IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case numbers: LCC 2018/59

(1) REPORTABLE: **YES**	
(2) OF INTEREST TO OTHER JUDGES: **YES**	
(3) REVISED. **YES**	
	(Signed)
5 August 2020	.....
DATE	SIGNATURE

In the matter between:

MALULEKE N.O., TIMOTHY
(in his capacity as Trustee of the Hlaniki Trust Applicant

and

SIBANYONI, DANIEL PHILAMON First Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Second Respondent

THE DIRECTOR-GENERAL: DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM Third Respondent

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JUDGMENT

SPILG, J:

INTRODUCTION

1. The applicant, which is the Hlaniki Trust, seeks the eviction of the first respondent, Mr DP Sibanyoni, from a labourer's cottage located on the farm known as Tweefontein.[1]

   The farm which is portion 5 (a portion of portion 4) of the farm Tweefontein 541 measures 498, 8842 hectares. It was purchased by the applicant in April 2015 for an amount of R7 million from Die Tweefontein Trust, represented by a Ms Viljoen.

   It is common cause that Ms Viljoen in effect inherited the right to the farm through the Trust on the death of her father who appears to have established the trust during his lifetime. She had already been living on the farm for a time prior to his death.

2. Two other parties were joined: The City of Tshwane Metropolitan Municipality ("*Tshwane Metro"*) by reason of the interest it may have pursuant to the provisions of ESTA and the Department of Rural Development and Land Reform ("*DRDLR")* being identified in the papers as the department responsible for the administration of the affairs of ESTA and the Land Reform (Labour Tenants) Act 3 of 1996 ("*Labour Tenants Act*").[2]

3. The applicant seeks the eviction of the respondent under the Extension of Security of Tenure Act 62 of 1997 ("*ESTA"*)

THE APPLICANT'S CASE

4. In its founding affidavit the applicant relied exclusively on the provisions of the Extension of Security of Tenure Act 62 of 1997 ("*ESTA")* to support the eviction of the first respondent, who for sake of convenience will be referred to as *"the respondent*".

[1] See para 5 of the founding affidavit
[2] Paras 6 to 8 of the founding affidavit

5. The applicant contended that the respondent had resided on the farm from a date after 4 February 1997 and for a period of less than three years without the express or tacit consent of the owner or person in charge of the land to do so.

6. Lack of consent, whether deemed or otherwise, precludes the application of s 3(2) of ESTA. Section 3(2) provides that:

> "*If a person who resided on or used land on 4 February 1997 previously did so with consent, and such consent was lawfully withdrawn prior to that date—*
>
> *(a) that person shall be deemed to be an occupier, provided that he or she has resided continuously on that land since consent was withdrawn; and*
>
> *(b) the withdrawal of consent shall be deemed to be a valid termination of the right of residence in terms of section 8, provided that it was just and equitable, having regard to the provisions of section 8."*

The cut-off date of 4 February 1997 is also significant in relation to the grounds on which a court can evict under s 9 of ESTA

7. The applicant also took the precaution of dealing with the occupancy of one Abi-Hendrick Sibanyoni who had been a labour tenant employed by the Tweefontein Trust.

8. It was alleged that Hendrick had agreed in writing to vacate the farm when the owner sold, with the result that on the sale of the farm to the applicant Hendrick had waived his rights to occupy under s 3(6) of the Labour Tenants Act.

Section 3(6) of that Act reads:

> *A labour tenant may, subject to subsection (7), waive his or her rights or a part of his or her rights if such waiver is contained in a written agreement signed by both the owner and the labour tenant.*
> (emphasis added)

9. No doubt alive to the requirements of s 3 (7)[3] to which s 3(6) was subject, the applicant contended in the alternative that even if the agreement did not constitute a waiver of rights under s 3(6) , Hendrick had in fact waived his rights when he vacated the farm. This was a reference to the provisions of s 3(3) (a) of the Labour Tenants Act which states:

> *(3) A labour tenant shall be deemed to have waived his or her rights if he or she with the intention to terminate the labour tenant agreement—*
>
> *(a) leaves the farm voluntarily;*

Presumably the reason for dealing with Hendrick was to anticipate the respondent relying their family relationship as founding his right to occupy[4]. On the basis that Hendrick had waived his rights of labour tenancy under either s

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[3] Section 3(7) reads:

The terms of an agreement whereunder a labour tenant waives his or her rights or part of his or her rights in terms of subsection (6) shall not come into operation unless—

(a) the Director-General has certified that he or she is satisfied that the labour tenant had full knowledge of the nature and extent of his or her rights as well as the consequences of the waiver of such rights; or

(b) *such terms are incorporated in an order of the Court or of an arbitrator appointed in terms of section 19.*

[4] In terms of the s 1 definition a "family member means a labour tenant's grandparent, parent, spouse (including a partner in a customary union, whether or not the union is registered), or dependant;"

Family members of a labour tenant are expressly afforded protection by the provisions of s 3(1) which reads:

Notwithstanding the provisions of any other law, but subject to the provisions of subsection (2), a person who was a labour tenant on 2 June 1995 shall have the right with his or her family members—

(a) to occupy and use that part of the farm in question which he or she or his or her associate was using and occupying on that date;

(b) to occupy and use that part of the farm in question the right to occupation and use of which is restored to him or her in terms of this Act or any other law.

3(3) (a) or s 3(6), the respondent would not be able to claim any right under s 3(2)(a) of the Labour Tenants Act to reside on the farm as a family member. The provision reads:

> *(2) The right of a labour tenant to occupy and to use a part of a farm as contemplated in subsection (1) together with his or her family members may only be terminated in accordance with the provisions of this Act, and shall terminate—*
>
> *(a) subject to the provisions of subsections (3) to (7), by the waiver of his or her rights;*

I have already referred to ss 3 (3), (6) and (7) of the Labour Tenants Act.

10. Earlier the applicant had also mentioned that one Johannes Government Sibanyoni had claimed a right to acquire portion of the land under s 16 of the Labour Tenants Act about a year after the applicant had purchased the farm. The applicant however had obtained an order from the Land Claims Court under case no LCC102/2017 declaring that he was not a labour tenant. The order which was granted on 31 October 2017 states that it was obtained by agreement.

11. Aside from lack of consent to reside and waiver of rights (if the respondent sought to rely on being a family member of Hendrik, or for that matter Johannes) the limited duration of the respondent's residence also played an important role in the formulation of the applicant's founding papers.

12. If the applicant's allegations are correct, that the respondent had not been on the farm for as long as three years, then the respondent can at best rely on a rebuttable presumption of consent under s 3(5) of ESTA, not on deemed consent in cases falling under s 3(4) where an occupier can show that he had been resident "*continuously and openly"* for a period of three years or more..

For sake of completeness the provisions of ss 3 (4) and (5) of ESTA are set out:

> *(4) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved.*
>
> *(5) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge.*

13. In its founding papers the applicant therefore relied on the respondent lacking any right, whether under common law or statute, to reside on the farm save for the presumption created by s 3(4) of ESTA.

14. However that does not end the matter. Once a person falls within the definition of an "*occupier"*, he or she enjoys security of tenure and the other rights of occupation accorded under s 6 of ESTA. The term has an extended meaning to bring within the protective umbrella of that Act any person or family member (as defined) of such person who, save for two categories of occupiers, resides on land belonging to another provided that on or since 4 February 1997 such person *"had consent or another right in law to do so"* . The excluded categories are persons whose income is in excess of the prescribed amount (currently R5 000) or who seek to exploit the land commercially (but not a person who *personally* works the land and only employs a member of his or her family to assist).

    The key to the protection is "*consent*" which refers back to the presumptions that consent has been obtained whether in a deemed and hardened form where occupation has been continuous and open for at least three years (under s 3(5)) or in the more tenuous form of a rebuttable presumption under s 3(4).

15. In both situations there must nonetheless be a notice of termination of the right of residence.

This is provided for in terms of s 8(1) of ESTA which allows for termination "*on any lawful ground provided that such termination is just and equitable having regard to all relevant factors".* In other words, simply because the ground relied on is lawful does not mean that the occupier's right of residence can be terminated; It can only be terminated if in addition the termination is just and equitable in the circumstances.

Specific considerations which must be taken into account in determining whether the termination of residence is just and equitable are enumerated in the subsections to s 8(1) of ESTA. Section 8(2) provides that where the right of residence arises solely from an employment agreement, the right of residence will terminate if the person concerned "*resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act".*

16. The applicant claims it terminated the respondent's right of residence in writing under s 8(1) of ESTA when he was requested to vacate the farm[5]. This was on 2 November 2017 and again a few weeks later on 23 November.

    The applicant however also sought in its founding papers to rely on a notice delivered to the respondent on 12 February 2018 as constituting the termination of his right of residence. This was just under two months before the current proceedings were instituted.[6]

17. The applicant further alleged that it has satisfied the requirements of s 9(2) and ss 11(2) and (3) of ESTA for the grant of an eviction order.

    Section 11 is concerned with the requirements for an eviction order against persons who became occupiers (as defined) after 4 February 1997 whereas s 10 deals with those who occupied the land in question prior to that date.

[5] Founding affidavit para 33 read with para 31

[6] This does not offend the two month notice requirement provided the court hearing only takes place after that period has elapsed. See the proviso to s 9(2)(d)

18. Of relevance is that the applicant consistently relies on the respondent's right, if any, to occupation being derived from his residence commencing only after 4 February 1997. In such a case the requirements which need to be satisfied are less stringent than in the case of a person who was in occupation prior to that date. In the latter case the first consideration is whether or not "*suitable alternative accommodation is available … within a period of nine months"*.

19. If there is not suitable alternative accommodation available within that time, then in general terms it will be necessary to demonstrate, that absent the eviction order sought, the efficient carrying on of the owner's operations will be seriously prejudiced if an eviction order is not granted. This is a pre-qualifier, or precondition which must be satisfied before a court will embark on an enquiry as to whether it is just and equitable to grant an eviction order. Without it the eviction order sought remains still born.

    This pre-qualifier is absent in cases where the person sought to be evicted only took occupation after 4 February 1997.

    Moreover, although both ss 10 (2) and 11 (2) require the court to be satisfied that it is "*just and equitable*" to grant an eviction order, the considerations which are to be taken into account are slightly more nuanced in the one than in the other.

20. In summary therefore, the applicant relies on the respondent being an ESTA occupier who had been resident on the farm for less than three years without the owner's express or tacit consent and, because only s 3(4) of ESTA applied, the applicant could rebut the presumption of consent. The application also sought to anticipate any reliance the respondent might place on the labour tenancy of Johannes or Hendrik Sibanyoni as alleged family members on the basis that their rights, if any, had terminated.

RESPONDENT'S ANSWERING AFFIDAVIT

21. In his answering affidavit the respondent disavowed any reliance on the labour tenancy of Johannes or Hendrik to support his entitlement to reside on the farm. He claimed that he was a labour tenant in his own right.

22. The respondent alleged that he occupies the cottage and has rights to a portion allocated for ploughing and for livestock. He contends that these rights were as "*part of the methods of payment"* in terms of an agreement to provide labour which his father had concluded, prior to the respondent's birth, with a previous owner of the farm who was identified as Mr Bekker. The respondent states that his parents lived on the farm, that he was born there and has lived there all his life. These allegations are supported by his mother.[7]

    Based on these allegations, and that he has worked on the farm as a seasonal worker for a long period of time both when Bekker and later Viljoen resided there, the respondent contends that he is entitled to the rights of a labour tenant who has occupied a portion of the farm since well before 2 June 1995. The respondent therefore alleges that he is entitled to the special protection afforded to such an occupier under s 2 of the Labour Tenants Act.[8]

    The respondent does not disavow reliance on ESTA. He alleges that he is also "*occupying the farm in my own right"* by reason of having continuously and openly resided on or used land on the farm for a period of much longer than three years but at least since 4 February 1997. If correct then the respondent enjoys the benefit of the deeming provision of s 3(5) of ESTA that he occupies with consent. On any basis he has resided on the farm for at least a year which, under s 3(4), allows him to claim consent to be on the land unless the contrary is proved.[9]

[7] Answering affidavit paras 5 and 6 read with his mother's supporting affidavit at annexure A4.
[8] Ib. para 10
[9] Ib. para 18. See also para 34.

23. The respondent provided a family tree which placed his mother and father at the apex. He and his siblings are identified in the next branch followed by their children and grandchildren. He identifies a total of 13 persons who he claims currently reside on the farm. They include his mother and himself, his wife as well as his children and the children and grandchildren of his siblings. Although his nephews, nieces and their children are all identified as still living on the farm, the applicant states that none of their parents do, i.e. the applicant's siblings. His siblings are identified as Abi-Hendrick (referred to as Hendrick), Emily and Jim.

24. The respondent admits receipt of the two November 2017 requests to vacate but contends that he had rights to reside under the Labour Tenants Act and ss 3 (4) and (5) of ESTA. He however denies that he is in possession of the February 2018 notice and provides a broad general denial of the applicant having any entitlement to terminate his right of residence or to evict him.

25. During argument the respondent raised a further issue. *Adv Strauss* on his behalf argued that any lawful termination of the right to occupy under ESTA would render the respondent's occupation unlawful thereby entitling him to the rights accorded to an unlawful occupier under the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ('*PIE')*.

APPLICANT'S REPLYING AFFIDAVIT

26. In reply the applicant sought to demonstrate that the respondent could not have been born on the farm, that he had never worked on the farm and that his mother, Josephine Sibanyoni, had left the farm prior to 2000; in other words more than 20 years ago.

27. Other allegations were made based on a verification document that had been signed by the respondent's older brother, Hendrick in September 2012 when he sought to solidify his labour tenancy rights on the farm. There were also two notices that had been issued some seven years earlier in July 2005 by the DRDLR when Hendrick and also the applicant's mother had sought to acquire

similar labour tenancy rights on a completely different farm, identified as portion 4 of Mullershoop 544 JR. According to Viljoen she never had an interest in that farm which is some distance away and to the south of Bronkhorstspruit.

28. The significance of these documents is that in the more recent one of 2012 Hendrick claimed that his parents only settled on the applicant's farm as a labour tenant in about 1973 when he was fourteen years old. The applicant therefore would have been at least four years old. . These allegations are not only in stark contrast to the contents of the respondent's answering affidavit but also are gainsaid by the section 17 Notice in respect of the claim of the respondent's mother and brother (i.e. Hendrick) to acquire ownership based on their alleged labour tenancy rights to an unrelated farm. Moreover in the notice relating to Hendrick's claim the respondent's name was also included as having labour tenancy rights to that other farm.

29. However in the Verification document Hendrick's identified Johannes as his cousin and states that Johannes had left the farm as far back as 1974.

30. The applicant also contended that unless the respondent could reliably demonstrate that he was in fact employed on the farm then he has no claim to be a labour tenant as his father had died and his mother had voluntarily vacated the farm some 20 years earlier.

THE ISSUES

31. It is evident that after the applicant filed its replying affidavit there were material disputes of fact regarding whether the respondent could claim to have been a labour tenant (as defined under the Labour Tenants Act) engaged by Viljoen's late father and Viljoen herself.

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32. If the respondent was not a labour tenant then there were further significant factual disputes as to whether the respondent had been resident on the farm

continuously and openly since before 4 February 1997 so as to entitle him to protection as an occupier to whom the deeming provisions of s 3(5) and the added requirements set out in s 10 of ESTA applied. There of course would also be the factual question of whether the termination of the right of residence itself was lawful and just and equitable as required under s 8 of ESTA.

33. Provided there was lawful termination which is just and equitable then, by reason of s 9(2)(c) of ESTA before a court can grant an eviction order it also has to consider;

    a. whether the right to terminate can be exercised in the circumstances (compare ss 10(1) with s 11(1)); and

    b. if the right to terminate can be exercised, whether it is first necessary to enquire into the existence of suitable alternative accommodative;

    c. if no such accommodation is available within a period of nine months from the date of termination then whether the efficient carrying on of the owner's operations will be seriously prejudiced unless the dwelling provided by the owner is available for occupation by another employee; and if it would be; and,

    d. provided the precondition set out in the previous para is satisfied then only, whether it is just and equitable to evict having regard to the factors set out in s 10(3) (a) to (c) and (i) and (ii)) if the respondent had occupied the land by no later 4 February 1997 or where he had commenced occupation only after that date, then having regard to the criteria set out in ss 11(2) and (3).

PROBATION OFFICER'S REPORT UNDER SECTION 9(3) OF ESTA REPORT

34. In terms of s 9(3) of ESTA the court requested that the necessary probation officer's report be submitted.

35. In his report of 26 June 2018 the probation officer claimed to have undertaken interviews which established that the respondent had been living on the farm since birth, that there were family graves on the farm and that Johannes who is the respondent's older brother had left the farm some time ago.

36. The probation officer then considered, as required under s 9(3), the availability of suitable alternate accommodation for the respondent and his family (as well as a place for the livestock), the effect of an eviction order on their Constitutional rights and whether an eviction would cause undue hardship to the respondent.

    He found that they had been in occupation on the farm for more than 20 years and had no other home. He also reported that the Tshwane Metro and the DRDLR had no alternative accommodation available and having been *"long term occupiers in terms of ESTA … they should not be evicted because they will find it difficult to build a house or to secure … suitable alternative accommodation since they are old"*

    The probation officer also pointed out that the respondent would suffer undue hardship as he will be left stranded with nowhere to go if evicted, is likely to be rendered homeless and will be unable to find an alternate place to graze his livestock.

37. The recommendation was that on the available information, and even if there is a termination of residence under s 8 of ESTA, an eviction should not be granted. If an eviction is to be granted then "*the responsible municipality and/or land owner must be ordered to provide the respondent and family with suitable alternative accommodation … and also … accommodate the livestock …"*

38. Aside from the recommendation regarding the inadvisability of an eviction order it is evident that the probation officer's report supported the factual averments made by the respondent, at least with regard to the length of time he had resided on the farm.

THE PARTIES' FURTHER AFFIDAVITS

39. In a further affidavit the applicant challenged the probation officer's impartiality on a number of substantive grounds, including that previously he had been involved in actively supporting those who were residing on the farm. It also contended that the probation officer exceeded his powers in making recommendations because the section in question requires only that he submits a report on certain identified matters. Anomalies between the respondent's affidavit and the facts set out in the report were also identified.

40. The court then issued an order which required the Tshwane Metro and the DRDLR to consider how they would be able to comply with their constitutional duty to provide alternative housing for the respondent and his family should an eviction order be granted. They were also directed to consider the re-location of the respondent's livestock.

41. An affidavit was deposed to on behalf of the DRDLR which stated that it has no available property and does not have the available resources to provide alternative housing.

    The DRDLR had however engaged a surveyor who claimed that the respondent occupied a little less than a third of the total farm. It proposed that, if agreeable to the applicant, the farm could be sub-divided and that it could acquire from the applicant the portion occupied by the respondent. The DRDLR claimed that it had resolved similar matters in this way and had provided the necessary finances.

42. The applicant challenged the DRDLR affidavit on the basis that it failed to deal meaningfully with the land at the Department's disposal and complained that it had accorded the respondent far more land than he in fact occupies.

    The applicant also pointed out that the DRDLR did not suggest that it had internal approval to put forward the proposal let alone that it had provided sufficient information.

The applicant concluded that the department's proposal was vague and that any negotiations would lead to an untenable situation as the applicant is supplying troughs of water and bales of feed to the respondent. The applicant's supplementary affidavit concluded that it was not willing to sell any portion of the farm or to negotiate such a sale with the Department.

43. The Tshwane Metro contended that they have no obligations towards ESTA occupiers beyond possibly providing temporary emergency accommodation. It would appear that by contrast s 10 (3) of ESTA envisages "*suitable alternative accommodation*" which is of a more permanent nature particularly bearing in mind that such an occupier would have been occupying a dwelling on the farm for at least 23 years.

HEARING ON 3 DECEMBER 2019- POINTS IN LIMINE

44. Adv Strauss raised three preliminary points. Firstly, that irrespective of the validity of the termination, the case will come down to whether or not adequate alternative accommodation is available. The second is whether the applicant complied with s 8(1) (e) of ESTA when terminating the respondent's right of residence and finally that the respondent is entitled to rely on PIE if there was not consent under ESTA.

45. As to the first point, the applicant had indicated in its affidavits that if there were material disputes of fact it would seek a referral to oral evidence. Since the issue is tied up with a factual analysis I was satisfied that evidence, if it was sought to be introduced, might affect the outcome. Consequently the issue cannot be determined as a straightforward legal point.

46. The second point is to be resolved in similar fashion. In determining whether a termination is just and equitable under s 8(1) a court must have regard to "*all relevant factors*". The section then identifies a number of specific considerations of which the fairness of the procedure under subsection (1) (e) is one of five.

Again for sake of completeness the wording of s 8 is repeated:

> *8 <u>Termination of right of residence</u>*
> *(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.*

Furthermore as I will indicate later, the fairness of the procedure followed must of necessity be case specific and a weighting must be given to it relative to the other factors. It may well be definitive in some cases while in others it may only be a factor carrying little or no weight. In short; whether it will be the silver bullet cannot be determined in isolation at this preliminary stage bearing in mind the extent of the disputed facts.

47. The respondent's final point *in limine* is that PIE is an available fall-back position if the presumption of consent is rebutted. The argument is a non-starter because the s 1 definition in PIE of an "*unlawful occupier*" excludes a person who occupied in terms of ESTA. The fact that the presumption of consent under s 3(4) may be rebutted does not detract from the fact that occupation is under ESTA. As I understand the scheme of ESTA it is only a person in occupation for less than a

year and, presumably without express or tacit owner consent, who falls outside its reach.

The profile of occupation relied upon by the respondent is that he falls under the provisions in terms of which he is irrebuttably presumed to have obtained consent either because he was in occupation on 4 February 1997 (under s 3(2) or had resided there continuously and openly for a period of at least three years (under s 3(5)). The profile of occupation which appears to be accepted by the applicant is that although neither express nor tacit consent to residence was given the respondent can rely on the rebuttable presumption contained in s 3(4) of ESTA.

Presumably the legislature, familiar with the distinctions established in the law of contract, readily found commonality between the creation of a ss 3(4) and (5) legislative consent and factual consent (whether express or tacit as *per* the definition section[10]). Such a distinction fits in well with the notion that if a person had continuously and openly resided on land for a sufficiently lengthy period of time a legal presumption of consent is established and can be supported on general common law principles with the expectation of being able to meet a constitutional challenge.

Section 3(4) and (5) in their terms equate the implied consent (being an agreement following as a matter of law) with a factual express or tacit consent.as provided for in the definition section.[11]

48. I therefore dismissed the points *in limine* and reserved the question of costs.

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[10] In terms of the s1 definition "" *consent " means express or tacit consent of the owner or person in charge of the land in question, and in relation to a proposed termination of the right of residence or eviction by a holder of mineral rights, includes the express or tacit consent of such holder"*

[11] In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532F-H Corbett AJA (at the time) said:

> *"The significance of this distinction is not merely academic. The implied term (in the above-defined sense) is essentially a standardised one, amounting to a rule of law which the court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation. The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term. (See Treital p 166). The court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so"*

In para 3 of the order I catered for the possibility that one of the parties may wish to refer issues to oral evidence by clarifying that:

> *"The matter will proceed on a date to be determined for the matter to be dealt with on the papers without prejudice to either party's right to have the matter referred to evidence or for the court to mero motu raise such issue subject to such order for costs as may be appropriate"*

HEARING IN MARCH 2020

49. Despite the contents of its affidavits indicating that a referral to oral evidence might be sought, at the main hearing the applicant confirmed that it would not do so and that I was to decide the matter on paper. The respondent adopted the same position.

50. Since the applicant sought final relief on motion, the evidence before me was confined to the version of the respondent, including admission he made, unless of course no genuine defence was raised or the other exceptional circumstances, as identified in *Plascon-Evans*, were present which would allow a court to reject the respondent's version.[12]

51. While there are a number of inconsistencies when comparing the respondent's version with that appearing in documents prepared a number of years earlier by or on behalf of his brother and mother, the applicant skirts dealing with facts

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[12] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – I

In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 55 Cameron JA (at the time) distilled the occasions when a court *"should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order'*. They are an uncreditworthy denial, a palpably implausible version and "*allegations or denials that are so far-fetched or clearly untenable".* The court cautioned at para 56 that "*the limits remain, and however robust a court may inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence"* .

which one expects it to know from, or can readily establish since, the time it acquired the farm.

Its own documents reveal that the Sibanyoni family had been settled on the farm. It produced no evidence, which one expects it could readily have done by going to the cemetery area on the farm where some of the graves had tombstones to determine if they were those of the respondent's family or ancestors.

Curiously, despite being on the farm for some two years, the applicant claims that no one on its behalf saw any livestock nor was otherwise aware of the physical presence of the respondent or his other family members. Moreover, without asking for a referral to evidence, the applicant should have appreciated that the respondent's version regarding his tenure was backed by the probation officer's report.

And if the applicant considered the probation officer biased, as it contended, then it could not simply rely on submissions made on paper and should have required that he be subjected to cross-examination. But that again would have required its own witnesses to testify under oath. By confining the case to paper the version of the respondent constitutes the evidence before me on which a decision must be taken.

52. It follows that the respondent;

a. can rely on the irrebuttable presumption created by s 3(5) of ESTA that he had been resident on the farm with consent;

b. must be taken to have been an occupier on the farm as at 4 February 1997 and therefore qualifies as an occupier who can only be evicted under s 9 provided the considerations set out in s 10 of ESTA, not s 11, are satisfied;

c. can rely on his own allegations supported by the DRDLR and the Tshwane Metro that there is no alternative suitable accommodation, that an eviction will gravely affect his Constitutional rights and subject him to not only undue but also grave hardship from which he is unlikely to recover having regard to his age and that (on paper at any rate) there is realistically no place for him to go. This of course has still to be contrasted with the interests of the applicant and the hardship to which it may be exposed.

It is also evident that the least invasive measure, in relation to both the applicant and the respondent, is that proposed by DRDLR; namely, of negotiating a settlement of part of the land. This is relevant to a consideration of the qualifiers in s 10(2) of ESTA if none of the circumstances set out in s 10(1) apply. It is also relevant to a consideration of the factors mentioned in s 10(3) (i) and (ii) which a court is obliged to consider when deciding whether it is just and equitable to evict the respondent and those who were wholly dependent on his right of residence.

The subsections to s 10 which have just been referred to read:

> *(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.

53. I mentioned earlier that the applicant was not interested in engaging in any form of negotiations, not even to insist on some form of reassurance that in principal the acquisition of a portion of the farm was possible or debate and objectively quantify the actual area utilised by the respondent.

WHETHER TERMINATION OF RIGHT OF RESIDENCE JUST AND EQUITABLE

54. The applicant relied on three notices as satisfying the requirements of termination of residence for the purposes of s 8 of ESTA

The one of 2 November 2017 did not terminate the right to reside but contended that the applicant had no right to occupy the premises, was in unlawful possession and was required to vacate within 14 days of receipt of the letter.

This letter cannot be described as a notice of termination of residence as required under ESTA. It is purely a demand to vacate property.

The second letter of 23 November fares no better. It records that despite the earlier notice the respondent had not vacated and was given another 30 days to do so.

The final one of 8 February 2018 describes itself as a notice of termination of the respondent's right to reside on the premises. The notice did not inform the respondent in so many words that consent to occupy was withdrawn. It however both terminated the respondent's residence by informing him that he had no basis for being on the farm and demanded that he vacate within two months failing which the applicant would apply to court for an eviction order. . The notice was also sent to the other occupiers, the Tshwane Metro and to DRDLR.

55. While I am satisfied that the respondent received the last notice and will assume for present purposes (but without deciding) that it terminated the respondent's right of residence on a lawful ground the question remains whether the termination is just and equitable as required under s 8 to enable the applicant to rely on the termination of residence to support an entitlement to an eviction order under s 9.

I have already pointed out that even if the occupier's right of residence was terminated on a lawful ground that alone is insufficient to establish an effective termination of that right for the purposes of ESTA. For this to occur s 8(1)

requires that in addition the court must be satisfied that it is just and equitable to do so.

56. One of the factors which the court is expressly required to take into account when considering this question is the fairness of the procedure followed by the owner in terminating a right of residence. This is required by s 10(1) (e), which in its terms accepts that the occupier need not necessarily be afforded an opportunity to make representations.

The wording of the subsection is clear on this point: It provides that when considering the fairness of the procedure followed by the owner a factor to be taken into account is;

> "*whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was taken to terminate the right of residence"* (emphasis added)

The first highlighted portion expressly acknowledges that it is not in every case that the affected person needs to be invited to make representations. By way of illustration; an unequivocal statement or conduct by the resident in the owner's presence may in appropriate circumstances obviate such a requirement- in which case the owner may stand or fall by his claim as to what transpired.

The second highlight is to the word "*effective"* which concerns the qualitative nature of the opportunity afforded relative to the circumstances. Not only does it connote an open mind if regard is had to the word "*decision"* but, in appropriate cases it also recognises that it is nonetheless sufficient to call for only written representations while in other cases that may be inadequate, if only because of literacy issues with regard to a language other than his or her mother tongue.

The second last highlight is below the word "*before"* which among other things attempts to ensure, in appropriate cases and as best as the legislature can, that

the affected person is afforded an opportunity to make representations and that the owner has an open mind which is susceptible to persuasion in respect of any relevant fact which must be considered under s 8(a) to (d).

In this regard the factors identified in subsection (c) may loom large since an owner is unlikely to be aware of hardship which the affected person (or an occupier through that person) is likely to suffer if there is a termination of residence, let alone be aware of the other interests which may be relevant.

57. It will be apparent from the facts I am entitled to consider on an application of *Plascon-Evans* that the applicant was required to afford the respondent an opportunity to make representations in an effective manner. This would have to take into account the difficulty the respondent was likely to have, and which the applicant should have anticipated, in communicating via correspondence alone.

I reach this conclusion for a number of complimenting reasons.

58. Perhaps the most important feature of this case is that the applicant came onto the land without any personal knowledge of how the respondent, or his family came to be there, or their historic attachment to the land bearing in mind that there was a clearly defined and maintained cemetery area near the cottages.

The applicant's lack of such knowledge is evident from its affidavits and its reliance on Viljoen[13]. If the applicant could only obtain the information from Viljoen in order to justify the termination, then *a fortiori* it was obliged to hear what the respondent had to say before terminating his residence. The applicant should also have appreciated that Viljoen had an interest in preserving the sale of the farm to the applicant at its price.

[13] The following statement by the applicant's trustee which appears in the founding affidavit is significant:

> "I do not know whether the first respondent occupied the farm through Johannes Government Sibanyoni or how long the first responded has been in occupation or who else occupies through the first respondent"

59. If the respondent had been afforded an opportunity to make representations then the applicant could have inspected the gravesite, could have established the identity of the respondent's father and mother, ascertained if adequate records had been maintained by Viljoen, or retained by the Trust during her father's lifetime, regarding the identity of the farm labourers or the payment of wages.

    This would have avoided the series of notices which relied on a common law ground of termination of residence when in fact residence and occupation, were determined, at the very least, by reference to s 3 (4) of ESTA if not to the Labour Tenants Act. It would also have required the applicant to engage more vigorously with Viljoen before deciding on terminating the respondent's right of residence.

60. Moreover the applicant could have used the opportunity to enquire about the hardship the respondent and his dependents might endure if residence was terminated. This may have assisted the applicant in enquiring into and proposing alternative accommodation and approaching the relevant housing authorities at an earlier stage.

61. I must now consider the effect of the failure to afford the respondent an opportunity to make representations before terminating his right of residence.

    Earlier I indicated that in any given circumstance it may be unnecessary to afford the occupier such an opportunity. There are likely to be cases where an opportunity was given to make representations but the decision was taken with a closed mind. In such a case and on an overview of all relevant facts, including the other factors mentioned in s 8(1), it may nonetheless be just and equitable to terminate the occupier's right of residence.

    In the present case, and for the reasons given earlier, the failure to adopt any procedure that would have enabled the respondent to make representations is significant. The seriousness with which this failure should be viewed is compounded by the applicant having demonstrated a completely closed mind in circumstances where, with no direct knowledge of the history of occupation, it

relied on the say-so of someone who had a real interest in disputing other occupier's entitlement to be on the farm if they still did not provide labour on the farm. This affects not only the factors mentioned in s 8(1) (e) but also 8(1) (b) as it also relates to the conduct of the parties giving rise to the termination.

62. Section 8(1) (c) requires a court to take into account the issue of comparative hardship. The evidence presented by the respondent together with that of the probation officer and the DRDLR, which as indicated earlier I am obliged to accept in motion proceedings, demonstrates the devastating consequences to the respondent if his right to residence is terminated.

63. By contrast the applicant avers that it requires the labourer's cottage for employees and the operational requirements of the farm, indicating that it intends to develop the area occupied by the respondent. It also avers that it provides water and fodder for the respondent's livestock.

As to the first consideration; there is no indication as to the nature of the development or why it has to impact on the entire area in question, nor the cost or other prejudicial consequences that may be occasioned if an additional labourers cottage was erected (bearing in mind the possible anomaly in both requiring the area for development and the dwelling for its own employees). The applicant also did not produce the agreement of sale for the farm which would indicate if any warranties were given regarding the rights of occupiers (a factor which may then lead to an enquiry as to whether the purchase consideration itself had been discounted as a consequence of families residing in the cottages.

The other factors raised by the applicant do not suggest that an attempt has been made to engage the respondent on them nor is there an explanation as to why the applicant is bearing the costs or why the respondent should not be left to his own devices in to procure.

A further consideration regarding respective hardship is why the purchase of the area in fact occupied by the respondent, or even a portion of it, cannot be purchased by the DRDLR for him or why the applicant cannot at least engage the

DRDLR to secure up-front commitments that would be reasonably expected in negotiations of this nature.

64. On the papers before me I am satisfied that the factors I have mentioned far outweigh any others and that whether cumulatively, or in one or two instances individually, the termination of the respondent's right of residence, even assuming that it is lawful (but on which it has become unnecessary to decide), is not just and equitable.

EFFECT OF FINDING THAT s 8 OF ESTA NOT SATISFIED

65. A finding that the provisions of s 8 have not been complied ends the matter.

It is now trite that two quite distinct requirements must satisfied before an eviction order can be obtained under ESTA: An applicant must first terminate the occupier's right of residence under s 8 *before* it is competent to give a notice under s 9 of an applicant's intention to obtain an eviction order.

66. In *Mkangeli and others v Joubert and others* 2002 (4) SA 36 (SCA)[14] the court at para 13 said in respect of sections 8 and 9 of ESTA:

> *"As to the remedy of eviction section 9(2) provides that a court may only issue an eviction order if certain conditions are met. The first such condition is that the occupier's right to residence must have been properly terminated under section 8. Other conditions prescribed by section 9(2) include the giving of two months' notice of the intended eviction application after the right to reside has been terminated under section 8 (section 9 (2) (d)). In a case such as the present, where the appellants took occupation of Itsoseng after 4 February 1997, section 11 also finds application. This section provides that a court may only*

[14] [2002] 2 All SA 473 (A)

grant an eviction order if it is of the opinion that it is just and equitable to do so. In deciding whether it is just and equitable to grant an eviction order the court must have regard to the considerations listed in section 11(3), but it is not limited to them. Included amongst these is the consideration "whether suitable alternative accommodation is available to the occupier" (section 11(3) (c)) and "the balance of the interests of the owner, the occupier and the remaining occupiers on the land" (section 11(3) (e)).

The Constitutional Court affirmed the two stage requirement in *Snyders v De Jager* 2017 (3) SA 545 (CC) at para 68[15]. Most recently the Supreme Court of Appeal did so again in *Aquarius Platinum (SA) (Pty) Ltd v Bonene and others* [2020] 2 All SA 323 (SCA) at para 13.

67. The reason for such stringent requirement was first explained by Brand JA in *Mkangeli* at para 17:

"From the synopsis of the provisions of ESTA it is apparent that the legislature, in an obvious endeavour to comply with the directives of sub-section 25(6) and (9) of the Constitution, intended to ensure security of tenure for occupiers by affording them comprehensive protection against eviction from the land upon which they reside. It seems to follow that as a corollary to this comprehensive protection of occupiers, the legislature intended to impose extensive limitations on any right to seek the occupiers' eviction from that land. This intention appears to be emphasised by the plain wording of sections 9(1) and 23(1) of ESTA. These sections provide:

"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"

and

"23(1) No person shall evict an occupier except on the authority of an order of a competent court."

[15] (2017 (5) BCLR 614

CONSIDERING SECTION 9 READ WITH ss 10 AND 11 IF SECTION 8 SATISFIED

68. The finding that the termination of the right of residence was not just and equitable under the provisions of s 8 makes it unnecessary to consider whether an order for eviction could pass scrutiny under s 10- let alone s 11.

69. However if I am wrong in respect of the application of s 8 to the facts before me, then I wish to indicate firstly that ;

    a. On both parties' averments the provisions of s10(1) do not apply;

    b. As a consequence, s 10(2) is triggered which means that a court has a discretion to grant an order for eviction provided it is satisfied that suitable alternative accommodation is available to the occupier, but if it is not then the provisions of s 10 (3) apply;

    c. The court cannot go behind the DRDLR and the Tshwane Metro's reports stating that such accommodation is not available

    d. In the result the provisions of s 10(3) apply.

    e. Section 10(3) has two parts.

       The first leg of a s 10(3) enquiry is contained in subsections (3) (a) to (c). In circumstance where suitable alternative accommodation is not available within the stipulated period of nine months, then satisfying the requirements of subsections (a) to (c) is a precondition before the second leg of the enquiry can be considered. In other words in the contemplated circumstances, if the first part is not satisfied then, on that ground alone, an eviction application will fail.

       Aside from the circumstances already discussed subsections (a) to (c) will be satisfied provided the dwelling in question is provided by the owner and that;

"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"

f. Provided the requirements of s 10(3)(a) to (c) are satisfied then under s 10(3)(i) and(ii) a court *may* grant an eviction order 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.

70. I have already found that the applicant failed to place sufficient information before the court to satisfy the requirement that the dwelling is required for its operational requirements as contemplated in s 10(3) (c). Even if it could, then for reasons already given, the respective interests of the parties and the hardship they will each be exposed to as contemplated under s 10(3)(ii) preclude an eviction of the respondent being just and equitable even if the termination of the right to residence itself was lawful and just and equitable.

The requirements under s 11 bear similarities to some of those under s 10, albeit that those under s 10 are more onerous. However where s 11 share commonality of features to s 10 they are key ones. Accordingly those same considerations overwhelmingly dictate that it would not be just and equitable to evict the respondent even if he had only become an occupier after 4 February 1997.

NATURE OF OCCUPATION OR TENURE

71. The respondent contended that he was a labour tenant. It cannot be disputed that he was born on the farm in 1964. He is now 56 years of age and his mother is 81 (being born in March 1939). The answering affidavit had attached to it photographs of a small family or communal cemetery. The respondent claims that 10 members of the Sibanyoni family are buried there. The graves range from what appear to be very old stone encircled traditional graves without a tombstone to a few with tombstones. A close up of one tombstone reveals that was erected in the 1950s.

72. The applicant contends that there is nothing to link the respondent to the persons buried and that the name on the close up photograph of the tombstone is not of a Sibanyoni. The problem I have is that, as explained earlier, it would have been easy for the applicant to have inspected all the tombstones. Presumably there should have been farm records as well.

73. The applicant also relied on an agreement Viljoen had concluded in November 2002 with Hendrick which recorded that he was granted a directorship in a close corporation, Yebo Sand CC, which had been formed only in that same year if regard is had to its 2002 registration number.

    The same agreement records that Hendrick had concluded an employment agreement with Yebo Sand in which the Tweefontein Trust must be taken to have an interest because the agreement between Hendrick and Viljoen (identified as owner/administrator of the farm) records that he was granted the right to reside on the farm for as long as he is part of Yebo Sand CC. In addition he was given the right to reside on the farm until his death subject to the condition that "*in the case of the farm being sold, … he agrees to make other arrangements for residence"*

74. Without explanation the agreement is contrived on a number of levels.

Firstly it is evident that Hendrick was already in occupation on a part of the farm and therefore it was unnecessary for the agreement to confer on him any right of residence in return for being appointed a director. Far from recognising that he had any existing right, the agreement is drawn up on the basis of excluding him from relying on having the rights of a labour tenant; it is drawn up on the basis that Hendrick was coming onto the land for the first time.

The agreement is also crafted in a way that would exclude him from relying on ESTA as the basis of his residence. In its terms it records that Hendrick came onto the land as a director of a legal entity pursuing a commercial enterprise associated with land. However an "*occupie*r" for the purposes of the protection afforded under ESTA excludes someone using the land or intending to use the land … "*mainly for … commercial or commercial farming purposes"* unless the person works the land himself.[16]

75. Moreover the applicant in its founding affidavit (supported by Viljoen) alleges that Hendrick had been a labour tenant and that it was only in terms of this very agreement that he had come to waive his rights under it.[17]

76. The concern I have is that the Sibanyoni family and possibly others had occupied the land for a very long time (judging from the very old stone graves), or had come onto the land and had established a symbiotic relationship with the landowner which, because of the apartheid laws, could not be recognised as conferring any rights in land, however elementary that might be.

Nonetheless the right of occupation was more than a simple personal right attendant on employment. The right to bury attests to that as does the succession of family members living on the land irrespective of whether each member contributed his or her labour on a full-time or part-time basis. It also enabled the occupier to live on the farm with his wife and children.

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[16] See s 1 definition of "*occupier"*

[17] Founding affidavit para 24

77. Whatever the origin of the Sibanyoni family's occupation or tenure on the farm, it is evident that it was more than simply a personal right while a family member was employed by the owner.

Apartheid laws had stifled an acknowledgement and development of rights which could have given effect to the true relationship between the parties; rather they enabled the landowner to reduce what were more concreter rights to mere personal ones[18]

I am concerned that the destruction of such rights, even if only those of a labour tenant wrought by apartheid have been replaced by agreements that bring about the same result; the conversion of more secure rights to occupy land into a purely personal right umbilically linked to the ongoing provision of labour or services. In particular there may be unfortunate parallels to be drawn with the case decided by the Constitutional Court in *Department of Land Affairs and Others v Goedgellegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 despite the fact that the reduction of rights previously enjoyed is now effected by agreements which may, not must, have been concluded at a time when the occupier was unaware of the true nature of the right he or she enjoyed. If so, this would have precluded the occupier from making an informed decision as to whether rights were in fact being gained or lost when signing agreements of this nature, unless of course there a meaningful consideration received. The agreement that Hendrick signed does not clarify this but opaquely refers to some other agreement of employment.

78. I have raised these concerns not only because of the structuring of Hendrick's agreement but also because when I previously sat in this court it was necessary, albeit only on a few occasions, to refer back cases which emanated from the Magistrates' Court under s 19 of ESTA. The reason for doing so was that settlement agreements which were being made orders of court had been concluded between an occupier and owner on terms or for a consideration which

[18] See generally *Department of Land Affairs and Others v Goedgellegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) ; 2007 (10) BCLR 1027

did not appear to take into account that the true nature of the residence arose from a labour tenancy or possibly in circumstances similar to the *Goedgellegen* case. This despite the defendant being represented by one of the law clinics.

APPLICATIONS AND THE HEARING OF EVIDENCE

79. Despite the court having a discretion in the interests of justice and expedition to hear evidence in a matter brought by way of application this does not appear to be an appropriate case to do so. This is because the applicant made a conscious election, for whatever reason, not to subject the respondent or its own deponents to oral evidence.

80. Evictions are generally proceeded with on motion and more often than not involve straight forward considerations. By their nature they require a more expeditious process. Nonetheless it appears that the courts are re-assessing the advisability of more readily allowing motion proceedings to be the default situation.

81. In the recent decision of *Lohan Civils (Pty) Ltd v Tokologo Local Municipalities* [2020] ZAFSHC 20 Opperman J at para 16 and 17, with reference to a number of well-known cases, reiterated the general concern about dealing with matters on motion where disputes of fact arise and the consequences if it is inappropriate. He found that in the matter before him there were no disputes of fact relevant to the real issues. Subsequently the learned judge in granting leave to appeal on the basis that there may have been a dispute which could have affected the decision to decide the case on motion opened with this observation:

> "*This case is a classic example of the complexity of the adjudication of some cases in proceedings by motion. Although the law is clear, the application thereof demands precautious handling by all involved; the applicants, the respondents and the courts*"[19]

[19] [2020] ZAFSHC 104 para 1

82. To a degree courts are damned if they do and damned if they don't proceed to determine a case on the papers alone; particularly in cases where an astute respondent argues that there is a dispute of fact but strategically does not itself seek a referral to evidence.

83. The present case demonstrates the extent to which a court has to engage in complex issues which are essentially value judgments as to what is just and equitable under at least two discreet enquiries (one under s 8, the other under s 10 and, in this case, a the third under s 11 of ESTA). The outcome, which is expected to be based entirely on paper, effectively forces the court's hand in an arena restricted to the selective facts produced by competing typewriters without the judge being able to seek clarity.

84. The court is placed in an intolerable position if, in cases where so many facts are placed in dispute as here, it is obliged to determine nuanced issues of what is just and equitable with reference to the numerous factors the legislature expressly requires it to take into account. More so where both party's versions raise concerns regarding the veracity of the underlying facts, but in the case of the respondent the concerns do not reach the *Plascon-Evans* tipping point- and even if it did then the applicant's version remains problematic in other material respects.

85. It may be contended that evictions under PIE are no more problematic. This is not necessarily so.

    Ordinarily in contested PIE applications the real issue comes down to a determination of the period the landowner is obliged to continue providing accommodation for an admittedly unlawful occupier until the responsible housing authority is obliged to assume its constitutional obligations of providing the occupier with shelter.[20]

[20] See generally *City of Johannesburg Metro Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC); 2012 (2) BCLR 150

By contrast cases brought under ESTA involve far more complex considerations precisely because a person residing on the land is deemed to have rights of tenure, and if the occupier claims to be a labour tenant then a court may be required to consider whether those rights should be extended and solidified into real rights of ownership under s 16 of the Labour Tenants Act.

Furthermore, the Constitutional Court has confirmed that both at the notice of termination phase and the eviction stage a court hearing an ESTA application is required to consider not just whether a formal notice has been given on lawful grounds but whether the termination is also just and equitable (in the case of a termination under s 8). In addition, and depending on whether the person had occupied before or after 4 February 1997, which itself may be contentious, issues regarding the availability of suitable alternative accommodation, the owners genuine operational needs as well as what is just and equitable are all tied up in determining whether an eviction order should be granted.

86. Cases under land right occupancy may therefore require far more complex considerations than simply a time line for allowing the landowner to evict before a municipal or provincial authority is obliged to provide the accommodation, bearing in mind that generally the occupiers may be indigent as discussed by Brand JA in *Mkangeli.*

87. Equally, there are many cases under ESTA and the Labour Tenants Act which are straight forward. An unscrupulous litigant can seek sanctuary under either of these Acts to string out a trial action indefinitely if an owner is restricted to a trial action. In such cases application proceedings are eminently suitable to effectively resolve the issues expeditiously and properly.

It appears that s 17 of ESTA took this into account and expressly recognised that matters may be brought either by way of action or on motion in accordance with the ordinary rules of procedure.

88. In short, in a number of instances ESTA cases may involve complex considerations of justice and equity which cannot be readily determined on paper

and may also require the direct involvement of the housing authorities. By the same token, even in these cases the complexities may only arise at the eviction stage of proceedings.

89. I suggest that it would advance the objectives of fairness, expedition and the interests justice between the parties if greater flexibility were allowed during the course of a matter so that cases can be initiated on motion and then be referred to the hearing of evidence, while appreciating that such evidence is likely to be wide ranging when dealing with what is "*just and equitable*" in the circumstances of the case.

90. In this manner the process of initiating proceedings via motion will still afford an expeditious resolution where the facts can be readily determinable, while more latitude can be given to proceed to an oral hearing once they become opposed.

The court would then have before it all relevant information aided by discovery, and properly tested through cross examination, in order to enable it to make the difficult value based decisions it is entreated to under the relevant provisions of ESTA and for that matter the Labour Tenants Act. It also overcomes the difficulty in meeting the expectations of the legislature because a court is compelled by the way the parties have chosen to fight the case to determine the outcome by reference to competing typewriters. This becomes of acute concern for a judicial officer because an intrinsic right to adequate housing is in issue and the proper weighting of what is just and equitable in the circumstances may require a more nuanced approach and a fuller understanding of the underlying facts than may be possible when confined to papers which are on occasion prepared under considerable pressure.

91. In the present case the dismissal of the application does not mean that the applicant is precluded from again giving notice of termination or again proceeding with eviction. The fact that it had predetermined the right to terminate without hearing the respondent may in due course attract a lesser weighting in relation to other factors that need to be considered.

92. In this regard, the applicant has shied away from the DRDLR offer to negotiate for the acquisition of part of the farm for the Sibanyonis. The manner in which the DRDLR has been negotiating the acquisition of portions of farms in what it claims are similar situations is attractive, accords with the objectives of ESTA as set out in its preamble and *inter alia* s 4(1)(b), and should be explored as part of a *bona fide* attempt to deal with what are potentially intractable situations in rural or peri-urban areas.

93. Finally it is necessary to clarify that I have deliberately not determined whether the respondent is or is not a labour tenant

COSTS

94. It is necessary to consider the reserved costs order made pursuant to the dismissal of the points *in limine*.

    The one point regarding the application of PIE was unrelated to whether oral evidence could affect the outcome. However it is evident that had the applicant at that stage elected not to refer to oral evidence one or both the other points may well have been determinative of the case at that stage.

95. I therefore consider that the respondent, although unsuccessful with its preliminary points, should not have been subjected to yet further costs which could have been avoided if the issues which determined the eventual outcome were allowed to be ventilated absent the spectre of a referral to oral evidence. .

96. Accordingly the reserved costs should follow the result.

ORDER

97. It is for these reasons that the application was dismissed with costs including the reserved costs of 12 December 2019.

(Signed)

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SPILG, J

DATES OF HEARINGS:	3 and 6 December 2019, 9 and 23 March 2020
DATES OF ORDERS:	12 December and 25 May 2020
DATE OF JUDGMENT:	5 August 2020
FOR APPLICANT:	Adv G F Porteous
	Cliffe Dekker Hofmeyr
FOR 1st RESPONDENT:	Adv HJ Strauss
	Marivate Attorneys Inc
FOR 2nd RESPONDENT:	Adv S Jozana
	Brian Ceylon Attorneys
FOR 3rd RESPONDENT:	Adv K Toma
	State Attorney, Pretoria