



IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC61/2023

Before: Honourable Ncube et Flatela JJ

Head on: 31 October 2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. NO / YES
SIGNATURE	DATE: 23/01/2024

In the matter between:

BAKOVEN PLASE (PTY) LTD
(Registration Number: 1962/000228/07)

First Appellant

BESTWYK PLASE (EDMS) BPK
(Registration number: 1967/00527/07)

Second Appellant

GILIAM JOHANNES VAN WYK

Third Appellant

and

SOPHIA DOREEN MAQUBELA

First Respondent

SHERINE MAQUBELA

Second Respondent

ELAINE SHINEY MAQUBELA

Third Respondent

AND ALL OTHER PERSONS RESIDING
WITH OR UNDER THE FIRST TO
THIRD RESPONDENTS IN THE PREMISES
ON BESTWYK FARM, PRINS ALFRED
HAMLET, WESTERN CAPE PROVINCE

Fourth Respondent

WITZENBERG MUNICIPALITY

Fifth Respondent

PROVINCIAL DIRECTOR OF THE
DEPARTMENT OF AGRICULTURE, LAND
REFORM AND RURAL DEVELOPMENT

Sixth Respondent

JUDGMENT

FLATELA J

Introduction

[1] This is an appeal against the whole judgement and orders of the Ceres Magistrate's Court granted on 3 March 2023. The Magistrate dismissed an eviction application against the First, Second, Third and Fourth Respondents from the Appellants' property, a farm known as Bestwyk Farm, Erf number 153, Prins Alfred Hamlet, Ceres Division, Western Cape Province ("the farm").

[2] In dismissing the eviction application, the *court a quo* held that the First to Second Respondents became occupiers before 4th February 1997 and that section 10 of ESTA applies. The *court a quo* further held that the Applicants failed to comply

with the provisions of section 8(1) of ESTA and failed to prove on a balance of probabilities that the application for eviction is procedurally fair, just and equitable.

- [3] The Appellants are appealing the decision of the *court a quo* on both grounds of errors of facts and law which are fully set out in the Notice to Appeal.
- [4] At issue in this appeal is whether there has been compliance with sections 8 ,9, 10 and 11 of the *Extension of Security of Tenure Act 62 of 1997* ("ESTA"), and whether the Appellants have shown that it would be just and equitable to terminate the occupiers' right of residence and for an order of the occupiers' eviction to be granted. The Constitutional Court has confirmed that a court making an order for eviction must ensure that justice and equity prevail by having regard to the considerations stipulated in section 8 read with section 9 as well as sections 10 and 11 of ESTA.¹

The Parties

- [5] The First Appellant is Bakoven Plase (PTY) Ltd, a company with limited liabilities duly registered in terms of the laws of the Republic of South Africa. The First Appellant is the registered owner of the farm .
- [6] The Second Appellant is Bestwyk Plase (PTY) LTD, a company with limited liabilities, duly registered in terms of the laws of the Republic of South Africa. The Second Appellant leases the farm from the First Appellant.

¹ *Molusi and others v Voges NO and others* [2016] ZACC 6 (CC) at para 39.

- [7] The Third Appellant is Giliam Johannes Van Wyk, an adult male who is the director of the first and second Appellants as well as the person in charge of the daily farming activities on the farm as well as the housing situated on Bestwyk Farm.
- [8] The First Respondent is Sophia Doreen Maqubela, a 37 years-old female who resides in the farm dwelling on the farm. The Second Respondent is Sherine Maqubela, a 31 years-old female who resides in the farm dwelling on the farm. The First and second Respondents were born on the farm. Both parents of the First and the Second Respondents worked and lived on the farm during their lifetime.
- [9] The Third Respondent is Elaine Shiney Maqubela, a 22 years-old female who resides on the farm dwelling on the farm. She is the First Respondent's daughter. The Fourth Respondent is all other persons residing with or under the first to third Respondents on the premises. This includes five minor children aged 16,14,13, 6 and 1year olds. The third and fourth respondents were born on the farm.
- [10] The Fifth Respondent is Witzenberg Municipality with its main place of business at 50 Voortrekker Street, Ceres, 6835, Western Cape. The Sixth Respondent is the Department of Agriculture, Land Reform and Rural Development with its provincial head office at 14 Long Street, Cape Town.

Factual Background

- [11] The salient background facts are largely common cause. The First and Second Respondents derive their right of residence from their late parent, Mr. Samuel

Maqubela who was permanently employed on the farm by the previous owner, Mr J Van Wyk.

[12] The late Mr. Maqubela's right of residence on the farm was derived from his permanent employment on the farm which terminated upon his passing on 5 August 2017, however, his wife and children continued their occupation on the farm dwelling. Shortly after Mr Maqubela's passing, Mrs Maqubela also passed on 17 January 2018. The First, Second and Third Respondents continued to occupy the farm dwelling with their children.

[13] The First Respondent has three children namely, Elaine Shiney Maqubela aged 20 years-old who is the Third Respondent in this application, Samila Jesney Maqubela aged 13 years-old and Demillio Maqubela aged 1 year. The First Respondent's three children were born on the farm and continue to stay with her in the farm dwelling.

[14] The Second Respondent has two minor children namely, Kayda Ashley-Ann Maqubela aged 14 years-old and Shantasia Loyalty Smith aged 16 years-old. The Second Respondent's two children were born on the farm and continue to stay with her in the farm dwelling.

[15] The Third Respondent has one minor child named; Grant Tyron Maqubela who is 4 years old. The Third Respondent's child was born on the farm and continues to stay with her in the farm dwelling.

[16] The First and Second Respondents were employed on the farm only during peak seasonal periods. The First Respondent discontinued employment after the 2016 season as she was not offered employment after that. The Second Respondent

was employed on the farm from 2013 to 2016 , she too was not offered employment

[17] The Appellants in their founding affidavit contend that after the passing of Mr. Maqubela and during the years preceding the eviction application, they requested the respondents to vacate the premises on the farm on numerous occasions before and after the passing of Mr Maqubela.

[18] As a result of the First to Third Respondents' unwillingness to voluntarily vacate the farm dwelling, the Appellants issued a Notice to make Representations as envisioned in terms of Section 8(1) (e) of ESTA and/or Invitation to discuss the respondents' residence on the farm with them dated 13 July 2021 which notice was served on the respondents via Sheriff on 21 July 2021.

[19] On 23 August 2021, written representations were served on the Appellants by the Respondents' legal representatives, Stellenbosch University Law Clinic. In addition, the First to Third Respondents submitted a letter to the Appellants indicating their willingness to discuss proposals regarding their potential relocation from the farm.

[20] The Appellants initially made an offer of R10 000 .00 to the Respondents as a financial contribution to assist them with their relocation from the farm. The offer was conditional upon the First to Third Respondents first vacating the dwelling on the farm. Counter proposals were made by the Respondents to the effect that an amount of R30 000 would be acceptable to secure a Wendy house to be erected in their relative's premises. The Appellant increased the offer to the maximum of R15 000(Fifteen Thousand Rands). The parties failed to agree on the terms and conditions of the Appellants' offer and the amount offered.

[21] on 28 September 2021 and 7 October 2021, the Appellants then served a Notice of Termination of Right of Residence and Demand to Vacate the Premises on the respondents through the Sheriff of this Court and upon their legal representatives.

[22] The First to Third Respondents did not vacate the farm dwelling and continued their occupation. On 02 February 2022, the Appellants launched eviction proceedings against them.

[23] The Appellants submit that the First to Third Respondents occupy the farm dwelling without any form of consent nor any right in law to do so. Further, that procedural steps required by law and ESTA for granting of an eviction order were complied with.

[24] 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)², read with section 8(1)³ of ESTA. Secondly, the First Respondent contended that

² **Limitation on eviction**

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

(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;

³ **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.

the requirements of section 9(2)⁴ read with section 10⁵ of ESTA have not been complied with. Therefore, the application ought to be dismissed.

⁴ 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 Land Affairs, 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 Land Affairs 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.

⁵ Order for eviction of person who was occupier on 4 February 1997

10. (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 months' 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.

[25] The First and Second Respondents submit that section 10 of ESTA is applicable as they have been in occupation since 1984 and 1990 respectively, that they did not fail to vacate the dwelling on the farm out of malice but as a result of their inability to afford alternative accommodation and further that an order for their eviction will lead to them being homeless.

[26] A report filed by the Fifth Respondent stated that it will not be in a position to provide alternative accommodation, nor the serviced site to the Respondents. Further, that it also does not have immediate available space within the informal settlements within its jurisdiction due to the fact that it does not have land of its own, besides Vredebes which is outside of Ceres which is still subject to the developmental processes to provide accommodation.

Court a quo

[27] On 03 March 2023, the Magistrate's Court handed down judgment and the eviction application was dismissed. In his judgement, the Magistrate considered the circumstances in which a court may grant an eviction order and the applicability of sections 10 and 11 of ESTA. The *court a quo* held that the First and Second Respondents became occupiers before the 4 February 1997 and that section 10 of ESTA finds application.

[28] Having considered all the relevant facts and the applicable law, the learned Magistrate found that the Appellants failed to show on a balance of probabilities that a fair procedure as required by section 8 of ESTA in the termination of the

right of residence was followed regard being had to section 8(1)(e)⁶ of ESTA which envisages an opportunity to make representations before a decision is taken to terminate the right of residence. The learned Magistrate also found there was no proof of the meaningful engagement prior to the termination of the right of residence. Further, that there was insufficient information before the court to assess whether there was an effective opportunity to make representations in the course of discussions.

[29] On this basis alone, the Magistrate held that the Appellants failed to make out a case for eviction.

[30] The Magistrate noted that there was no available accommodation as the Fifth Respondent stated in its report that it could not assist with immediate alternative housing and the Sixth Respondent recommended that an eviction order not be granted and rather engagements between the parties ensue.

[31] Having considered all the relevant facts, the Magistrate concluded that the Appellants failed to prove that the eviction application is both procedurally fair, or just and equitable.

On Appeal

[32] The appeal is against the whole judgment and orders of the Magistrate's Court on grounds of both errors of facts and law. There are three main issues that arise in this appeal and they are as follows:

⁶ (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.

1. Whether section 10 of ESTA finds application?
2. Whether the termination of the right of residence was just and equitable in both substance and procedure in terms of section 8 of ESTA?
3. Whether the *court a quo* erred in its determination of whether it would be just and equitable to grant an eviction or not in terms of section 9?

The first issue: whether section 10 of ESTA finds application.

[33] In the founding affidavit, the Appellants conceded that the First and Second Respondent 's residence on the farm emanated solely from the late Mr. Maqubela's right to residence on the farm on the basis of his right to family life which came to an end upon his death in August 2017. The Appellants further conceded that the First and Second Respondents started occupying the farm from birth⁷.

[34] It is common cause that the First Respondent was born in April 1984 and the Second Respondent was born in July 1990. ESTA distinguishes between occupiers who were in occupation on 04 February 1997 and those who came into occupation after 04 February 1997.

[35] Section 10 of ESTA provides as follows:

10. (1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if—

⁷ Para 10 of Record, page 30 , Volume 1 of Record

(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 months' 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.

[36] Section 11 of ESTA provides for an order for an eviction of persons who became occupiers after 4 February 1997 and records as follows:

11. (1) If it was an express, material and fair term of the consent granted to an occupier to reside on land, 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;
- (e) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land.

[37] In the founding affidavit and in argument, the Appellants submitted that section 11 of ESTA was applicable regard being had to the fact that the First and Second Respondents were minors at the time of their occupation of the property occupying through their parents and they only started occupying the property independently after 4 February 1997. In the alternative, the Appellants submitted that should the *court a quo* find that section 10 is applicable, the requirements of section 10 have also been complied with on the following basis ;

1. The respondents had sufficient time from 2017 to obtain alternative accommodation and to vacate the property;
2. The Second and third respondents were gainfully employed elsewhere, and they should have utilised their income to secure alternative accommodation elsewhere;
3. The respondents have access to alternative accommodation with their family member who is residing at Ceres. In the alternative, the respondents are capable of securing alternative accommodation on themselves by means the income the respondents generate;
4. The respondents were repetitively invited to make representations in terms of section 8(1)(e) and despite the invitation and generous financial contribution the respondents declined any assistance from the appellants.

5. In the event the *court a quo* rejecting the appellant's submissions, the Appellant further submitted that it was not the appellant's duty to assist the respondents in securing accommodation as the duty lies with the Fifth and Sixth respondents.

[38] Having considered all relevant facts, the learned Magistrate held that section 10 of ESTA finds application to at least the First and Second respondents, as they have been occupiers before 4 February 1997 and that the Appellants failed to comply with section 10 of ESTA.

[39] In the appeal, the Appellants contend that section 11 of ESTA rather than section 10 of ESTA finds application due to the respondents all being minors on or before 4 February 1997 and further that there has also been compliance with section 10 of ESTA should the *court a quo* find that the respondents became occupiers before 4 February 1997.

[40] An occupier as defined by ESTA means:

"...a person residing on land which belongs to another person and who has or on 4 February 1997 or thereafter had consent or another right in law to do so.

but excluding—

(a) a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996); and

(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and

(c) a person who has an income in excess of the prescribed amount;

[41] In terms of ESTA, all occupiers will fit into one of two ESTA categories that is either:

41.1 Occupiers on 4 February 1997 whose eviction is dealt with by section 10 of ESTA and;

41.2 Occupiers after 4 February 1997 whose eviction is dealt with in terms of section 11 of ESTA. This also applies to long terms occupiers.

[42] Section 9(2)(c) of ESTA requires compliance with section 10 of ESTA if the person to be evicted was already an occupier on 4 February 1997 and compliance with section 11 if the person became an occupier after 4 February 1997.

[43] In *Hattingh and Others v Juta*⁸, Mrs Hattingh was an occupier according to ESTA in terms of which she had a right of residence on the respondent's land. The respondent brought an application in the Stellenbosch Magistrate's Court to evict the applicants, who were members of Mrs Hattingh's family, from his farm because he required part of the cottage to accommodate his farm manager. The family members opposed the eviction. The Magistrate's Court held that the members of the applicants were entitled to live with her on the farm in terms of ESTA. The Land Claims Court overturned this judgment and granted eviction.

⁸ *Hattingh and Others v Juta* (CCT 50/12) [2013] ZACC 5.

The Supreme Court of Appeal upheld the eviction. In the Constitutional Court, the leave to appeal was dismissed.

[44] In dismissing the appeal in a unanimous judgment, Zondo J held that section 6(2) of ESTA requires that the right to family life of an occupier be balanced with the rights of the landowner.⁹ Accordingly, various factors were considered to determine whether it would be just and equitable for Mrs Hattingh to live with the applicants in the cottage, amongst these factors was the fact that the respondent is the owner of the property and that the applicants have no right of their own to live in the cottage but only depend upon Mrs Hattingh's right to family life to do so¹⁰.

[45] In the present case, the First and Second Respondents were born on the farm on 1984 and 1990 respectively. On 4 February 1997, the First Respondent was 13 years-old whilst the Second Respondent was 9 years-old, both were minor children.

[46] The First and Second Respondents' right of occupation was dependent and derived from their father, the late Mr Maqubela's right to family life. They were not occupiers in their own right. They are occupiers by virtue of section(3) and (4) of ESTA . It follows that the provisions of section 11 of ESTA and not section 10 of ESTA apply. Therefore, the *court a quo* erred in its findings that section 10 of ESTA and not section 11 of ESTA finds application in respect of the First and

⁹ Ibid at para 32.

¹⁰ Ibid at para 42.

the Second Respondents. Section 11 of ESTA is applicable to all the respondents. I now deal the second issue.

Whether the termination of the right of residence was just and equitable both in substance and procedure in terms of section 8 of ESTA

[47] In rejecting the contention that the appellants complied with section 8 (1) of ESTA, the *court a quo* held as follows:

- Given the particular hardships for the respondents that would flow from an eviction, there ought to have been an effective opportunity to make representations before the decision to terminate the right of residence as envisaged in section 8(1).
- The Appellants had not proven that a fair procedure was followed in termination of the right of residence.

[48] In the appeal, the Appellants submit that the appeal should be upheld, on the basis that section 8 (1) of ESTA was complied with and that the *court a quo*:

- failed to consider the exhaustive process followed by the appellants before eviction proceedings were instituted, the efforts made by the appellants to secure alternative accommodation available to the respondents through their aunt, Desire Johannes and that;
- Respondents were directed to make Representations as required by sec 8(1)(e) and they were delivered by the respondents' attorney on their behalf; and the learned Magistrate

was vague and failed to provide a clear basis for concluding that the procedure followed by the appellants was not procedurally fair, just, and equitable.

[49] Should this Court find that the Appellants did not comply with section 8 of ESTA, it would be dispositive of the matter.

Discussion

[50] Section 9(2)(a)¹¹ of ESTA requires that the occupier's right of residence must have been terminated in terms of section 8 of ESTA, which provides as follows:

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.

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

(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;

(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.'

[51] Dealing with compliance with section 8 of ESTA Carelse J in *Timothy Maluleke No vs Daniel Phellimon Sibanyoni & Others* [2022] ZASCA 40¹² held as follows:

"This Court in *Aquarius Platinum (SA) (Pty) v Bonene and Others*¹³ re-affirmed this principle and that the first stage is a notice terminating the occupier's right to reside, thereafter a second notice of eviction in terms of s 9(2)(d) should be given to the occupier".

[52] It is not disputed that Appellants sent notices to all the occupiers, giving them an opportunity to make representations in terms of section 8(1) (e) of ESTA on 13 July 2021 and notices terminating their right of residence on 28 September 2021 and 7 October 2021 respectively. The occupiers refused to vacate and as a result thereof, on 2 February 2021, the Appellants launched an eviction application against the Respondents and the notice was served on them.

[53] The pertinent question is whether the termination of the Respondents' right to reside given all relevant circumstances was just and equitable.

[54] In determining whether the termination was just and equitable 'all relevant factors' in particular, the criteria set out under s 8(1)(a) to (e) must be considered. In *Snyders and Others v De Jager and Others*¹⁴ at para 56, the Constitutional Court held that:

"Section 8(1) makes it clear that the termination of the right of residence must be just and equitable both at a substantive level as well as at a procedural level. The requirement for the substantive fairness of the termination is captured by the introductory

¹² *Timothy Maluleke No vs Daniel Phellimon Sibanyoni & Others* [2022] ZASCA 40.

¹³ *Aquarius Platinum (South Africa) (Pty) Ltd v Bonene and Others* [2020] 2 All SA 323 (SCA).

¹⁴ *Snyders and others v De Jager and others (Appeal)* 2017 (5) BCLR 614 (CC).

part that requires the termination of a right of residence to be just and equitable. The requirement for procedural fairness is captured in section 8(1)(e)”

[55] The Constitutional Court further held in para 76 that:

“ESTA requires the termination of the right of residence to also comply with the requirements of procedural fairness to enable this person to make representations why his or her right of residence should not be terminated. This is reflected in s 8(1)(e) of ESTA. A failure to afford a person that right will mean that there was no compliance with this requirement of ESTA. This would render the purported termination of the right of residence unlawful and invalid. It would also mean that there is no compliance with the requirement of ESTA that the eviction must be just and equitable.”

[56] It is trite that the *onus* is on the Appellants to place information before the Court to enable it to have regard to the criteria listed under s 8(1)(a) to (e) and any other relevant factors.

[57] The Magistrate found that not all relevant factors as envisaged by section 8 (1) of ESTA were considered by the appellants. In particular, section 8 (1) (e) which makes provision for effective opportunity to make representations before the decision to terminate the right of residence is made.

[58] I now consider the applicable factors provided in section 8(1) of ESTA each in turn.

[59] Section 8(1)(a) and (b) is not applicable in this matter.

(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.

[60] In their founding affidavit, the Appellants contend that they are being acutely prejudice by the continued residence of the Respondents as housing cannot be allocated to the deserving permanent employees of the farm. The hardship of the respondents would suffer however was clearly homelessness. The fifth Respondents offers no alternative accommodation to the Respondents in case of eviction. The respondents' relative offered them a vacant space to erect the Wendy house and had been offered no temporary accommodation whilst the Wendy house was erected.

(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.

[61] In their founding affidavit, the Appellants aver that after the passing of Mr Maqubela and during the years preceding the eviction application, the Appellants requested the Respondents to vacate the premises on numerous occasions, before and after the passing of Mr Maqubela and as result of the respondent's unwillingness to voluntarily vacate the premises, the Appellants through their attorneys gave the Respondents an opportunity to make representations regarding their eviction. The Respondents through their attorneys, made representations. The Appellants offered financial assistance to the respondents to buy a Wendy house, the Appellants offered the respondents an amount of R15 000 (Fifteen Thousand Rand) payable to the nominated bank so selected by the respondents, when vacation occupation was provided. It was suggested that the Respondents should request assistance from their family to provide them with interim lodging until the Wendy or similar structure was erected. The offer was declined by the Appellant on the basis that, their family have no temporary lodging for 3 adults and 5 minor children. The Respondents also advised the Appellants that they have made quotations for suitable Wendy house and an amount of R30 000 (Thirty Thousand Rand) would be reasonable in the circumstances

and the Appellants were advised that the Respondents would only be able to vacate the dwelling after a structure has been purchased and erected. The Appellants were not willing to contribute R30 000 (Thirty Thousand Rand) towards suitable alternative accommodation. As a result, negotiations failed.

[62] In my view, the opportunity given to the Respondents to make their representations was an effective opportunity as envisaged by section 8(1)(e) and in accordance with the principles of procedural fairness as envisaged in section 8 of ESTA in that even though the Appellants had already resolved to terminate the Respondents' right of residence by requesting that they vacate the farm dwelling on numerous occasions after the death of their father before 13 July 2021, when the notice in terms of section 8(1)(e) was issued, the Appellants only made a request to the Respondents to vacate but the legal process started when the section 8 (1)(e) notice was issued.

[63] It is apparent from the papers that meaningful engagement ensued between the parties and the Appellants made efforts to secure alternative accommodation for the Respondents through a monetary offer.

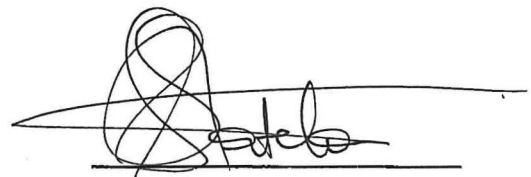
[64] The negotiations failed due to the fact that the appellants were not able to contribute R30 000 (Thirty Thousand Rand) towards suitable alternative accommodation. Despite the invitation to make representations in terms of section 8 (1) (e) and the financial contribution by the Appellants, the Respondents declined any assistance from the appellants.

[65] In my view, the procedure followed by the Appellants was fair. In the circumstances, the termination of the respondent's rights of residence was just and equitable. Accordingly, I find that the Magistrate erred in finding that it would not be just and equitable to grant the eviction.

[66] In view of all of the above, the requirements specified at section 9(2) read with section 8(1) of ESTA have been complied with and an order for the eviction of the First to Fourth Respondents ought to have been granted by the Court a quo. This being so, the appeal succeeds.

[67] In the result, the following order is made:

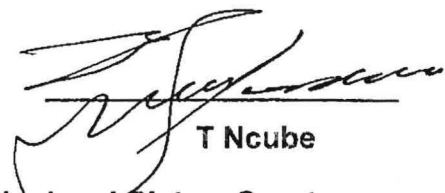
1. The appeal succeeds.
2. The order of the Magistrate Ceres is set aside and replaced with the following order:
3. The First to Fourth Respondents shall vacate the farm dwelling on Bestwyk Farm, Erf number 153, Prins Alfred Hamlet, Ceres Division, Western Cape Province, on or before 1 June 2024.
4. In the event of the Respondents failing to vacate the said dwelling by 1 June 2024, the Sheriff of the court is authorised and directed to evict them on 15 June 2024.
5. The Fifth Respondent is ordered to provide emergency housing suitable for human habitation with access to basic services to the First to Fourth Respondents and all those occupying the farm under them, on or before 31 May 2024.
6. There is no order for costs.



L Flatela

Judge of the Land Claims Court

I agree, and it is so ordered



T Ncube

Judge of the Land Claims Court

Date of hearing: 31 October 2023

Date of judgment: 23 January 2024

Appearances

**For the Appellants: Adv B Brown
Instructed by Otto Theron Attorneys**

**For the Respondents: Adv F Nemavhola
instructed by Legal Aid South Africa**