordance with the principles articulated in *Plascon Evans*<sup>10</sup> and *Wightman*.<sup>11</sup> I deal in this judgment with primary factual considerations, but note that there are others which appear from the affidavits and which I have also considered.

### **The property and the parties' positions**

6. At this juncture, it appears that the adult members of the respondents' family residing permanently on the property are Mrs May and the third respondent, Janine Lombaard. They reside in a cottage referred to as Cottage no 7 (which includes rooms designated as 7A and 7B) which is a four-roomed house, with running water, electricity and sanitation.

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<sup>8</sup> *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* [2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC).

<sup>9</sup> Section 26(3) provides: '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.'

<sup>10</sup> *Plascon-Evans Paints v Van Riebeeck Paints* 1984(3) 623 (A) (*Plascon Evans*) at 634H-635C.

<sup>11</sup> *Wightman t/a JW Construction v Headfour (Pty) Ltd and ano* 2008(3) SA 371 (SCA) (*Wightman*), para 13.

7. Mrs May is currently unemployed. When the proceedings were instituted in 2020, she was 55 years old. According to her, she was employed on the property as a helper, a cook and child minder, between 2007 and 2017.<sup>12</sup> Her employment – then with an entity that operated a guest house on the property – was terminated in early 2018, when she was dismissed in circumstances where the applicants allege she was grossly dishonest, having stolen clothing from guests on the property. Mrs May disputes that she was responsible for any theft, that there was a fair dismissal and says that she referred the matter to the CCMA. She says both the disciplinary proceedings and the CCMA proceedings were conducted in English, which she does not understand and she was unrepresented. At this stage, she has not exercised any further rights she may have in this regard.
8. Lee-Ann Lombaard, the second respondent, stays in Strand during the week, where she is employed and where her son, Xavier, is at crèche. She is living there with Xavier's father, in a two bedroomed house.<sup>13</sup> Lee-Ann nevertheless still regards the property as her home: she grew up there, has a family life there and her child Zaylee lives there. It appears she stays there over weekends. Some years ago (between 2010 and 2013) Lee-Ann worked on the property as a waitress. However, she is now employed at Axis Event Solutions in Somerset West where she has worked since 1 March 2023. She earns a net income of R9000. Included in her monthly expenses of R6224 is rental of R1274 and electricity of R200. Her minor child, Zaylee, who is twelve years old, lives with Mrs May on the property and attends primary school at Raithby Primary School.

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<sup>12</sup> The applicants allege that she was only permanently employed on the farm from 2011 to 2018, initially by the Trust from 2011 to March 2013, as a cook, and thereafter as a guesthouse keeper by an entity referred to as Bitline SA 630 CC.

<sup>13</sup> There are three adults and three minor children living in the house.

Raithby Primary School is about 3.7 km to the property and about 13.6 km to Stellenbosch.

9. Janine Lombaard, the third respondent, resides with Mrs May with her minor son Leighton. Leighton is nearly seventeen. In 2023, he was in Grade 11 at Hoerskool Boland Landbou in Paarl, which is a boarding school about 49 km from the property, and 42 km from Stellenbosch. Like Lee-Ann, Janine worked on the property some years ago as a waitress (2011-2013). Janine is now employed as a supervisor at Wild Peacock Products in Stellenbosch and earns a net income of R7627.17. Included in her total monthly expenses of R6944 is a rental cost of R1274 and R500 in electricity.
10. The fourth respondent, Clinton Lombaard, also used to work on the property. He worked there from 2010 to 2015 as a general worker, waiter and gardener. He is now employed at Eikenhof Estate in Stellenbosch with a monthly salary of R8 400.00. He supplements his income with weekend work in the service industry, earning about R11 100 a month. Included in his monthly expenses of R9492.51 is a rental cost of R1274 and R550 in electricity. While Clinton Lombaard resides with Mrs May and that remains his home, he spends most of the week with the mother of his minor child, Lyle, on a neighbouring farm. Lyle is at Raithby Primary School – in 2023 he was in Grade 1. Clinton Lombaard provides primary care to his son, preparing him for school every day and taking him to the bus stop. He contributes financially to Lyle's upkeep. Lyle has never lived on the property.
11. According to the respondents, the monthly rental expenses incurred by second to fourth respondents, amounting to over R3800 per month, are paid monthly to the Trust via the second applicant. The Trust accepts that these payments are made.



The respondents say that they historically understood the amounts paid to be contributions to water and electricity rather than rental.

12. The Trust, as mentioned, owns the property. The applicants contend that the features of the property are somewhat different to many ESTA cases. The property lies between the towns of Stellenbosch and Somerset-West. It is 2km from Somerset-West and 17 km from the central business district in Stellenbosch. While the property is subject to ESTA and is agricultural land, it has not operated as a commercial farming venture for several years and is not a viable farming unit on its own. It has an olive plantation on it but it is not commercially productive and is currently maintained primarily for ambience.

13. The property has several buildings on it, which provide a place of residence for the first applicant and his wife and which generate income for the Trust. There is a larger structure on the property, which is currently operated as a Wellness Centre, specializing in palliative care for cancer sufferers. At an earlier time, the venue was used as an events or conference venue. There are 10 small cottages on the property, currently leased to long term tenants. There are also two smaller premises leased for commercial ventures and a small portion of land leased as a cellphone tower. At this juncture, the Trust is trying to focus its income generation on the rental income stream from the cottages. If rented on a market basis, the Trust would be able to generate in excess of R8000 a month from Cottage No 7. The Trust spent some R220 000 upgrading its cottages. The cottages generate between R2000 and R8500 per month depending on their size. One cottage is rented to a manager at a below market rental.

## **Termination of rights of residence – section 8**

14. The first main issue is whether the applicants terminated the respondents' rights of residence in accordance with section 8 of ESTA.

15. According to the applicants, the respondents' rights of residence were so terminated on 17 September 2019, following a lengthy process of engagement. On their version, the rights that were terminated were rights conferred by way of lease agreements, initially concluded in March 2013 in writing and which terminated in April 2014 continuing thereafter on a month-to-month basis. On the information before me, at least prior to March 2013, the respondents may have resided on the property by virtue of their, or their parents', employment on it, albeit paying a financial contribution to electricity and water. But neither party asserts this explicitly and indeed the applicants seek to avoid the conclusion. Nevertheless, whatever the historical position, from 2013, the relationship changed to one based on payment. Moreover, it is common cause that after the termination of Mrs May's employment, she has made no payments to the applicants in connection with her residence, whereas on the evidence, the second to fourth respondents have consistently paid rent, currently in the amount of R3800 a month. None of the respondents are currently employed on the property.

16. Although it is common cause that the respondents signed the 2013 lease agreements, they dispute that they knew what they were signing and contend that they were asked at that time to pay a contribution to expenses due to financial difficulties faced on the property. They say that they occupy the property with

consent and with no obligation to pay rental, indeed apparently on the understanding that the 'farm belongs to them as much as it belongs to the owners.'

17. In my view, and applying *Plascon Evans* and *Wightman*, this Court must accept the applicants' version on the nature of the rights asserted: I cannot accept that the dispute on the nature of the rights is a genuine one in circumstances where the applicants' allegations have not been seriously or unambiguously addressed. However, even assuming the correctness of the respondents' version of the nature of the rights, no case is made for any life use rights, and their rights as pleaded must be terminable, subject to section 8 of ESTA. I approach the matter accordingly.

18. According to the applicants, the formal process of termination of rights of residence under section 8 of ESTA ensued by way of a letter the applicants sent the respondents on 5 November 2018. It is common cause that the respondents received the letter.

19. The letter recorded that the applicants were considering terminating their rights of occupation (whether by way of lease or otherwise) and afforded an opportunity to make representations on the issue. The letters record that the applicants had attempted on numerous occasions to enter into further written lease agreements with the respondents, efforts which recommenced seriously in 2015, which is when the Trust embarked on the process of repurposing the cottages. However, the respondents had refused to do so and this had led to an irretrievable breakdown of the relationship between the parties. As regards the first respondent, the Trust

recorded that since the date of her dismissal in March 2018, she had not paid any rental. Reference was made to the circumstances of the first respondent's dismissal. The Trust offered various assistance regarding relocation, indicating flexibility about the date of vacation, arranging a bank consultant to obtain finance, assisting with viewing properties, liaising with the Municipality and providing vehicles and labour to relocate. Representations were sought in 14 days. None of the respondents responded or approached the applicants directly. The respondents dispute that any opportunity to make representations was afforded but that is clearly untenable in view of their receipt of the letter and the events that ensued.

20. Specifically, engagements did ensue with the Trust, but through a layperson representative, a Mr Johannes, then secretary general of an entity known as BAWSI. The engagements ensued over several months both in writing and through discussion. Although initially relatively amicable, the engagement soon soured and Mr Johannes levelled harsh accusations against the respondents for their apparent willingness to throw the family on the streets despite a long and close history between the families on the property and their monied position. The respondents accept that they mandated Mr Johannes to assist them, but they dispute that they mandated any hostile communication, which I accept. Nevertheless, one feature of the engagement is that Mr Johannes conveyed that the respondents were willing to leave the property but needed to obtain finance to purchase property. At a point it was conveyed that two of the respondents were in

a position to raise finance in a region of some R400 000, although it appears that this ultimately came to naught in light of the cost of properties in the area.<sup>14</sup>

21. The Trust formally terminated the respondents' occupation rights in correspondence dated 17 September 2019. The respondents were afforded until the end of October 2019 to vacate the property, failing which the Trust would approach the Court to obtain an eviction order. The Trust tendered to pay a deposit and a month of rent to assist.

22. Notably, the evidence demonstrates that for a lengthy period before the formal process of termination commenced, and from 2015, the Trust had sought to formalize the terms of residence of the respondents on the property. They did so by requesting the respondents to conclude further written lease agreements at a non-market related rental. However, the respondents refused to do so, and according to the applicants, this eroded the trust relationship between the parties. Moreover, the first respondent persistently asserted a right to live in perpetuity without any payment of rental only contributing to some costs, a stance persisted with in the opposing affidavit. This ensued in circumstances where the Trust was repurposing the property to one housing the Wellness Centre and ultimately, which would rely materially for its income on lease income including from the residential cottages. Cottage 7 is one of the larger cottages which, as mentioned, can generate over R8000 per month on a market related rental income.

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<sup>14</sup> According to the supplementary affidavit delivered in response to the Court's directions, two of the respondents were pre-approved for finance in the region of R350 000 but properties in the area were selling for R600 000. They were moreover unable to conclude a beneficial sale agreement for property at a favourable price because it required a cash offer.

23. In my view, the termination of the respondents' rights was procedurally fair.<sup>15</sup> It was preceded by extended efforts to formalise the relationship on a mutually acceptable basis, the applicants tendering a non-market related rental. Even when the formal termination process commenced, the applicants provided a substantial period for engagement and sought to assist the respondents prior to the termination of rights. I accept, on *Plascon Evans*, that Mr Johannes was not mandated to engage in a hostile way and, for present purposes, I do not attribute hostility to the respondents. Nevertheless, what is clear is that while the respondents displayed a clear willingness to move if they were able to purchase property, the respondents displayed no interest in considering alternative rental accommodation. Moreover, the respondents' did not then demonstrate a willingness to seek a mediated or compromise solution or one that took cognisance of the applicants' position. On the other hand, the applicants persistently demonstrated a willingness to assist.

24. Substantively, there can be no doubt that the hardship for the respondents which arises from the termination of rights, is notably worse than any suffered by the applicants if the rights are not terminated. Given the historical relationship between the parties – one of service by landless to landed people<sup>16</sup> – which is steeped in South Africa's colonial and apartheid past, the case is a reminder, sadly frequent in this Court, that the road to land justice and the achievement of equality in this country remains a long one. Most pertinently, the respondents lose their right to

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<sup>15</sup> *Snyders and Others v De Jager and Others (Appeal)* [2016] ZACC 55; 2017 (5) BCLR 614 (CC); 2017 (3) SA 545 (CC) at para 56.

<sup>16</sup> See *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) in which the Constitutional Court considered the position of domestic workers in South Africa in context of social security legislation. Landlessness exacerbates their position.

their residence in a place which they consider their home, where the children were raised to adulthood and where they were able to enjoy a family life, albeit in conditions of service. Furthermore, the termination means that there would be disruption not only to family life but to daily life, including access to schooling. For the Trust, the impact is a limitation on the exercise by the Trustees of property rights to the benefit of the beneficiaries and its ability to maximize its income. There is, however, little information before the Court to demonstrate the actual impact on the beneficiaries, the Trust's financial position, or how significant Cottage 7 is in the broader scheme of the Trust's operations. On the other hand, the Trust has legitimately sought to formalize the tenure relationship with the respondents on terms favourable to them to no avail, thereby impacting on the trust in the relationship.

25. I am unable to conclude that there is any unfairness in the agreements that the applicants rely upon, and if the agreements the respondents rely upon are accepted, they were amply fair. In my view, in the circumstances of this case, there could not be a reasonable expectation on the Trust to accommodate the respondents in perpetuity, without payment of any rental, or – when and to the extent the second to fourth respondents paid rent – without formalizing the arrangements. The applicants tendered the conclusion of lease agreements on favourable terms and were open to negotiation for an extended period of time.

26. Moreover, I will assume that the parties' conduct is largely neutral in this case and in doing so, I exclude from consideration, as un-mandated, the hostile elements of the communications from Mr Johannes. Moreover, I exclude from consideration

the alleged, but disputed, dishonesty that formed the basis of the termination of employment in 2018 with Mrs May.

27. In all of the circumstances, I have concluded that the applicants' reasons for the termination of the respondents' occupation rights were fair, and it was just and equitable to terminate them. The applicants complied with section 8 of ESTA.

### **Section 11 of ESTA**

28. The second main issue is whether the conditions for an order for eviction in terms of section 11 have been complied with.<sup>17</sup> The content of the Department's probation officer's report and the Municipality's housing report are relevant to this enquiry,<sup>18</sup> which ultimately turns on whether an order for eviction is just and equitable. The factors listed in section 11(3) must be considered. The first factor is the period that the respondents have resided on the property, which is a very long time, an important consideration. The first respondent has resided there, on her version, since 2004, some 16 years when the application was instituted, now nearly 20 years. The second to fourth respondents have resided there through their childhoods and it remains a home for two of their children. However, also relevant is that, at this stage, the second and fourth respondent now partly reside and are also building family lives elsewhere.

29. I have canvassed above the fairness of the agreements between the parties and the reasons for the proposed evictions. I do not repeat these considerations. The parties' balance of interests is partly dealt with but warrants elaboration.

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<sup>17</sup> See above n 4.

<sup>18</sup> Section 9(3) of ESTA.



30. Where the respondents, especially the first and third respondents, and the children who still reside on the property, Zaylee and Leighton, will face hardship should an eviction order be granted, this is not a family that is destitute or without options. According to the respondents themselves, on the current arrangements, they contribute (or at least have allocated) some R3822.00 to rental of the property and even after all expenses, the second to fourth respondents have at least R3000 to spare monthly. Moreover, the respondents are in good health and the second to fourth respondents are all employed. Their interests must be viewed in this context.

31. Important considerations are the impact of any eviction on the respondents' ability to work and access schooling. Leighton's ability to access school is unlikely to be materially affected given where he is at school, although the fact he is probably finishing school must be catered for. There will likely be a greater impact on Zaylee, the scale of which will be determined by the availability of alternative accommodation. I assume that Mrs May, currently unemployed, may not be able to secure further employment and will be dependent on her children as she currently appears to be, and ultimately the State. The family's current formation and support systems require consideration too: Mrs May is effectively heading the household at the property, with particular significance for third respondent and Zaylee. The ultimate impact of an eviction thus depends on the availability of suitable alternative accommodation and its proximity to current places of employment, family and schools.

32. Indeed, these considerations impact on the assessment whether the respondents have suitable alternative accommodation available to them.<sup>19</sup> In this regard, the property is very close to Somerset West, a relatively dense urban area and close to Stellenbosch. It is not far from Jamestown, which is the location of emergency Municipal accommodation should this become needed.

33. It is apparent that notwithstanding various efforts on the part of the respondents to purchase property in the area, they are unable to do so. The respondents have, moreover, provided the Court with information about whether family in the area can accommodate one or more of them. The respondents are in a position where there appear to be some four family households reasonably close by, but none are able to accommodate them.

34. This means that should they wish to access private accommodation they would need to rent. The Court has pertinently not been supplied with information about rental costs in the area. This failure does not assist the respondents, who have, been less than forthcoming with information in response to the application, specifically about their income and personal circumstances and access to alternative accommodation. Indeed, this failure ultimately limited the value of the Municipality's report and the Department's probation officer's report. These reports are vital to enabling this Court duly to perform its functions and parties to

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<sup>19</sup> Suitable alternative accommodation is defined in section 1 of ESTA 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 them prior to eviction, and suitable having regard to –

- (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.'

these proceedings must duly co-operate with State functionaries while they seek to perform theirs.

35. The obvious solution to the family's position is to seek to rent space in reasonable proximity to where they now live and work, specifically to accommodate the first and third respondents, Leighton – when not at school – and Zaylee. While they reside on agricultural land, the property is located in close proximity to urban spaces and towns. The respondents were less than forthcoming with information material to their circumstances during these proceedings and, while the applicants raised the issue during their engagements, the respondents have clearly not sought to investigate rental options. The inference to be drawn on all the evidence before me is that suitable private rental options are available even if they may be less desirable than the family's current place of residence on the property.<sup>20</sup> In this regard, the family – in its current formation and circumstances – do not require the same size home as they currently enjoy. The second and fourth respondents both live elsewhere, for at least much of the time.

36. The respondents apparently cannot access housing through the Municipality for two reasons, the one being an apparent moratorium on housing assistance and the second being that they declined to supply their combined household income per month. However, the Municipality confirmed, *inter alia*, that it would adhere to its responsibility of providing emergency housing in nearby Jamestown should this become necessary upon an eviction and the respondents are rendered homeless. The Court's attention has been drawn to concerns about acceptance within the

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<sup>20</sup>*Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* [2017] ZASCA 77; [2017] 3 All SA 382 (SCA); 2018 (1) SA 391 (SCA) at para 40, 42.

Jamestown Community in view of historical conflicts during relocation processes. Should this scenario and these challenges materialize, they would need to be addressed. The probation officer's report raised concerns about availability of suitable alternative accommodation to the respondents and proposes further settlement discussions, but the information upon which it is based is incomplete because the respondents failed to supply complete or accurate information about their income. Updated and complete information came to light as a result of the request from the Court, which materially alters the position. Furthermore, the respondents were open to settlement and ongoing negotiation for many years and only resorted to litigation with its attendant financial costs when they had exhausted these routes.

37. Given my findings on the respondents' ability to access the private rental market, I am satisfied that there will be suitable alternative accommodation available to the respondents, at least provided that they are given enough time to source it and to do so in a manner that does not disrupt their employment or the children's access to schooling.

38. In all the circumstances, I am satisfied that it would be just and equitable to grant an eviction order. The applicants cannot reasonably be expected to accommodate the respondents indefinitely, without any formal arrangement in place and without an assumption of any duty to pay rental.<sup>21</sup>

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<sup>21</sup> Cf *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC); *Baron v Claytile (Pty) Ltd* [2017] ZACC 24; 2017 (5) SA 329 (CC); 2017 (10) BCLR 1225 (CC); *Grobler v Phillips and Others* [2022] ZACC 32; 2023 (1) SA 321 (CC); 2024 (1) BCLR 115 (CC).

## **Date for vacation and eviction**

39. In my view, justice and equity in this case demand that the respondents be afforded adequate time to find suitable alternative accommodation in the rental market, and, if they are able to, to regularize their position with the Municipality. Their move must not unduly interrupt any of the children's schooling or the second to fourth respondents' access to employment. The respondents have already waited a long time but, on the other hand, they have received payment for the property even after the occupation rights were terminated and the basis for doing so was disputed and unclear. The amounts disclosed in 2023 were in excess of R3800 per month. Given the history and circumstances of the matter, a further delay of a to ensure no undue hardship to the respondents, their employment and children, would not be unfair. There is no urgency in this case and the need to protect the dignity of the respondents warrants a wholly smooth transition. Furthermore, while the applicants may no longer wish to expend further financial resources following the litigation, and the trust relationship may now be wholly compromised, the time I afford may still provide scope for the parties informally to find some form of compromise. In this regard, it must be remarked that this is a case that cried out for effective mediation which, if pursued at an earlier stage, may well have resulted in an amicable resolution of the matter.

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40. In my view, the date for vacation of the property should be set at the end of June 2024.

### **Costs and order**

41. This Court only orders costs in special circumstances: there are none.

42. The following order is made:

42.1. The first to fifth respondents are ordered to vacate the property, specifically Cottage 7 (including 7A and B), on or before 30 June 2024.

42.2. Should the respondents fail to vacate the property as aforesaid, the sheriff is authorized to evict the first to fifth respondents on **15 July 2024**.

42.3. There is no order as to costs.



**S Cowen**

**Judge, Land Claims Court**

### **Appearances:**

**Applicants:** Adv L Wilkin instructed by Hannes Pretorius Bock & Bryant

**Respondents:** F Nemavhola, Legal Aid South Africa.

Date of hearing: 5 October 2023

Date of delivery: 22 January 2024