CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 50/12
[2013] ZACC 5

In the matter between:

| | |
|---|---|
| MICHAEL HATTINGH | First Applicant |
| EDWINA JUNITA HATTINGH | Second Applicant |
| PIETER HATTINGH | Third Applicant |
| and | |
| LAURENCE EDWARD JUTA | Respondent |

Heard on : 6 November 2012

Decided on : 14 March 2013

---

JUDGMENT

---

ZONDO J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J concurring):

*Introduction*

[1] The three applicants have brought an application for leave to appeal against a judgment and order of the Supreme Court of Appeal dismissing their appeal against a judgment and order of the Land Claims Court. The respondent opposes the application. Before I deal with the application, it is necessary to set out the background to the matter.

*Background*

[2] Mr Laurence Edward Juta, the respondent, owns a smallholding called Fijnbosch in Stellenbosch. The smallholding consists of 1,4 hectares. It has a cottage which consists of three bedrooms, a kitchen and a living room or lounge. In the cottage live Mrs Magrieta Hattingh, her three grandchildren and the applicants. She is about 67 years old and is of poor health. The first and second applicants are, respectively, husband and wife and parents of the three minor grandchildren.

[3] The first and third applicants are Mrs Hattingh's adult children. The second applicant is Mrs Hattingh's daughter-in-law.[1] Ricardo, who is not a party to these proceedings, is the youngest son of Mrs Hattingh. He also lives in the cottage.

[4] Some time prior to December 2002 Mrs Hattingh worked for Mr Juta as a housekeeper in his house in Stellenbosch. At that time Mrs Hattingh, her husband and the applicants lived together as a family on a farm owned by a Mr Mostert. In

[1] See [2] above.

December 2002 Mrs Hattingh and her husband moved to Fijnbosch with Mr Juta's consent. It appears that the applicants also came to live in Fijnbosch at about the same time. Mrs Hattingh was going to continue in Mr Juta's employment. For some time, Ricardo lived in accommodation provided by his then employer in Stellenbosch. He joined the family in the cottage only when he no longer had that accommodation. The applicants and Mr Juta have different versions on the basis upon which the applicants came to live in the cottage. For the purpose of this judgment, it is not necessary to resolve this difference.

[5] The cottage originally consisted of two separate units with an interlinking wall. Initially, Mr and Mrs Hattingh were to use only one of the two units of the cottage but, when the applicants moved in as well, Mr Juta converted the two units into one house by putting a door in the interlinking wall, thereby joining the two units.

[6] After Mrs Hattingh had moved to Fijnbosch, she did not perform any work for Mr Juta from 3 December 2002 to 27 May 2003 but Mr Juta continued to pay her salary as if she was working. Between 28 May 2003 and December 2005 there was a time when the only work that Mrs Hattingh performed for Mr Juta was ironing and a time when she worked for him on a full-time basis as a domestic worker. After December 2005 Mrs Hattingh did not continue working for Mr Juta but continued to live in the cottage. There is some dispute between the applicants and Mr Juta about how Mrs Hattingh stopped working for him. Again, it is not necessary to resolve that dispute.

[7] Originally, the agreement between Mrs Hattingh and Mr Juta was that Mr and Mrs Hattingh could live in the cottage for as long as Mrs Hattingh was in Mr Juta's employ. Mr Hattingh passed away in 2006. Mr Juta took a decision at some stage that Mrs Hattingh could stay in the cottage for as long as she wanted.

[8] Mr Juta expected that the applicants would vacate the cottage at some stage. When they did not, he spoke to Mrs Hattingh enquiring as to why they had not tried to find alternative accommodation. It appears that Mrs Hattingh's response was that her children could not be expected to sleep in the bush.[2] The applicants indicated to Mr Juta that they had been looking for alternative accommodation but had not been able to find it. Mr Juta indicated that he was willing to pay a sum of R22 000,00 to help the applicants towards finding alternative accommodation.

[9] In 2008 the applicants were in the employ of different employers around Stellenbosch. The first applicant was earning R2400,00 per month, the second applicant about R1200,00 per month for work that she performed three days a week and the third applicant R2000,00 per month.

[2] That this was Mrs Hattingh's attitude appears from Mr Juta's founding affidavit. Mr Juta said in Afrikaans in this regard: "Ek het vir Magrieta genader en haar gevra waarom haar kinders, kleinkinders en skoondogter . . . nie alternatiewe akkommodasie gesoek het nie. Magrieta se antwoord was bloot 'dat haar kinders tog nie in die bos kan slaap nie'."

[10] At some stage Mr Juta employed a Mr Willemse as a farm manager. He does not say when this was. Mr Juta says that Mr Willemse cycles 16 km per day. It seems that Mr Willemse must be cycling 8 km to work and back which makes the distance 16 km per day. He says that he needed the applicants to vacate the cottage because that would enable him to close off one of the units of the cottage and let Mr Willemse live in that unit so that he would not have to cycle 16 km per day.

*In the Magistrate's Court*

[11] Mr Juta insisted that the applicants should leave the cottage but they did not. They said that they had not found alternative accommodation. He then instituted proceedings in the Magistrate's Court, Stellenbosch (Magistrate's Court), for their ejectment from Fijnbosch. Mr Juta's case was that he and the applicants had agreed that the applicants would stay in the cottage only for three months which had long expired and that he needed one of the two units of the cottage to accommodate Mr Willemse.

[12] The applicants opposed Mr Juta's application in the Magistrate's Court. They denied Mr Juta's version that there was an oral agreement between him and them that they were to stay in the cottage for three months only and should have left after the expiry of that period. Their case was that Mrs Hattingh was an occupier as defined in section 1 of the Extension of Security of Tenure Act[3] (ESTA), that she had a right to

[3] 62 of 1997. An "occupier" is defined in section 1 of ESTA as meaning:

family life in terms of section 6(2)(d) of ESTA[4] and this right entailed that she could live with them in the cottage. In response to this Mr Juta adopted the position that he was not denying Mrs Hattingh her right to family life provided for in section 6(2)(d). He said that the applicants could visit Mrs Hattingh but had no right to live on the farm.

[13] The Magistrate's Court found in favour of the applicants on the point that their mother's right to family life meant that they could live with her in the cottage. It dismissed Mr Juta's application but made no order as to costs.

---

> "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) . . .
>
> (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".

It is clear from the definition of "occupier" that a person cannot be an occupier as defined in ESTA if his or her residence on someone else's land is not based on consent or on another right in law. This means that a person who resides on another person's land illegally cannot be an occupier as defined in ESTA. It is also clear from the definition that, if a person had consent or had a right in law prior to 4 February 1997 but not after that date, he or she can also not be an occupier as defined in ESTA.

[4] Section 6(2)(d) of ESTA reads:

> "Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right—
>
> (d) to family life in accordance with the culture of that family: Provided that this right shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997".

*Appeal to the Land Claims Court*

[14] Mr Juta appealed to the Land Claims Court against the judgment and order of the Magistrate's Court.[5] It was at the time of those proceedings that the legal representatives of the applicants and Mr Juta reached an agreement that, notwithstanding the disputes of fact, all the requirements for the eviction of the present applicants as occupiers in their own right under ESTA had been complied with.[6] The parties agreed at that stage that what remained to be determined was whether the present applicants could remain in occupation of the cottage because of Mrs Hattingh's right to family life provided for in section 6(2)(d) of ESTA.[7]

[15] Meer J wrote the judgment and Gildenhuys J concurred.[8] The Land Claims Court dealt with the appeal on the basis that the issue before it was whether or not Mrs Hattingh's right to family life entitled her to live on Mr Juta's land with her adult children who were not dependent upon her. It concluded that, in so far as the right to family life provided for in section 6(2)(d) entailed that the occupier could live with family members, it was limited to the occupier living with a spouse and dependants.

[5] Section 19(2) of ESTA provides for an appeal from the Magistrate's Court to the Land Claims Court.

[6] In particular they agreed that the requirements of sections 8 and 11 of ESTA had been complied with.

[7] In the Land Claims Court the Minister for Land Affairs, the Minister for Housing and the Municipality of Stellenbosch were joined in the proceedings but they took no part in the proceedings in that Court, in the Supreme Court of Appeal or in this Court.

[8] *Laurence Edward Juta v Michael Hattingh and Others*, Case No LC 145/2010, 30 March 2011, unreported (Land Claims Court judgment).

[16] This conclusion was based on section 8(4) and (5) of ESTA.[9] The Land Claims Court said that, in specifically referring to a spouse or dependant, section 8(5) provided a justification for an inference that those are the members of an occupier's family with whom an occupier is entitled to live pursuant to his or her right to family life in section 6(2)(d).[10] That Court pointed out that in the balancing of rights of a landowner and an occupier required by section 6(2) of ESTA, restricting family members to a spouse and dependants struck an equitable balance.[11] It said that, were it otherwise, landowners would have the onerous and intolerable burden of housing adult members of occupiers' extended families indefinitely. It said that this could not have been intended by the Legislature.[12]

[9] Section 8(4) and (5) of ESTA reads as follows:

> "(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)."

[10] Land Claims Court judgment above n 8 at para 15.

[11] Id. Section 6(2) reads as follows in relevant part:

> "Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right . . .".

[12] Land Claims Court judgment above n 8 at para 15.

[17] The Court also stated that it could well be that in a specific situation a wider interpretation could be accorded to the right to family life permitting other family members to reside with an occupier.[13] It said that "[i]n such a case, evidence in support of a wider interpretation will be required."[14] It pointed out that in this case there was no such evidence.[15]

[18] The Court upheld the appeal, set aside the order of the Magistrate's Court and replaced it with an order for the eviction of the present applicants by 12 May 2011. In the event that the applicants did not vacate Fijnbosch by that date, the Court authorised and directed the sheriff of the area to secure their eviction on or after 13 May 2011. Just as no order as to costs had been made by the Magistrate's Court, the Land Claims Court also made no order as to costs.[16] Subsequently, with the leave of the Land Claims Court, the applicants appealed to the Supreme Court of Appeal.[17]

---

[13] Id at para 16.

[14] Id.

[15] Id.

[16] The full order made by the Land Claims Court read as follows:

> "The appeal is upheld. The order of the Court *a quo* is set aside and substituted as follows.
>
> 1. The Respondents are ordered to vacate the premises they occupy on the farm Fijnbosch by 12 May 2011.
> 2. In the event of the Respondents not vacating the premises they occupy by 12 May 2011, the Sheriff for the area is authorised and directed to secure their eviction on or after 13 May 2011.
> 3. There is no order as to costs."

[17] *Hattingh and Others v Juta* 2012 (5) SA 237 (SCA) (Supreme Court of Appeal judgment).

*In the Supreme Court of Appeal*

[19] The Supreme Court of Appeal viewed the issue before it as requiring the determination of the meaning of the phrase "family life in accordance with the culture of that family" in section 6(2)(d).[18] It pointed out that the applicants did not impugn "the approach that it was incumbent upon them to prove the cultural basis under section 6(2)(d), upon which they rely to avoid eviction from the respondent's farm".[19] The Supreme Court of Appeal said that, as a result of this, it was unnecessary to decide whether the Land Claims Court's approach in this regard was correct.[20] It also said that "it would hardly require evidence to prove that a wife and minor dependants were family of an occupier, and a nuclear family of that nature would surely be regarded as a 'family' as envisaged by section 6(2)(d)".[21] However, the Supreme Court of Appeal expressed the view that the question before it was "whether the extended Hattingh family reside together in accordance with its culture".[22]

[20] The Supreme Court of Appeal first considered the concept of a family and, later, that of culture. With regard to the concept of "family", the Supreme Court of Appeal referred to certain international conventions,[23] to the case of *Huang v Secretary of State*

[18] Id at para 10. Section 6(2)(d) is quoted in full above in n 4.

[19] Supreme Court of Appeal judgment above n 17 at para 11.

[20] Id.

[21] Id.

[22] Id.

[23] These are the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights and the European Convention on Human Rights and Fundamental Freedoms.

*for the Home Department*,[24] the *Certification case*[25] and concluded that the word "family" was "incapable of having a precise legal connotation or definition."[26] Nevertheless, the Court expressed the view that a right to family life is inherent in the fundamental right to human dignity enshrined in the Constitution.[27]

[21] In considering the meaning of the term "culture" in section 6(2)(d), the Supreme Court of Appeal referred to the decision of this Court in *MEC for Education, KwaZulu-Natal and Others v Pillay*[28] and observed that in that case this Court was unanimous that the concept of "culture" resisted any precise definition.[29] It noted that in both the majority judgment by Langa CJ, and the minority judgment by O'Regan J, it was concluded that culture is an inherently associative practice and that cultural practices are often influenced by religious practices.[30] It also noted various statements from the judgments in *Pillay* about culture.[31]

[22] The Supreme Court of Appeal concluded that a person's culture as envisaged by the Constitution is not a matter of individual practice but of association and practices

[24] [2007] UKHL 11; [2007] 2 AC 167 (HL).

[25] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*Certification case*).

[26] Supreme Court of Appeal judgment above n 17 at para 17.

[27] Id.

[28] [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC).

[29] Supreme Court of Appeal judgment above n 17 at para 18.

[30] Id.

[31] Id at paras 18-9.

pursued by a number of persons as part of a community. It then held that the right to family life in accordance with the family's "culture" in section 6(2)(d) is "clearly a reflection of the fundamental rights set out in sections 30[32] and 31[33] of the Constitution".[34] These sections provide that every person has the right "to participate in the cultural life of their choice" and to "enjoy their culture" with other members of a cultural, religious or linguistic community.[35]

[23] The Supreme Court of Appeal also held that this Court's finding in *Pillay* that cultural rights are clearly associative in nature was fatal to the applicants' contention that culture as envisaged in section 6(2)(d) was non-associative and fell to be determined solely by the manner in which Mrs Hattingh and her extended family lived their lives.[36] It pointed out that the applicants had not sought to establish a cultural practice of association to show that they and Mrs Hattingh were enjoying family life in accordance

[32] Section 30 of the Constitution reads as follows:

> "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

[33] Section 31 of the Constitution reads as follows:

> "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—
>
> (a) to enjoy their culture, practise their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
>
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

[34] Supreme Court of Appeal judgment above n 17 at para 21.

[35] Id.

[36] Id.

with the culture of their family. The Court observed that the applicants' counsel had conceded that in the event of that Court finding that culture was a matter of association shared by at least a portion of the community, the appeal had to fail. Accordingly, the Supreme Court of Appeal dismissed the appeal but amended the eviction order granted by the Land Claims Court concerning the date by which the applicants had to vacate Fijnbosch and the date by when the sheriff was authorised and directed to evict them if they had not vacated the smallholding by the given date. It made the following order:

> "1. The appeal is dismissed.
> 2. The dates 12 May 2011 and 13 May 2011 in paras 1 and 2 of the order of the court a quo are amended to read 31 August 2012 and 1 September 2012, respectively.
> 3. There will be no order as to the costs of this appeal."[37]

*Constitutional matter or issue*

[24] This Court's jurisdiction is restricted to deciding constitutional matters and issues connected with constitutional matters. ESTA falls within the ambit of legislation passed to give effect to the constitutional right provided for in section 25(6) of the Constitution.[38] The parties were agreed that this Court is called upon to interpret and apply the provisions of section 6(2)(d). This is clearly a constitutional matter.

[37] The full order of the Land Claims Court appears above in n 16.

[38] Section 25(6) of the Constitution reads as follows:

> "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."

*Interests of justice*

[25] The test for the determination of an application for leave to appeal to this Court is whether or not it is in the interests of justice for this Court to grant leave. The matter raises the interpretation of section 6(2)(d) which relates to a right that is important and affects a vulnerable and yet significant section of our society, namely, people who live on other people's land. This is also the first opportunity that this Court is called upon to consider and interpret the provisions of section 6(2)(d). Its pronouncement in this case may bring about certainty on the meaning and scope of the right to family life provided for in section 6(2)(d). I consider that the matter has reasonable prospects of success. It is in the interests of justice that this Court grant leave to appeal.

*Rule 31 application*

[26] The applicants have brought an application for the admission of certain new evidence in this Court in terms of Rule 31.[39] This evidence was not placed before any of the other courts which have dealt with this matter.

[39] Rule 31 reads as follows:

> "**Documents lodged to canvass factual material**
>
> 1. Any party to any proceedings before the Court and an amicus curiae properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—
>
> (a) are common cause or otherwise incontrovertible; or
>
> (b) are of an official, scientific, technical or statistical nature capable of easy verification.
>
> 2. All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court."

[27] The new evidence that the applicants seek to adduce in their Rule 31 application is contained in the affidavits of Dr Budlender and Dr Amoateng and annexures thereto. The evidence in Dr Budlender's affidavit and annexure thereto was extracted from the General Household Survey, 2010 conducted by Statistics South Africa. The evidence to which Dr Amoateng's affidavit refers is contained in an annexure to his affidavit. The annexure is a chapter from a book co-authored by Dr Amoateng on the living patterns of families in post-apartheid South Africa. The evidence of Dr Budlender is said to deal with the phenomenon of adult children residing with one or both of their parents.

[28] One of the requirements that must be met in order for a Rule 31 application to succeed is that the material canvassed in the documents lodged with the Registrar must be relevant to the determination of the issues before the Court. Already at the time when this matter was before the Land Claims Court, the parties agreed that the only remaining issue between them was whether Mrs Hattingh's right to family life in section 6(2)(d) entailed that she could live with the applicants in the cottage. This remains the only issue before us as well. Given the conclusion I reach in this matter, the new evidence relating to the living patterns of families in post-apartheid South Africa and relating to the phenomenon of adult children living with their parents is irrelevant and should not be admitted.[40]

[40] See [42] below.

[29] The applicants also seek the admission of statistical material showing the extent of the housing backlog in the Western Cape. This matter has been dealt with on an acceptance by all concerned that there is a huge accommodation problem in and around Stellenbosch in the Western Cape. This acceptance is based, in part, on the statements made in the papers that the applicants have been on the waiting list for accommodation for a long time. This is a reference to government housing. There is therefore no need to admit this statistical evidence. This common cause fact will be taken into account in the balancing exercise required by section 6(2). The application for the admission of the statistical evidence also falls to be dismissed.

*Appeal*

[30] The question for determination is whether or not the Supreme Court of Appeal was correct in dismissing the applicants' appeal against the judgment and order of the Land Claims Court. The answer to that question depends upon whether Mrs Hattingh's right to family life provided for in section 6(2)(d) will be infringed if the applicants are evicted from Fijnbosch. This requires a proper construction of section 6(2)(d). Mrs Hattingh's right to family life as provided for in section 6(2)(d) is a right that she has by virtue of her status as an occupier as defined in ESTA.[41] It is common cause that Mrs Hattingh is an occupier in terms of the definition of "occupier" in ESTA.

[41] See above n 3.

[31] The critical provision in the determination of this appeal is section 6(2)(d). However, I need to refer to sections 5 and 6(1) because section 6(2) makes a reference to both sections 5 and 6(1). Section 5 reads as follows:

> "Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to—
>
> (a) human dignity;
>
> (b) freedom and security of the person;
>
> (c) privacy;
>
> (d) freedom of religion, belief and opinion and of expression;
>
> (e) freedom of association; and
>
> (f) freedom of movement,
>
> with due regard to the objects of the Constitution and this Act."

Section 6 governs the rights and duties of an occupier. Section 6(1) reads:

> "Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly."

It is now necessary to quote section 6(2)(d). It reads as follows:

> "Without prejudice to the generality of the provisions of section 5 and subsection (1), *and balanced with the rights of the owner or person in charge*, an occupier shall have the right—
>
> (d) *to family life in accordance with the culture of that family*: Provided that this right shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997". (Emphasis added.)

*The phrase "balanced with the rights of the owner or person in charge" in section 6(2)*

[32] In my view the part of section 6(2) that says: "balanced with the rights of the owner or person in charge" calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner. The effect of this is to infuse justice and equity in the inquiry required by section 6(2)(d). Section 6(2)(d) is not the only provision in which ESTA seeks to infuse justice and equity or fairness. In this regard I draw attention to the requirement in section 6(4)[42] that the landowner's right to impose conditions for the exercise of the right by any person to visit and maintain his or her family graves must be exercised reasonably and the requirement in section 8(1) that the termination of an occupier's right of residence must not only be based on a lawful ground but also that it must be "just and equitable, having regard to all relevant factors". The factors set out in section 8(1) make it clear that fairness plays a very important role. They are:

> "(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;

[42] Section 6(4) reads as follows:

> "Any person shall have the right to visit and maintain his or her family graves on land which belongs to another person, subject to any reasonable condition imposed by the owner or person in charge of such land in order to safeguard life or property or to prevent the undue disruption of work on the land."

(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."[43]

[43] Reference may also be made to section 8(7)(b), section 11(2) and (3)(a)-(e), section 12(2)(a)-(c) and section 12(4). Section 8(7)(b) of ESTA reads as follows:

> "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 section 8(5)—
>
> (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."

Section 11(2) of ESTA reads as follows:

> "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."

Section 11(3)(a)-(e) of ESTA reads as follows:

> "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."

Section 12(2)(a)-(c) of ESTA reads as follows:

> "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."

Section 12(4) of ESTA reads as follows:

[33] That the requirement in section 6(2) that the occupier's rights be balanced with the rights of the owner or person in charge has the effect of infusing justice and equity in section 6(2) is not surprising, because, for some time now, there has been movement by Parliament towards infusing justice and equity or fairness into certain legal relationships. A few examples in support of this proposition should suffice. In the employment relationship this was already the case prior to the advent of democracy.[44] The Constitution took this a step further when it entrenched in the Bill of Rights the right to fair labour practices.[45] The relationship of landowner and unlawful occupier has also been infused with an element of justice and equity. This has been done by the passing of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[46] (PIE) in terms of which it is now a condition for the eviction of an unlawful occupier that such eviction be just and equitable.[47] The result is that a court will not issue an eviction order against an unlawful occupier of land if it is unable to find that the eviction will be just and equitable. The relationship of landlord and tenant has also been infused with justice and equity. In terms of the Rental Housing Act[48] (RHA) a landlord to whom the RHA

---

> "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."

[44] The introduction of the unfair labour practice jurisdiction in our employment law in the early 1980s meant that an employer who had lawfully dismissed an employee could still be ordered to reinstate such employee if the court found that the dismissal was unfair or constituted an unfair labour practice. This continues to be our law.

[45] Section 23(1) of the Constitution reads: "Everyone has the right to fair labour practices."

[46] 19 of 1998.

[47] See section 4(6), (7), (8)(a) and (9) of PIE.

[48] 50 of 1999.

applies may not terminate a lease if the termination would constitute an unfair practice as defined in that Act even if at common law the landlord would have been within his or her rights to terminate the lease.[49]

[49] Section 1 of the RHA defines an "unfair practice" as meaning—

> "(a) any act or omission by a landlord or tenant in contravention of this Act; or
>
> (b) a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord."

In terms of section 13(1) of the RHA a tenant or landlord may lodge a complaint with the Rental Housing Tribunal concerning an unfair practice.

Section 13(4)-(6) of the RHA reads as follows:

> "(4) Where a Tribunal, at the conclusion of a hearing in terms of paragraph (d) of subsection (2) *is of the view that an unfair practice exists*, it may—
>
> (a) rule that any person must comply with a provision of this Act;
>
> (b) where it would appear that the provisions of any law have been or are being contravened, refer such matter for an investigation to the relevant competent body or local authority;
>
> (c) *make any other ruling that is just and fair to terminate any unfair practice, including, without detracting from the generality of the aforegoing, a ruling to discontinue—*
>
> (i) overcrowding;
>
> (ii) unacceptable living conditions;
>
> (iii) exploitative rentals; or
>
> (iv) lack of maintenance.
>
> (5) A ruling contemplated in subsection (4) may include a determination regarding the amount of rental payable by a tenant, but such determination must be made in a manner *that is just and equitable to both tenant and landlord* . . .
>
> (6) When acting in terms of subsection (4), the Tribunal must have regard to—
>
> (a) the regulations in respect of unfair practices;
>
> (b) the common law to the extent that any particular matter is not specifically addressed in the regulations or a lease;
>
> (c) the provisions of any lease to the extent that it does not constitute an unfair practice;
>
> (d) national housing policy and national housing programmes; and
>
> (e) the need to resolve matters in a practicable and equitable manner." (Emphasis added.)

The movement towards the infusion of justice and equity or fairness in certain legal relationships is also taken further in the National Credit Act 34 of 2005 (see the inclusion of a prohibition of "certain unfair credit and credit-marketing practices" in its preamble and the reference to equity in section 3(d) thereof) and in the Consumer

*The term "family" in section 6(2)(d)*

[34] The reference to "family life" in section 6(2)(d) of ESTA raises the question of what constitutes a "family" for purposes of that section. The applicants contended for the inclusion of an extended family in the term "family" whereas the respondent contended for its restriction to the occupier's spouse and dependent children. The Land Claims Court held that the "family" contemplated in section 6(2)(d) is constituted by the occupier's spouse or partner and dependent children.[50] That means the nuclear family. In my view there is no statutory justification for limiting the term "family" in section 6(2)(d) to the nuclear family. The Land Claims Court based its conclusion in this regard on section 8(4) and (5). It said that those provisions gave an indication that even in section 6(2)(d) the family contemplated was the spouse of the occupier and his or her dependent children. Section 8(4) gives no such indication. Section 8(5) makes a reference to a spouse and a dependant but I do not think that the mere mention of those words in the provision is sufficient to serve as a proper basis for the conclusion that the reference to "family" in section 6(2)(d) is a reference to a nuclear family. As it was said by this Court in *Dawood*,[51] families come in different shapes and sizes. There is no need to attempt to define the term "family" with any precision other than to say that it cannot

---

Protection Act 68 of 2008 (see in part G the reference to the "right to fair, just and reasonable terms and conditions" and section 48).

[50] Land Claims Court judgment above n 8 at para 15.

[51] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*) at para 31.

be limited to the nuclear family. The first and third applicants are two of Mrs Hattingh's sons. The second applicant is Mrs Hattingh's daughter-in-law. In my view, whatever notion of family is contemplated in section 6(2)(d) will include the children of the occupier. I do not think that the attainment of the age of majority or being independent of parents takes a person out of the ambit of his or her parents' family. I now turn to a discussion of the term "family life".

*The term: "family life"*

[35] It would be difficult to define with any degree of certainty the occupier's "right to family life in accordance with the culture of that family" for which provision is made in section 6(2)(d). However, it seems to me that the reference to "family life" in section 6(2)(d) suggests that the purpose of the conferment of this right on occupiers was to ensure that, despite living on other people's land, persons falling within this vulnerable section of our society would be able to live a life that is as close as possible to the kind of life that they would lead if they lived on their own land. This means as normal a family life as possible, having regard to the landowner's rights. Most people who fall into this section of our society are people who, under apartheid, were denied certain rights by landowners including the right to live a normal family life with their family. In this regard, I note that the preamble to ESTA does suggest that ESTA seeks to deal with a situation that "is in part the result of past discriminatory laws and practices". The object was to give this section of our society human dignity which they were denied under apartheid.

[36] Although I have said that the purpose of section 6(2)(d) was to ensure that, as far as possible, an occupier could enjoy a life that is as much of family life as is possible, the extent of that family life in any specific set of facts will depend upon striking a fair balance between enabling the occupier to enjoy family life and enabling the owner of the land to also enjoy his rights as owner of the land. In this regard I also note that the preamble to ESTA includes a statement that it is desirable that "the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners".

[37] Living a family life may mean the occupier living with his or her spouse or partner only or living with one or more of his or her children or with one or more members of his or her extended family, depending upon what the result is when one balances the occupier's living with any one or more of those persons with what the owner of the land is also entitled to. If, in a particular case, the balancing produces a result that is unjust and inequitable to the owner of the land, the occupier's right to family life may be appropriately limited. If, however, the occupier were to live with his or her spouse or partner and with one, two or more of his children or other members of the extended family and this would not result in any injustice or unfairness and inequity to the owner of the land, the occupier would be entitled to live with those members of his or her family. The purpose of section 6(2)(d) is to enable occupiers to live as full a family life as possible including engaging in cultural activities or practices, as long as that does not

offend the equitable balance of the occupier's rights with the rights of the landowner as required by section 6(2)(d).

[38] Counsel for Mr Juta contended that, if "family life" were interpreted broadly, a landowner would never know what he or she had taken on when granting a single occupier consent to reside on the property. He pointed out that, on the basis of the right to family life under section 6(2)(d), a single occupier could later claim to be entitled to live with a large number of family members on the landowner's property. Counsel called this "family life by ambush".

[39] The answer to the concern expressed on behalf of Mr Juta is that ESTA ensures proper respect for the rights of the landowner. It does so by requiring that the occupier's right to family life be balanced against the rights of the landowner. Although the scenario mentioned by counsel for Mr Juta is conceivable, as this judgment holds, the position is that the occupier may not reside on the landowner's property with more family members than is justified by considerations of justice and equity when the occupier's right to family life is balanced with the rights of the landowner.

[40] The right to family life in section 6(2)(d) is not restricted to the occupier being able to live with his or her spouse or partner or children only. He or she may also live with other members of his or her family provided that doing so will not be unjust and inequitable to the landowner when the rights of the owner of the land are balanced

against the occupier's right to family life. In such a case whether the children are adults or self-reliant is neither here nor there. What matters is what is just and equitable when the rights of the occupier are balanced with those of the landowner.

*The phrase: "in accordance with the culture of that family"*

[41] Ordinarily, the next phrase for discussion in section 6(2)(d) would be the phrase "in accordance with the culture of that family". However, in the view I take of this matter, a discussion of that phrase is not necessary. This is so because the decisive question in this case is whether or not it can be said that, when Mrs Hattingh's right to live with the applicants in terms of her right to family life as provided for in section 6(2)(d) is balanced against Mr Juta's rights as landowner, it would be just and equitable that Mrs Hattingh continues to live with the applicants on Mr Juta's property. That calls for the striking of a fair balance between the rights of the two parties. That is the exercise to which I turn.

*Would it be just and equitable that Mrs Hattingh lives with the applicants in the cottage?*

[42] In seeking to determine whether it would be just and equitable that Mrs Hattingh lives with the applicants in the cottage, many factors require to be taken into account. These include the following—

(a) Mr Juta does not seek Mrs Hattingh's eviction from the cottage and she will continue to live in the cottage;

(b) Ricardo will not be evicted and Mr Juta is happy that Ricardo may continue to live in the cottage; this means that he will be able to assist Mrs Hattingh whenever she needs assistance;

(c) at some stage Mr Juta was prepared to pay an amount of R22 000,00 to the applicants to assist them in finding alternative accommodation;

(d) the applicants' eviction will enable Mr Juta to use part of the cottage to provide accommodation to Mr Willemse who, otherwise, has to cycle 16 km per day because he cannot presently be accommodated in the cottage;

(e) it can be accepted that neither the first applicant nor the third applicant has ever worked for Mr Juta in any serious way; the second applicant did work for him for a limited period in the past;

(f) Mr Juta and his wife have committed themselves to transporting Mrs Hattingh whenever she needs to be taken to a doctor or hospital;

(g) the fact that Mr Juta owns the cottage and 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 so;

(h) the fact that the applicants, by their own admission, wish to find alternative accommodation and would leave for such accommodation if they were to find it;

(i) the applicants are adults and independent of Mrs Hattingh;

(j) the applicants will, after eviction, be free to visit Mrs Hattingh at the cottage from time to time;

(k) the applicants have stayed in the cottage for a long time during which Mr Juta could not use it for any of his purposes;

(l) Mr Juta has had to incur a lot of legal costs relating to the applicants' eviction in circumstances where he is unlikely to be able to recover any of those costs from the applicants whereas the applicants have received free legal representation from the Legal Aid Clinic of the University of Stellenbosch;

(m) at the time of the institution of the proceedings in the Magistrate's Court, the first and third applicants were working and earning about R2000,00 per month each, whereas the second applicant was earning R1200,00;

(n) the applicants have been on a housing waiting list for a number of years in the area; and

(o) there is an acute shortage of housing in the area.

The factors listed in (a) to (m) above count in Mr Juta's favour in the balancing of the competing rights whereas the factors in (n) and (o) count in favour of the applicants. In this exercise all the relevant factors must be taken into account and a value judgment be made whether it would be just and equitable that Mrs Hattingh lives with the applicants in the cottage. Having considered all these above factors, in my view it would be just and equitable that Mrs Hattingh does not live with the applicants. This means that the exclusion or eviction of the applicants from Fijnbosch will not infringe Mrs Hattingh's

right to family life because, even though it limits that right, the limitation is just and equitable. Accordingly, it would be just and equitable that the applicants be evicted.

[43] With regard to the date of eviction, which must also be just and equitable, it seems to me that the applicants should be given a period of about three months from the date of this judgment to vacate Fijnbosch.

[44] It is necessary to fix new dates for the applicants' eviction and for the intervention of the sheriff should they not vacate Fijnbosch on or before the deadline to be given in the order of this Court. For this purpose it will be necessary to vary paragraph 2 of the order of the Supreme Court of Appeal and replace it with a new order and new dates.

*Order*

[45] The following order is made:

1. Leave to appeal is granted.
2. The application for the admission of new evidence is dismissed.
3. The appeal is dismissed.
4. The order of the Supreme Court of Appeal is varied to read as follows:

   "1. The appeal is dismissed.
   2. The dates 12 May 2011 and 13 May 2011 in paras 1 and 2 of the order of the court a quo are amended to read 13 June 2013 and 14 June 2013, respectively.
   3. There will be no order as to costs in this appeal."

5. There is no order as to costs.

| | |
|---|---|
| For the Applicants: | Advocate A Dodson SC and Advocate S Cowen instructed by University of Stellenbosch Law Clinic. |
| For the Respondent: | Advocate L Wilkin instructed by Bouwer Potgieter Inc. |