IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

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

12/8/2020

BEFORE COWEN AJ

CASE NO: LCC 31/2019

In the case of:

DELTA 200 PROPERTIES (PTY) LTD Applicant

and

PETER ALEXANDER DALE First respondent

TRACY DALE Second respondent

(and any person occupying the property under the First and / or second respondent, including the Dale Family and / or any person claiming a right of residence on Portion 6 of the Farm Brakkefontein No 32, in the City of Cape Town, Division Cape, Western Cape, through the first respondent and / or the second respondent)

CITY OF CAPE TOWN Third respondent

HEAD OF THE RELEVANT PROVINCIAL OFFICE OF THE DEPT OF RURAL DEVT AND LAND REFORM Fourth respondent

Dates of hearing: **13 February 2020 and 23 March 2020**
Date of Supplementary submissions: **3 April 2020**
Date of judgment: **12 August 2020**

JUDGMENT

1. This is an application in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA) to evict the Dale family from their home. Their home is situated on a property known as Portion 6 of the farm Brakkefontein No 32, City of Cape Town, Division Cape, Western Cape (the property). ESTA is legislation that affords secure tenure to persons who reside on land that they do not own, as envisaged in section 25(6) of the Constitution.[1] It affords occupiers '*the dignity that eluded most of them throughout the colonial and apartheid regimes*.'[2]

2. The applicant, Delta 200 Properties (Pty) Ltd (Delta), is the registered owner of the property. The property is some 176 hectares in extent and is zoned for agricultural purposes. Its primary commercial asset is an airstrip. Delta purchased the property for R4 million at a public auction in March 2016. The property was transferred to Delta a year later in March 2017. The applicant is seeking an order evicting the Dale family from the property (and any person who occupies through them) within 30 days after an order is granted, and various ancillary relief. The first and second respondents are Mr Peter Dale and Mrs Tracy Dale respectively, their four children and any other person occupying the property through them. Their home is a large thatched dwelling (350m²) with access to a second dwelling.

[1] *Daniels v Scribante* 2017(4) SA 341 (CC) (Daniels) at para 13. Section 25(6) provides: '*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*.'
[2] Id at para 23.

3. The third respondent is the City of Cape Town (the City). The fourth respondent is the head of the relevant provincial office of the Department of Rural Development and Land Reform.

Litigation background

4. The application was instituted on 20 March 2019. On the court's request, and on 17 July 2019, the fourth respondent's Mr Mbebe (Acting Director: Tenure Reform Implementation) supplied a report in terms of section 9(3) (the section 9(3) report) and the City provided a housing report dated 31 July 2019 (the City's housing report). Mr Dale deposed to an answering affidavit on 27 May 2019. He had access to limited legal representation at the time.[3] Mrs Dale did not file a separate answering affidavit. The applicant filed a replying affidavit on 11 June 2019.

5. The matter came before me in Cape Town on 13 February 2020. Mr Nel appeared for the applicant and Mr Dale appeared personally. On 12 February 2020, Mr Dale delivered an application to have the application dismissed, struck from the roll alternatively postponed *sine die* pending the outcome of an urgent spoliation application instituted on 9 February 2020. At the commencement of the hearing, Mr Dale raised various other matters including the impact on the eviction application of other related ongoing proceedings. The applicant opposed the 12 February 2020 application. During the course of argument, I raised with the parties my independent concerns that a) the court was not seized with adequate information to determine the application in light of the Constitutional Court decision of *Occupiers of Erven 87 & 88 Berea v Christiaan*

[3] Mr Tim Dunn of Tim Dunn Attorneys assisted him in the eviction proceedings with pre-litigation correspondence, filing of documents and certain procedural matters and advice. He was not on record when the litigation commenced. Mr Dunn represented Mr Dale in related litigation. On the information before me this was funded in substantial measure by Mr Dale's father.

Frederick De Wet NO,[4] and b) Mr Dale and his wife were not legally represented in circumstances where complex issues arose. After hearing the parties, and upon Mr Dale's confirmation that he would indeed prefer his family to be represented, I postponed the application, and the application of 12 February 2020, until 23 March 2020 to enable the Dales to obtain legal assistance and to enable the parties to supply the court with further information relevant to the exercise of its discretion, including on the impact of the related proceedings raised by Mr Dale.[5] To the extent that Mr Dale had contended in the spoliation application that he did not have access to his full set of papers in this application, Mr Nel assured the court that his attorney would ensure that all papers were made available as required.

6. Following the adjournment, Mr Dunn agreed to act on Mr Dale's behalf *pro bono* and placed his firm on record. The Cape Bar Council assisted by identifying counsel willing to represent Mr Dale, also on a *pro bono* basis. The assistance is noted with appreciation.

---

[4](CCT108/16) [2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC) (8 June 2017) (De Wet) at paragraphs 39 to 51.

[5] I specifically requested further information on the following matters:

1. Full and further information relevant to the circumstances and interests of the children of the first and second respondents;
2. Full and further information relating to the financial position of the first and second respondents and the manner in which they can and do support themselves, including but not limited to the extent to which they are supported by other family members and any right or interest, direct or indirect, that the first and second respondents have in any other trust or entity;
3. The employment history of the first and second respondents and full and further information relevant to their ability to obtain employment or otherwise generate an income.
4. Full and further information relating to all steps taken by the first and second respondents in respect of possible suitable alternative accommodation.
5. Any other matter germane to the exercise each of the Court's discretions in terms of the Act. (The parties' attention is specifically directed to section 8, section 9, sections 10 and 11 and section 12.)

In providing the above information, I directed the first respondent to supply to the Court:

1. A copy of any order obtained or purportedly obtained by consent in proceedings involving the South African Revenue Services together with any information in respect thereto that he considers relevant to the issues before the Court or raised by the applicants during the hearing;
2. With reference to the photographic evidence before the Court, further details relating to the history of his occupation of the property and more specifically relating to the specific premises he occupied at what points in time together with any information in respect thereto that he considers relevant to the issues before the Court or raised by the applicants during the hearing;
3. Further or updated information concerning any related court proceedings that he regards to be germane to the application.

7. Pursuant to the 13 February 2020 order, Mr Dale delivered a further affidavit dated 6 March 2020 and supplementary submissions which he drafted himself. The applicant delivered a further affidavit on 12 March 2020 and submitted an updated practice note and supplementary submissions on 16 March 2020. Mr Dale also sought to introduce as evidence certain further information (not on affidavit) by way of e-mail of 19 March 2020.

8. In the interim, Covid-19 emerged as a global pandemic and domestic disaster. In the result the hearing of 23 March 2020 was convened remotely by SKYPE. The parties did not object to this procedure. The applicant was again represented by Mr Nel. Mr Dale was at that stage represented by Mr Montzinger of the Cape Bar, acting *pro bono*. The court appreciates Mr Montzinger's contribution to the administration of justice.

9. At the commencement of the hearing, Mr Montzinger requested a further postponement of the application because he had been instructed only recently. There was no formal application. After hearing argument from the parties, I refused the postponement. I did so as, aside from the fact that no formal application had been brought, the interests of justice would not be served by yet a further delay in the hearing of the matter. While sympathetic to the position of Mr Montzinger, the delays in instructing him cannot be attributed to the applicant and were unexplained. Mr Montzinger further confirmed that he was in a position to argue the matter. The matter had already been postponed once, the affidavits that were to be relied upon had been filed, and I took the view that I could accommodate Mr Montzinger's position by allowing him to file comprehensive supplementary heads of argument after the hearing, which he then did on 3 April 2020.

The application of 12 February 2020

10. The applicant opposed the application of 12 February 2020.[6] The founding affidavit in the application was the founding affidavit filed in support of the spoliation application instituted in the Cape High Court in respect of a second dwelling on the property and various movable property. Questions about the regularity of such a process aside, it is difficult to understand on what basis the content of the spoliation application would ground the relief sought. On the contrary, the spoliation application is predicated on an assertion that this court is seized with and must determine the Dale respondents' rights of occupation. At the commencement of the hearing, Mr Montzinger responsibly conceded that the eviction should proceed on its merits and that the spoliation application did not provide any basis for the relief sought. The 12 February 2020 application is dismissed. While the application was ill conceived, Mr Dale was apparently unrepresented when instituting it and as matters transpired any costs incurred by Delta in that application would be minimal. For these reasons and because the evidence in the spoliation application provides corroborative value in the eviction application on matters germane to the exercise of this court's discretions, I am of the view that I should make no order as to costs in the 12 February 2020 application.

Issues for determination in these proceedings

11. ESTA only applies to certain land. There is no dispute that the property is such land.[7] Under section 9 of ESTA, a court may make an order for the eviction of a person if the

[6] The relief sought is referred to in paragraph 5, being the dismissal, striking off or postponement of the application pending the outcome of the spoliation application.

[7] Section 2 provides that it applies to '*all land other than land in a township established, approved, proclaimed or otherwise recognized as such in terms of any law, or encircled by such a township or townships*' but includes agricultural land and land occupied prior to the establishment of the township, in respect of such occupier.

requirements of section 9(2) are met.[8] There is no dispute that the conditions in section 9(2)(b) and (d) have been complied with.

12. The issues that arise for decision in this application are:

12.1. Whether the persons sought to be evicted are "occupiers" as contemplated by ESTA and entitled to its protections;

12.2. Whether any occupier was an occupier on 4 February 1997. If so, section 10 of ESTA is applicable. If not, section 11 of ESTA is applicable.

12.3. Whether any occupiers' right of residence was lawfully terminated in terms of section 8?

12.4. If so, whether section 10, or, if applicable, section 11 of ESTA is complied with?

---

[8] **Limitation on eviction**

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

(2) A court may make an order for the eviction of an occupier if—

(*a*) the occupier's right of residence has been terminated in terms of section 8;

(*b*) the occupier has not vacated the land within the period of notice given by the owner or person in charge;

(*c*) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and

(*d*) the owner or person in charge has, after the termination of the right of residence, given—

(i) the occupier;

(ii) the municipality in whose area of jurisdiction the land in question is situated; and

(iii) the head of the relevant provincial office of the Department of Rural Development and Land Reform, for information purposes,

not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.

12.5. Whether Mr Dale's alleged common law *lien* provides a defence to his eviction. application and, if his eviction is to be ordered, whether the court should order compensation for improvements in terms of section 13 of ESTA?

12.6. If an eviction is to be ordered, what is a just and equitable date for eviction?

The evidence

Approach to the evidence

13. It is well established that an applicant for eviction in terms of ESTA must set out in their papers the necessary factual averments to comply with ESTA before an eviction can be granted and must adduce the necessary evidence to make out a case in relation to every provision to which the court must apply its mind in deciding whether an eviction order would be justified.[9] In *Stargrow,*[10] which binds me, it was held that the applicant bears the onus of proof to prove all the requirements, including an allegation in the first instance that a person is not an ESTA occupier. This Court held:

> '*... if an applicant, in an application for eviction under ESTA, contends in the first instance that the respondents are not ESTA occupiers, it needs to allege and put up evidence (at least of a prima facie nature) of this. Such prima facie evidence would generally call for an answer on the part of the respondent which would place an evidentiary burden upon them. If not effectively answered, the prima facie evidence put up by the applicants would become sufficient proof that the respondents are not ESTA occupiers.*'

14. However, insofar as the issues for determination in this case require the court to make a judgment on what is just and equitable, *Stargrow* must be read subject to the Constitutional Court's decision in *PE Municipality.*[11] In *PE Municipality,* Sachs J for a unanimous court cautioned that when a court is having regard to the circumstances

[9] *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005(4) SA 506 (SCA) at para 15.

[10] *Stargrow v Ockhuis* 2018(1) SA 298 (LCC) at para 52 to 54.

[11] *PE Municipality v Various Occupiers* 2005(1) SA 217 (CC) (PE Municipality) at para 32.

relevant to making its judgment on what is just and equitable (in that case in respect of an eviction order under the PIE Act),[12] the obligation on a court is to give the facts and circumstances due weight and '*technical questions relating to onus of proof should not play an unduly significant role in its enquiry.*'

15. These are motion proceedings. The facts found in the affidavits must be determined based on the principles in *Plascon-Evans*[13] and *Wightman*[14]. Although there are disputes on the papers, the core material facts are either common cause or can be determined in light of these principles. I also have regard to the further information and views contained in the section 9(3) report, the City's housing report and the affidavits supplied in March 2020 pursuant to the 13 February 2020 order (the March 2020 affidavits).[15] I have limited regard, to the content of the 12 February 2020 application and Delta's answer thereto (part of its March 2020 affidavit). I do so in light of the Constitutional Court decisions in *De Wet,* referred to above, and *PE Municipality,* section 32(3) of the Restitution Act and this court's decision in *Mlifi.*[16]

The evidence

16. Mr Dale was born in October 1959. He turned 60 in October 2019, seven months after the application was instituted. Mr Dale is married to the second respondent, born in 1970, now 49 years old. Mr and Mrs Dale moved from Johannesburg to Cape Town in

[12] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

[13] *Plascon-Evans Paints v Van Riebeeck Paints* 1984(3) 623 (A) (Plascon Evans) at 634H-635C

[14] *Wightman t/a JW Construction v Headfour (Pty) Ltd and ano* 2008(3) SA 371 (SCA) (Wightman), para 13.

[15] *De Wet, supra. Furthermore, t*his court is vested with inquisitorial power, in terms of section 32(3) of the Restitution of Land Rights Act 22 of 1994 (*Restitution Act*). *Mlifi v Klingenberg* 1999 (2) SA 674 (LCC) (*Mlifi*) at para 104, 105, 111 and 112.

[16] *PE Municipality,* supra, at para 32.

about 1992. They have four children who reside with them on the property, three of whom are still minors. Their eldest child James, born in 1999, is 20 years old. A friend of theirs, Mr van Heerden, stays with them and provides security. It seems that the Dales permit other persons, a 'Tia' and (from time to time) her partner, a Mr de Jager, to stay as well.

17. As mentioned, the property is some 176 hectares in extent and its primary commercial infrastructure is an airstrip. The property is traversed by various access roads and has various structures on it. The thatched dwelling is located near the airstrip. There is a second smaller residential dwelling not far from the main dwelling, which the Dale family, notably James, have also used for residential purposes but which has fallen into a state of disrepair and limited use. On the information before me, only the main thatched dwelling is currently occupied for residential purposes, but some of the Dales' belongings, including James', remain in the second dwelling.

18. Mr Dale alleges in his answering affidavit that jointly he and his wife, collectively, earn under R13 650 per month but he omitted to provide any further detail. The section 9(3) report revealed that Mrs Dale was working as a receptionist for a doctor in Cape Town. The March 2020 affidavits confirm that Mrs Dale is working as an assistant to a gynaecologist. Her basic salary is just over R9500 per month and her net salary (after PAYE and UIF) is just under R9000 per month.

19. Mr Dale pleads that he is unemployed, and being white, male and over 60, unable easily to find work. This is disputed by the applicant[17] who explain in the March 2020 affidavits that following certain enquiries, it appears that Mr Dale sells electric bikes and

[17] The applicant initially admitted Mr Dale's status as unemployed in reply but in the March 2020 affidavits, withdrew the admission as an error, alleged that it had no personal knowledge of his position but provided further information to the Court that it had obtained on investigation revealing economic activity on his part.

accessories online, and has, as recently as 2018, worked at a call centre and as a market trader. Mr Dale explains in the March 2020 affidavits that he tries to sell products online and makes between R30 000 and R40 000 per year this way (which equates to between R2500 to R3333 a month). Divergent views on Mr Dale's employability or ability to produce income are reflected in the City's housing report and the section 9(3) reports. On the information before me, Mr Dale has a variety of skills and experience in business, corporations, sales, building, property development and aviation, even grape farming and wine making. In these circumstances, and while on *Plascon Evans* and *Wightman* I accept the evidence that Mr Dale is unemployed, I cannot agree with the view that Mr Dale is unable to produce income at this stage of his life. Not only does he admit that he does, but he has the good fortune of having a variety of skills and experience that can be put to productive use. It is furthermore notable that he apparently has directorships in several active companies which he has not dealt with in his evidence. While I accept, on the principles of *Plascon Evans* and *Wightman*, that Mr Dale does not currently earn any income from any such entities, this confirms he is an enterprising person with experience in business.

20. James is a student at Stellenbosch University. He is in his second year of a 4-year visual arts degree. His fees are partly funded by his paternal grandparents and partly funded by the National Student Financial Aid Scheme. The three minor children, all boys, are still at school. The Dale's 16-year old son is in Grade 11 at Parklands College High School and doing well. His (substantial) fees are covered in part by a scholarship and in part by his paternal grandparents. James' parents transport him to school each day and are concerned about any disruption to his schooling as he reaches Grade 12 and in view of the importance of Grade 11 results for access to tertiary institutions. The Dale's 14-year

old son is in Grade 9 and a weekly boarder at SACS. His paternal grandfather also pays for his fees. His parents are concerned about the disruption to his stability that would arise from an eviction. While he is doing reasonably well at school, he is facing personal challenges as a result of the family's current financial and other struggles. The Dale's 9-year old son is in Grade 3 at a local public school, Van Riebeekstrand Primary School which is located about 4km from their current residence. He is doing well at school. His parents are similarly concerned about personal disruption to him flowing from any eviction. On the information before me, his education is also supported by his paternal grandparents. The section 9(3) report concludes that an eviction will disrupt all of the children's education if no provision is made to mitigate disruption.

21. Mr Dale's parents are now very elderly and live in Australia. Over and above supporting the children's education, Mr Dale's father gifts the Dales an amount of some R26 000 a year,[18] from a (decreasing) South African annuity. Save for *ad hoc* assistance from time to time, Mr Dale's parents are unable to afford further financial support. Mrs Dale's mother, also very elderly, is a pensioner living nearby in Bloubergstrand. She assists the Dale family by cooking some meals for them and providing access to her electrical facilities (eg laundry) in circumstances where their thatched dwelling only has limited power. Her apartment is small. The rules of the body corporate preclude the family from residing there.

22. Mr Dale explains that his family lives month to month. He and his wife are only able to cover food and transport costs (using a borrowed vehicle), he says, and have no current investments and own no property. They cannot afford any rented accommodation, he

[18] This translates into approximately R2166 per month.

says. He says that in the coastal area where he lives, a lease on a small apartment would cost in a region of R12 000 to R15 000 a month which would not compare favourably with the large home they currently occupy in pleasant rural surrounds.

23. Mr and Mrs Dale have lived on the property for a very long time. After moving to Cape Town, Mr Dale purchased the property in 1994. He purchased it through a close corporation, subsequently converted to a private, then public company, Aeronastic Properties Limited (Aeronastics).[19] Mr Dale is an erstwhile director, shareholder and employee of Aeronastics, which is now in liquidation.

24. Aeronastics used the property as an airstrip and flying school and, at a time it seems, to grow grapes. Over the years, the property was improved: the airstrip, roads and various other infrastructure was built on the property and power lines installed. Mr Dale asserts that as a result of its development, the value of the property increased considerably. The court has been supplied with a valuation dated 13 June 2016 reflecting the market value at R89 500 000. Aeronastics leased a demarcated area and the use of the airstrip to third parties to conduct parachuting activities and a flying school. A lease agreement was concluded with Skydive Cape Town CC (Skydive), which built a hangar, and some other tenants leased space. Mr Dale explains that in the early 2000s, the City planned to develop an adjacent property as a landfill site which resulted in development on the property being halted and the Dale family expected that the property would be expropriated in due course. In about 2010, a decision was taken to move the landfill to another site.

[19] Registration no 2001/011967/06. Aeronastics was formerly a close corporation, converted in 2001.

25. One question for determination in this application is whether Mr and Mrs Dale were ESTA occupiers on 4 February 1997. The precise date on which Mr and Mrs Dale started to reside on the property is not known. While Mr Dale alleges in his answering affidavit that they have lived there continuously since 1994 this is not borne out by the documentary evidence Mr Dale attaches to his papers, which also shows that the Dales had a residential address in Cape Town during the early years. The photographic evidence before me shows that a small and modest log cabin had been constructed in 1995 / 1996. I specifically requested Mr Dale to clarify the history of his residence in the February 2020 order.

26. Mr Dale expressly declined to do so. He contends that the date on which his family started to occupy any residence is irrelevant as they have been using the land as a whole since 1994. His failure to provide the information supports the conclusion that he and his wife only resided in their current dwelling after February 1997.[20]

27. Mrs Dale explains in the March 2020 affidavits that they lived temporarily in a log cabin they built on the property while her husband developed the property. Mrs Dale was working two jobs in Cape Town at the time. In 1992, Mr Dale purchased the Feathers Gallery at the Waterfront which he sold only in 2001. Mrs Dale explains that it was only after the birth of her second child (2003) that she stopped working in Cape Town and worked for Aeronastics managing the rental income from the various tenants. The photographic evidence before me shows that building of the large thatched dwelling in which the Dale family currently resides only commenced (with foundations) some time in

[20] Troublingly, further photographs supplied (without the court's leave, by e-mail and not on affidavit) purport to date 'kids' swimming in front of their current home in 1995/1996. However, their own children had not yet been born and the photographic history that Mr Dale provided on affidavit directly contradicts this dating.

1997 and it was still being built in 1998. Before this time, any use and development of the property was for commercial purposes.

28. While Mr Dale started to develop the property after its purchase in 1994, I find that he only commenced building the thatched dwelling after February 1997. Mr and Mrs Dale started to live there in or after 1998. Mr and Mrs Dale clearly regard the thatched dwelling as their permanent home and their 'retirement plan' and it is the only home that their children have known. I accept that prior to 4 February 1997, Mr and Mrs Dale spent some time in the 'log cabin' which Mr Dale built somewhere on the property to enable him to develop the property. However, on all the evidence before me and in view of Mr Dale's refusal to respond to the request for information, I find that the log cabin was probably only a place of part-time abode at least before the Dales started to build the thatched dwelling.

29. Aeronastics started to run into difficulties in the late 2000s. It is common cause that its challenges flowed from a transaction concluded in 2009 between Aeronastics and a company known as Summer Daze Trading 709 (Pty) Ltd (Summer Daze). The transaction entailed the purchase by Aeronastics of 7 helicopters and various tooling, equipment, components and spares for a purchase price of R100 million plus VAT. Aeronastics paid by issuing 100 of its shares to the seller. Aeronastics then claimed a refund of the VAT component of the purchase price – R14 million. However, the South African Revenue Services (SARS) adopted the view that the transaction was a scheme to obtain an undue tax benefit as contemplated by section 73 of the Value Added Tax Act 89 of 1991[21] and refused the refund in full. Instead, SARS assessed Aeronastics to have a

[21] Section 73 is titled 'Schemes for obtaining undue tax benefits'.

substantial VAT liability as at November 2009 (some R28 million). Aeronastics objected, unsuccessfully, and then pursued a costly appeal in the Tax Court, which granted an order, ostensibly by agreement, on 28 August 2013.[22] Mr Dale contends that he did not authorize the settlement and has never received a copy of the order. With new legal representatives, but only nearly a year later, Aeronastics apparently applied to rescind the order granted of 28 August 2013. On the information before me, it has not been rescinded.

30. On 2 March 2011, SARS obtained judgment against Aeronastics in the sum of R47 945 101.57 which included penalties and interest. Aeronastics failure to pay the VAT liability ultimately led to its final liquidation, at SARS' instance, on 28 August 2014.[23] Aeronastics had sought a dismissal or postponement of the liquidation application due to the ongoing dispute between Aeronastics and SARS regarding the November 2009 VAT liability. Its submissions were rejected by Cossie AJ in part, but not solely, on the authority of *Commissioner, SARS v Hawker Air Services (Pty) Ltd* 2006(4) SA 292 (SCA) which accepts the application of the 'pay now, argue later' principle in an application for liquidation.[24] Three efforts to appeal the liquidation order

[22] The order made was an order dismissing the appeal, recording confirmation of SARS VAT assessment for the 04/09 VAT period and ordering Aeronastics to pay the costs of the appeal including the costs of two counsel.

[23] SARS applied for Aeronastics' liquidation on 24 May 2013. Aeronastics was placed in provisional liquidation on 26 February 2014.

[24] See para 17. The constitutional validity of the 'pay now, argue later' principle was upheld by the Constitutional Court in *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* (CCT3/00) [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) (24 November 2000)

failed, first in the High Court, then the Supreme Court of Appeal and then the Constitutional Court.[25]

31. Aeronastics' liquidators are Messrs Cloete Murray NO and Moses Mack Baloyi NO. The property was placed on public auction on 26 February 2016. The applicant's bid (R4 million) was accepted on 17 March 2016.

32. Mr Dale (either alone or through other entities) has pursued various efforts to place Aeronastics in business rescue, without success.[26] The commencement of a business rescue application delays a liquidation process as it suspends liquidation proceedings in terms of section 131(6) of the Companies Act 71 of 2008.[27] In terms of section 134 of the Companies Act there are strict controls over the disposal of any property of a company during the course of business rescue proceedings. A third application to place Aeronastics in business rescue ensued at around the time that the property was registered in the name of the applicant in March 2017. Mr Dale believes that the transfer was unlawful and is tainted by fraud. He has lodged a criminal complaint at the Melkbos Police Station in this regard. The third business rescue application was withdrawn on 16 May 2019.

33. Shortly before the property was transferred to Delta, the applicant and its lessee Skydive[28] obtained an interdict against Mr Dale in the Western Cape Division of the High Court

[25] An application for leave to appeal was initially dismissed on 26 June 2015. An initial petition to the Supreme Court of Appeal was rejected for want of compliance with that Court's rules on 24 July 2015. A second petition was refused on 17 November 2015. An application for leave to appeal to the Constitutional Court was refused on 20 March 2016.

[26] One application was made through another entity of Mr Dale's Maverick Transport on 6 November 2013. This was dismissed on 16 February 2014. A second application was instituted on 31 May 2016 after the applicant purchased the property. This application was dismissed on 25 October 2016. Application for leave to appeal was dismissed on 14 March 2017.

[27] Section 131(6) provides: 'If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until – (a) the court has adjudicated upon the application; or (b) the business rescue proceedings end, if the court makes the order applied for.

(per Saldahna J). The interdict restrains Mr Dale from interfering in any way with the use by Skydive of the airfield on the property. It was granted in circumstances where Mr Dale was found to have parked his motor vehicle across the airstrip preventing its use. The applicant alleges that the circumstances giving rise to the interdict and the need to obtain it constituted a fundamental breach of the relationship between the parties and rendered it practically impossible to remedy. The relationship between the parties has not been restored, but has further deteriorated. The applicant is of the view that Mr Dale has used litigation repeatedly to thwart and delay its lawful enjoyment of the property over many years and it wants peaceful possession of its property.

34. Mr Dale on the other hand disputes that the relationship is broken down. He contends that he has sought tirelessly to defend what he regards as a malicious and groundless attack on his business and his family. Mr Dale believes that he still owns and lawfully retains the airstrip and the infrastructure he built on the property and that he needs to continue to have access to it in order to make a living. He pleads that the sand value alone is R166 million. He believes he is entitled to remove the airstrip and other infrastructure if he and his family are evicted. He does not accept that he did anything untoward that warranted the grant of the interdict by Saldahna J. He says further that the applicant's directors are responsible for troublesome conduct including conduct that has invaded the Dales' privacy and is verbally threatening. They have been vilified on social media, he says. He accused Delta of deprived his family of access to basic services including water and electricity.

[28] Both were applicants in the matter (Case no 15642/2016). The applicant in this application was the second applicant in circumstances where it had taken occupation of the property upon conclusion of the agreement of sale paying occupational rental.

35. Mr and Mrs Dale both say that there is a long-standing historical relationship with 'the applicant', through the lessee SkyDive which has operated on the property for many years. They explain that many years ago, Aeronastics acted generously towards Skydive, when SkyDive faced financial ruin following a fire. Aeronastics offered six months' rent free and then low gradually escalating rental for a recovery period. The Dales believe the applicant should show generosity in return. While the Dales establish an apparent overlap of at least one director of SkyDive and the applicant, a Mr Pretorius, the applicant disputes any relationship with the Dales and, asserts its corporate identity in these proceedings.

36. The applicant alleges, and it is not disputed, that the Dale family and others pay no rental for their occupancy and have paid none throughout the period of the applicant's ownership of the property. They want to use the property for their business activities and without interference. The thatched dwelling, they say was not built according to planning requirements and is dangerous. They want it demolished. They want to make way for new hangars and infrastructure around the water and electric supplies that they have installed. They want the freedom to exercise their legal rights as the owner of the property peacefully and contend that the Dale family's wish still to pursue their long term and retirement plans to live in the thatched dwelling is no defense. The Dales say that given the size of the property, the applicant can pursue its activities without the family being evicted.

37. On 28 July 2017, some four months after the farm was transferred to the applicant in March 2017, the applicant's attorney, Mr Hoffman, wrote to the Dale respondents finally to terminate their rights of residence and give notice to vacate. The letter was addressed to Mr Dale, Mrs Dale, the children and others residing with them on the property. In that

letter, the respondents were afforded two weeks to make representations to the applicant why they should be allowed to continue to reside on the property and not be evicted and were told that the representations would be considered to establish whether the notice would be amended. The letter recorded that the right of occupation had terminated once the property was sold and transferred to the applicant, which had never given the family the right to stay on. Rather, the family had been informed by Aeronastics' liquidators that their right of occupation would come to an end when the property was sold, and did so terminate. The letter further recorded that the relationship between the parties had irretrievably broken down as a result of the need for the applicant and Skydive to obtain an interdict and the underlying conduct that gave rise to it, which was described as 'intimidating and extorting'. The applicant also recorded its concern about the Dales' perceived attempts to 'obstruct and frustrate' the liquidation process. Concerns were also expressed about the dwelling being an illegal structure built without planning approval and the use of what was described as an 'excessive' amount of water in circumstances of a drought. The letter further effectively recorded that to the extent that it may be regarded that any of Mr Dale, Mrs Dale, the children or any other person had consent to occupy at the time, which was not conceded, that right was terminated. The Dales were afforded three months to vacate. On alternative accommodation, Mr Hoffman recorded that the Dales had had more than ample time to source alternative accommodation in circumstances where they must have known that the liquidation would lead to their being required to leave.

38. On 11 August 2017, Mr Dunn responded on behalf of Mr and Mrs Dale resisting the attempt to give notice and advising that any attempt to evict would be defended on various grounds. These included an alleged right of retention over the property, the alleged fraudulent transfer of the property, an application to remove one of the liquidators

for selling the property 'for a fraction of its true value' and a pending business rescue application. Mr Dunn asserted that the Dales required no permission to stay on the property, 'especially given the … right of retention'. He disputed any breakdown of relationship recording that the incident that gave rise to the interdict proceedings was a single incident in which the Dales were seeking to enforce their rights (including to payment for the use of the airstrip) and protecting others from flying into thick mist. Mr Dunn disputed that the buildings were constructed contrary to any building requirements and contended that the SARS claims were all 'bogus'. The concerns about water were disputed. Various reasons were advanced why the Dales should be permitted to stay: save for pursuing legal proceedings the Dales were not causing any disturbance or interfering with the applicant's business; the Dales undertook to maintain the status quo and not interfere with the applicant's business; Mr Dale substantially built the buildings and infrastructure on the property himself including a contribution to tarring the airstrip; the Dales had no alternative accommodation with four children (then) under 18, are in an invidious financial position without any income and wish to remain in peaceful occupation of their home of twenty years where they expected to remain in perpetuity.

39. On 18 August 2017, Mr Hoffman then wrote to the liquidators to obtain information concerning matters raised by Mr Dunn including the alleged criminal charge, any consent to occupy afforded to the Dales by them prior to transfer and any claim in respect of the alleged right of retention. Mr Murray of Sechaba Trust responded on 28 August 2018 recording *inter alia* (a) that the liquidators were not aware of the criminal charge (and providing various information about the auction of the property and surrounding circumstances); (b) that the liquidators had an arrangement with the Dales that they could remain until the property is sold after which he should vacate the house if he could not

come to an alternative arrangement with whoever buys the property; (c) that Mr Dale did frustrate the winding up process through a series of unsuccessful litigation and (d) that the liquidators were aware of the alleged right of retention but that no claim had been lodged in that regard.

40. On the same day, Mr Hoffman wrote to Mr Dunn responding in detail to the letter of 11 August 2017. The letter recorded the applicant's response to the issues Mr Dunn had raised but confirmed their decision that the Dales should proceed to seek alternative accommodation. The letter records a further alleged interruption by Mr Dale of the applicant's business on 25 August 2017 when Mr Dale allegedly photographed persons working at the airstrip and threatened that he would have them arrested. There was no response to this letter. This letter was followed a month later on 29 September 2017 with another letter reminding Mr Dale to provide details of the alleged retention right and recording a suggestion that a meeting be held. There was no response to this letter either.

41. On 7 December 2017, Mr Hoffman addressed correspondence advising that the applicant would be proceeding with the eviction application. The letter again urges the Dales to source alternative accommodation and records measures that had been taken to ensure the ongoing supply of water to the home including the replacement of water pipes on the farm. The letter records that the third respondent had terminated an illegal water supply that had existed while Aeronastics owned the property which bypassed metering and payment for consumption. In correspondence of 14 December 2017, Mr Dunn denied the claims regarding unlawful water connections and recorded the Dales' persistence substantially with the stance in Mr Dunn's previous correspondence. It advised the eviction application would be opposed.

42. Mr Hoffman wrote to Mr Dunn again on 20 February 2018, again requesting information about the lien and an update on the various litigation matters. Mr Hoffman advised Mr Dunn at this stage that the applicant would be preparing the second dwelling for lease. Mr Dunn responded on 22 February 2018 advising that James was living in the second dwelling, the alleged lien applied also to this dwelling, certain available documents to support the alleged lien would be supplied and providing a high-level update on the litigation matters. On 28 February 2018, Mr Hoffman responded placing Mr Dale on terms to substantiate the alleged lien and to provide adequate substantiating information about the related litigation. The letter recorded that the applicant's plans to lease the second dwelling were now on hold, but that the applicant objected to James' occupation.

43. In September 2018, the applicant issued formal notices of its intention to apply to evict in terms of ESTA to Mr Dale and Mrs Dale and others occupying through them including their family. By this time, James Dale was over 18 and a specific notice was served on him. The notices were also supplied to the third and fourth respondents. The notice recorded 13 grounds upon which an eviction order would be sought as follows:

43.1. The Dales occupation was dependent on Aeronastics owning the property;

43.2. The property was then sold and transferred to the applicant;

43.3. The applicant did not provide any consent to occupy;

43.4. There is no agreement to occupy;

43.5. An opportunity to make submissions to support continued occupation was afforded;

43.6. The submissions were taken under advice and considered but found not to be fair, justifiable or acceptable.

43.7. The applicant does not recognize the alleged right to possession of the property;

43.8. The applicant disputes any lien over the property;

43.9. The applicant is not concerned with any dispute between the Dales and the liquidator.

43.10. The right to reside on the property was terminated.

43.11. The procedure was just and equitable.

43.12. The Dales have previously had notice to vacate which they failed to do.

43.13. The Dales are unlawfully occupying the property.

44. The eviction application was instituted in March 2019.

Are the persons sought to be evicted "occupiers" as contemplated by ESTA

Relevant provisions of ESTA

45. An "occupier", for purposes of ESTA, is defined in section 1, as:

> '*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) ... [deleted by s6(a) of Act No 51 of 2001], (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*.'

46. In *Halle v Downs*[29] this Court held that the time legal proceedings for a person's eviction are commenced will usually be the relevant time to assess whether the circumstances of a person are such as to render them an ESTA occupier.[30] The application was instituted in

[29] 2001(4) SA 913 (LCC).

[30] At para 13, per Gildenhuys AJ (Bam J concurring): '*In my view, the Tenure Act requires the circumstances of a person whose eviction is sought to be considered as at the time when his eviction was called for, in order to ascertain whether he is an 'occupier'. That would usually be the time when legal proceedings for his eviction are commenced, but it may even be*

March 2019. The notice of termination of rights was first given in July 2017 and the formal notice of eviction given in September 2018.

47. The SCA held in *Sandvliet* that the essence of the term '*reside*' for purposes of ESTA is '*the notion of a permanent home*'.[31] Its view was fortified by the definition given to the term in the Extension of Security of Tenure Amendment Act 2 of 2018, which, though assented to by the President on 18 November 2018, has not yet commenced. In that Act, '*reside*' is defined to mean '*to live at a place permanently*'.[32]

48. '*Consent*' is defined in section 1 of ESTA to mean '*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*.' Sections 3 provides that for purposes of civil proceedings, '*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'* (section 3(4)) and '*a person who has continuously and openly resided on land for a period of three years shall be presumed to have done so with the knowledge of the owner or person in charge'* (section 3(5)).

49. The prescribed amount is currently R13 650.00 per month. Until 15 February 2018 the prescribed amount was R5000 per month. On the authority of *Stargrow,* the income of

---

later, should circumstances change during the course of the litigation. A person who, at that point in time, complies with the definition of 'occupier' is entitled to raise the defences available to an occupier under the Tenure Act. ...' (Footnotes omitted.)

[31] *Sandvliet Boerdery (pty) Ltd v Maria Mampies and another* 2019(6) SA 409 (SCA) (Sandvliet) at para 19.

[32] Id with reference to the cases cited at footnote 9.

spouses who otherwise qualify for ESTA should be considered individually rather than collectively.[33]

The Dales' residence

50. It is common cause that Mr and Mrs Dale and their four children are residing, in the sense contemplated by *Sandvliet*, in the thatched dwelling, which is on the property of which the applicant is the registered owner. They are currently so residing and they were so residing at the time the applicant commenced these proceedings.

Mr Dale

51. The applicant alleges that Mr Dale had consent from Aeronastics to reside on the property until his right was lawfully terminated. Mr Dale does not dispute this. Rather, he alleges a retention right flowing from an alleged lien, which, for reasons I explain below, does not assist him. The applicant accepts, however, that the liquidators of Aeronastics had an arrangement with Mr Dale that he and his family could stay there until the property was sold. In these circumstances, at the time the property was transferred to the applicant in March 2017 and at least until the applicant called for the Dales to vacate in July 2017, Mr Dale was residing there with the consent of the owner or person in charge. On the evidence before me, dealt with above, I conclude that Mr Dale individually does not currently earn in excess of the prescribed amount of R13 650 per month. I also conclude that he probably was not earning in excess of the prescribed amount at the time the proceedings were instituted in March 2019, or indeed when the September 2018 notice to evict was delivered. Mr Dale is accordingly an "occupier" for purposes of ESTA and entitled to its protections.

[33] Supra at paras 43 to 46.

Mrs Dale

52. The applicant alleges in the founding affidavit that Mrs Dale is not an ESTA "occupier". Rather, the applicant pleads that Mrs Dale is gainfully employed and resides with Mr Dale as an incident of his family right protected in section 6(2)(d) of ESTA. Section 6(2) confers on occupiers, balanced with the rights of owners or persons in charge, the right to family life in accordance with the culture of that family.

53. In *Hattingh,*[34] the Constitutional Court interpreted section 6(2)(d) of ESTA and held that the purpose of the right '*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 landowners' rights.'*[35] The Constitutional Court emphasized that the right to family life '*is not restricted to the occupier being able to live with his or her spouse or partner or children only'*[36] and what this means depends on the circumstances of a particular case.[37] In my view, on the principles established in *Hattingh,* Mr Dale would be entitled to have his spouse and at least his minor children reside with him in the thatched dwelling as an incident of his right to a family life as long as he enjoys the protections of section 6 of ESTA.

[34] *Hattingh v Juta* 2013(3) SA 275 (CC) (Hattingh).

[35] At para 35.

[36] At para 40

[37] At para 37

54. However, Mr Montzinger submitted that applying the Constitutional Court's decision in *Klaase*,[38] Mrs Dale is herself an ESTA occupier. In *Klaase,* Mrs Klaase, who had not been joined in the proceedings, asserted that she was an occupier independently of her husband. The Court agreed, interpreting and applying the substantive requirements of "consent" in light of the deeming provisions of section 3 of ESTA. Where a spouse is an occupier in his or her right, that spouse is entitled independently to ESTA's protection and all of the requirements for eviction must be independently complied with.

55. It is common cause that Mr and Mrs Dale have resided together on the property for a very long time, and applying the presumptions in section 3(4) and 3(5) of ESTA, it must be presumed that Mrs Dale has done so with the knowledge and consent of the owner of person in charge. There is nothing to gainsay this. On the contrary, the liquidators must have contemplated that she too could remain pending the disposal of the property. Furthermore, the evidence establishes that when the proceedings commenced (and currently) Mrs Dale's income was and remains less than the prescribed amount (although her salary was above the prescribed amount of R5000 for a brief period between August 2017 and February 2018, when the prescribed amount increased).

56. The difficulty is that Mrs Dale did not depose to any answering affidavit to raise this dispute, and Mr Dale did not raise this as a dispute between the parties in his answering affidavit. Rather, the averments in his answering affidavit are premised on an acceptance of the applicant's averment that Mrs Dale lives with him as an incident of his right to family life. The evidence that clarified Mrs Dale's position in this regard was supplied in the March 2020 affidavits, specifically in response to the 13 February order. In these circumstances and in view of these courts' inquisitorial powers, and having satisfied

[38] *Klaase and another v Van der Merwe NO and others* 2016(6) SA 131 (CC).

myself that there is no prejudice to the applicant in doing so, I decide this application on the basis that Mrs Dale is, independently, an ESTA occupier. Unlike in *Klaase,* Mrs Dale is separately joined and cited in these proceedings. Although the applicant cites her as a family member, the question for the Court is whether the applicant has nevertheless complied with each of the procedural and substantive requirements for her eviction or not.

James Dale

57. The applicant alleges that James Dale occupies as an incident of the right to family life. This would have been so whilst he was a minor. However, Mr Montzinger submits that he is now an occupier in his own right. I disagree. James Dale turned 18 on 10 December 2017. By this time, the applicant had been the registered owner of the property for over 8 months and had purchased the property some 20 months previously. At no stage had the applicant granted James consent to occupy in his own right. On the contrary, the letters seeking to terminate any right of residence including to the Dale children were sent as early as 28 July 2017, 4 months after transfer. The applicant specifically objected to James' occupation of the second dwelling in February 2018 and James was independently served with a copy of the notice of eviction of September 2018. When the application was instituted James had been a major only for some 15 months. In these circumstances, while it is clear that James, as an adult, resided on the property for some 15 months before the application was instituted with the applicant's knowledge, at no stage did he have the applicant's consent to do so. To the contrary, throughout this time, the applicant was pursuing a final termination of any rights and the eviction of the Dale family including James. In light of the clear evidence before me, the presumption of consent in section 3 of ESTA thus does not assist him.

Whether either Mr or Mrs Dale was an "occupier" on 4 February 1997?

58. The applicant alleges in the founding affidavit that the Dale family's ESTA occupancy only commenced after 4 February 1997. This allegation is made drawing logical inferences from the information that the applicant had to hand regarding Mr Dale's then control of Aeronastics, the extant owner of the property and its activities. Applying *Stargrow,* Mr and Mrs Dale carried an evidentiary burden to satisfy the Court that in fact they were ESTA occupiers at this time.

59. The position of Mr Dale is straightforward as Mr Montzinger submitted on his behalf. The inescapable conclusion is that Mr Dale could not have been an ESTA occupier until Aeronastics' liquidation (in 2014), as on his own evidence Aeronastics was earning limited rental income and he was personally funding substantial improvements to the property and thus must have been earning more than the prescribed amount. That substantial infrastructural developments took place during the late 1990s is clear and this is the basis upon which Mr Dale seeks to substantiate the alleged lien. Accordingly, I conclude that Mr Dale was not an ESTA occupier on 7 February 1997, or at any time prior thereto.

60. Mr Montzinger submitted, however, that the evidence establishes Mrs Dale's status as an ESTA occupier on 4 February 1997. I do not agree in view of my conclusions in paragraphs 25 to 28 above. In short, I am unable to conclude that Mrs Dale resided on the property in the sense contemplated in *Sandvliet,* at least before Mr Dale started to build the thatched dwelling which was after that date. In any event, I am unable to conclude that Mrs Dale was earning below the prescribed amount (R5000 per month) at

this time either. While Mrs Dale failed to file any answering affidavit, there is no suggestion that Mrs Dale was struggling financially at this time. Furthermore, Mrs Dale makes it clear in her March 2020 affidavit the that the family's financial struggles started much later. In 1997, Mrs Dale was not yet a mother and had two jobs in Cape Town, one in her husband's art gallery at the Waterfront, and one with an esteemed South African artist. This apart from any assets she had that she says she invested in the property. Yet she does not disclose what she was earning then, even in the March 2020 affidavits. And Mrs Dale filed no answering affidavit.

61. Accordingly, I conclude that neither Mr nor Mrs Dale were ESTA occupiers of the property on 4 February 1997. In the result, section 11 of ESTA applies.

Were Mr and Mrs Dale's rights terminated in accordance with section 8

62. Section 9(a) requires that any right of residence must be terminated in accordance with section 8 of ESTA. Section 8 provides:

'8 Termination of right of residence.

(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to—

(a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;

(b) the conduct of the parties giving rise to the termination;

(c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;

(d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and

(e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective

opportunity to make representations before the decision was made to terminate the right of residence.

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

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

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

(a) has reached the age of 60 years; or

(b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner 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.

...

63. The first question is whether section 8(4) applies to Mr Dale. In my view it does not. I am unable to conclude on the evidence that Mr Dale has been an occupier for 10 years. At best for him, he may have become an occupier around the time of Aeronastics' liquidation in 2014, as Mr Montzinger submitted. In addition, Mr Dale only turned 60 several months after the proceedings were instituted.

64. In *Snyders,*[39] the Constitutional Court held:

'*Section 8(1) makes it clear that the termination of residence must be just and equitable both at a substantive level as well as at a procedural level. The requirements for the substantive fairness of the termination is captured by the introductory part that requires the termination of a right of residence to be just and equitable. The requirement for procedural fairness is captured in s8(1)(e).*'

[39] *Snyders and others v De Jager and others* 2017(3) SA 545 (CC) (Snyders).

65. Importantly, interpreting section 8(1)(e), the Constitutional Court held:

> '*ESTA requires the termination of the right of residence to also comply with the requirements of procedural fairness to enable this person to make representations why his or her right of residence should not be terminated. … A failure to afford a person that right will mean that there was no compliance with this requirement of ESTA. This would render the purported termination of the right of residence unlawful and invalid. It would also mean that there is no compliance with the requirements of ESTA that the eviction must be just and equitable.*'

66. Each case has to be considered in light of its own facts, and from the perspective of both the occupier and the owner.[40] As both Mr and Mrs Dale are entitled to ESTA's protections, the applicant was obliged to comply with section 8 in respect of each of them.

67. On the evidence before me, when the applicant sought finally to terminate the Dales' rights of residence, it did so in respect of each of them but on the same grounds. The letter of 27 July 2017 and the notice of September 2018 were addressed specifically and separately to both Mr and Mrs Dale. Mr Dunn, when responding to Mr Hoffman on 10 August 2017, did so expressly on behalf of both parties.

68. The applicant contends that Mr Dale's rights terminated by law when Aeronastics was placed in liquidation in terms of section 38 of the Insolvency Act 24 of 1936. Section 38(1) provides that the contracts of services of employees whose employer has been sequestrated are suspended from the date a sequestration order was granted. I do not deal with this submission because I am unable to conclude on the evidence that Mr Dale's rights of residence flowed from any employment he may have had with Aeronastics.

[40] *Land en Landbouontwikkelingsbank van SA v Conradie* 2005(4) SA 506 (SCA) at paras 9 and 17; and *PE Municipality,* supra at para 33.

69. The applicant accepts that the liquidators consented to Mr and Mrs Dales' ongoing occupation pending the disposal of the land on the understanding that the Dales' ability to continue to reside there required a new arrangement with any new owner, in other words the consent of a new owner. However, I assume in favour of the Dales (without deciding) that their consent to occupy survived the sale and transfer of the property by virtue of section 24 of ESTA, in terms of which the rights of an occupier bind successors in title of an owner or person in charge of the land concerned and consent given by a prior owner or person in charge is binding on a successor in title as if he or she or it had given it. If that is so, the termination of any rights could only have occurred as a result of the correspondence that commenced when Mr Hoffman wrote to Mr Dale, Mrs Dale and their family on 28 July 2017 and culminated in the notices of eviction of September 2018. Importantly, while the applicant persisted with its stance that any consent to occupy had already lapsed, it is common cause that no consent was given by the applicant at any stage and the letter of 28 July 2017 made it clear that to the extent that any consent-based right to reside remained in-tact, it was thereby terminated subject to consideration of any submissions that the Dales were invited to make about their continued occupation. In that regard, the letter concluded that any representations would be considered to establish whether the notice will be amended, absent which it would stand. It was at no stage amended notwithstanding extensive engagement. Rather, the applicant's attorney advised that it was persisting with its stance.

70. The first question is whether the procedure that the applicant followed to terminate the rights was fair. Mr Montzinger criticized the procedure on the basis that the letter of 28 July 2020 purported to terminate rights prior to hearing representations from the Dales. I

considered a similar argument in *Du Plessis and another v Ross and another*[41] and held as follows (footnotes omitted):[42]

'82. .... As Corbett CJ noted in Attorney-General Eastern Cape v Blom 'a right to be heard after the event, when a decision has been taken, is no adequate substitute for a right to be heard before the decision is taken. There is, as Van Winsen pointed out in [Davies' case] a 'natural human inclination to adhere to a decision once taken.'

83. In administrative law, where the right to procedural fairness enjoys constitutional protection, the usual position is that a party should be heard before a decision is taken. That accords with both the intrinsic and instrumental value of procedural fairness. Intrinsically, a prior hearing serves better to enhance the dignity and worth of the person whose rights and interests are being affected, and instrumentally, it improves the quality and rationality of decision-making. However, this rule is not unyielding and it is recognized that, in some exceptional circumstances, a decision can be taken fairly even though representations are received after a decision has been taken.

84. In my view, when applying section 8(1)(e) of ESTA, fairness demands that, in the usual course, a person whose rights to occupy may be terminated ought to be afforded an opportunity to make representations before any decision is taken. However, there will be circumstances where receiving representations after an initial decision is taken complies with the requirements of fairness. It is neither necessary nor desirable for me to seek to detail when these circumstances will arise. However, in my view, this is such a case.'

71. Each case must be considered on its own facts. A person who seeks to receive submissions from a prospective evictee should, in the usual course, record a *proposed* course of action and its basis. While the letter of 28 July 2017 may be inelegantly phrased, it is clear from its content that the applicant's 'decision' was provisional and subject to consideration of any representations: in substance, it was a proposed course of action. But in any event, the subsequent correspondence shows that the applicant actively engaged the issues raised on behalf of Mr and Mrs Dale genuinely and with an open mind, and it did so over an extended period time and remained willing to engage. Where necessary, the applicant made independent enquiries to verify the factual position, such as

[41] LCC 257/2017 Unreported judgment. Delivered on 26 May 2020.

[42] In paras 82 to 84.

with the liquidators, and sought independently to satisfy itself about the implications on its intended course of action of the related ongoing proceedings. The engagement did not consist of mere legal letters and threats as Mr Dale sought to suggest.

72. On the facts of this case, I am accordingly unable to conclude the terminations were procedurally unfair and turn to the substance of the decisions. The question rather is whether the applicant's decisions to persist with the intended course were substantively just and equitable.

73. In my view, neither Mr nor Mrs Dale could reasonably expect their right to reside in the thatched dwelling to persist indefinitely and irrespective of Aeronastics' success. Mr and Mrs Dale were independently economically productive individuals and they chose to invest their wealth and build their home and futures on property owned by Aeronastics which pursued commercial activities and which was controlled (at least at material times) by Mr Dale. They must have appreciated that their ability to stay there over time would be affected by its fortunes. While their predicament is unfortunate, it results not from any unfair law or agreement, historical disadvantage or imbalance in power relations with the owner of the property, but from their choices as economically empowered and married persons to structure their private and business affairs in the manner in which they did. The factors in section 8(a) and (d) thus weigh firmly in the applicant's favour in assessing the substantive justice and equity of the termination of rights.

74. The applicant complains about Mr Dale's conduct in pursuing litigation that delayed the liquidation process and the transfer of the property. While the litigation efforts pursued may have been misguided, they were not directed against the applicant, and Mr Dale is, in my view, entitled to seek to exercise his rights. Different considerations apply to Mr Dale

when considering the impact of the interdict proceedings and his unwillingness to accept the outcome, which in turn reflects his belief that he maintains ownership and control of the airstrip and other structures on the property.

75. Furthermore, through Mr Hoffman, the applicant has responsibly made enquiries regarding the alleged *lien* and satisfied itself, in my view reasonably (as appears below), that it did not substantiate any ongoing possession of the property. Similarly, enquiries were made about the allegation of fraud against the liquidators and other related parallel litigation and again the applicant satisfied itself, in my view reasonably (as appears below), that it did not affect the transfer of the property. In my view, it is not unreasonable for the applicant to want to exercise peaceful enjoyment of its right of ownership and without disturbance from Mr Dale, who still believes he is entitled to conduct himself as if he were the owner or in control of the property. This state of affairs would render any ongoing relationship at best extremely challenging, in my view unfairly.

76. On the other hand, Mr and Mrs Dale complain of the conduct of the applicant's directors. I have considered the evidence in Mr Dale's answering affidavit. I conclude that insufficient information is supplied in the answering affidavit upon which I can draw conclusions adverse to the applicant's directors in respect of the alleged vilification on social media or alleged threats. Only in the March 2020 affidavits, is there some elaboration including of an incident in which a Delta director is alleged to have shouted and sworn at Mr Dale in front of his family in respect of the ongoing legal wrangles and the Dale's privacy was disrespected. The conduct complained of is indeed concerning not least as it apparently caused distress to the family. But Mr and Mrs Dale ought to have detailed these complaints in answering affidavits, and when doing so, provided

sufficient information about the dates of any incidents, the circumstances and how it affected any termination of rights. On the limited information to hand, I am unable to conclude that when the applicant sought finally to terminate occupancy rights, its various directors were conducting themselves in a harmful or otherwise reprehensible way towards the Dales. On the contrary, the applicant's conduct as evidenced in the correspondence of Mr Hoffman, shows otherwise. Nevertheless, to the extent that the incident is detailed, it shows the fraught nature of the relationship between the parties and in this regard, I accept that there has been an incident where this has manifested in concerning conduct on the part of one or more of the applicant's directors.

77. Mr Dale also complains of water and electricity cuts at the instance of the applicant. The complaint is again made at a highly generalized level. On the evidence before me, the applicant has had to regularize service provision to the property, Mr and Mrs Dale have installed solar and battery power for lighting, and the applicant has taken steps to ensure ongoing access to water. I accept there have been service disruptions, but on the limited evidence to hand, I am unable to conclude that the applicant's conduct is unlawful or unreasonable.

78. When considering the interests of the parties and their comparative hardship as a result of any termination, the circumstances of the Dale family come into focus. Mr and Mrs Dale no longer enjoy a life of financial comfort and have had to adjust their lives to the new financial realities that face them. They have four children, all still in the process of being educated, whose lives have and continue to be intimately tied to their home and stand to be disrupted. They stand to lose a large family home that has provided a sanctuary over many years and was their long-term dream. Their lives are now financially challenging and they live month to month. The impact is however lessened by the significant support

that the family receives from extended family and their own income generating capacity. Mrs Dale is employed and Mr Dale is able to generate an income. Their children are all in good schools, their educations financially supported by their paternal grandparents and James is now a young adult, who ought to be able to contribute economically whilst pursuing his funded studies.

79. Where the Dales' home life is affected, the applicant is affected in its commercial operations. The property is, furthermore, a large one, which might in different circumstances, affect the balance of considerations. But the thatched dwelling is close to the airstrip, which is in use, and located where the applicant wishes to continue with and expand its operations, without disturbance from Mr Dale. In these circumstances, it is difficult to see how these interests can be simultaneously reasonably accommodated.

80. Furthermore, the applicant was receiving no rental income from either Mr or Mrs Dale.

81. In light of the above considerations, I am of the view that the decision to terminate Mr Dale's right of residence, was just and equitable. In considering the position of Mrs Dale, I am mindful that Mr Dale's conduct and his decisions regarding Aeronastic's predicament cannot, without more, be visited on Mrs Dale.[43] Mrs Dale's position is, as a result, more finely balanced but I am satisfied in light of the above considerations that the termination of her rights was nevertheless just and equitable.

Mr Dale's alleged common law *lien*

82. Mr Dale has consistently asserted a common law lien over the improvements to the property including the airstrip and his places of residence and he raises them in his

[43] *Conradie v Hanekom* 1999(4) SA 491 (LCC) at 497G-498C.

answering affidavit in defense of the eviction application.[44] Insofar as an occupier may raise a common law *lien* as a defence to an application for eviction in terms of ESTA and independently of section 13 of ESTA, issues I do not consider or decide,[45] I have concluded that Mr Dale's alleged *lien* does not assist him.

83. The two types of *liens* broadly recognized are the debtor-creditor *lien* and an enrichment *lien* (improvement or preservation).[46] In both cases, a possessor may retain and is not required to relinquish possession of property until his or her claim has been met, in the case of a debtor-creditor lien, payment of the full contractual amount, and in the case of an improvement lien, payment of the enrichment claim.[47] Importantly, a debtor-creditor *lien* is not in the form of real security, is based on contract and the SCA has held that '*a lien holder may retain the property as against the contracting party (but not against the third parties) until he has been compensated for the work and costs incurred. This lien does not exist apart from the contract …*'[48] As I understand Mr Dale's evidence, his claim is in the nature a debtor-creditor *lien* arising from a contract he concluded with Aeronastics, not with the applicant.[49] In any event, Mr Dale's pleadings and evidence regarding the alleged contract are too vague to enable any determination of the quantum of such a claim.[50]

---

[44] Mr Montzinger did not advance any submissions on the lien.

[45] *I*n *Daniels,* supra, para 50 to 52 dealt with the question of compensation for unauthorized improvements by an occupier.

[46] *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* [1993] 1 All SA 259 (A) (Goudini) at 255.

[47] *Pheiffer v Van Wyk and others* [2015] JOL 33632 (SCA) at paras 11 and 12 and *Goudini* at p 266: 'A debtor and creditor lien, being a contractual remedy and not a real right, is maintainable by the one party to a contract against the other who may or may not be the owner of the property.'

[48] Id at para 11. Badenhorst, Pienaar and Mostert, Silberberg and Schoeman's The Law of Property (5 ed) p413

[49] Cf *Levy v Tyler* 1933 CPD 377.

[50] Cf *De Aguiar v Real People Housing (Pty) Ltd [2010] 4 All SA 459* (SCA) (De Aguiar) at paragraph 19.

84. Inasmuch as Mr Dale is asserting an improvement *lien,* his claim would fail not only for want of proof of the quantum of the claim but because it was Aeronastics not the applicant who may have been enriched as the improvements were all made long before the applicant became the owner of the property.[51]

85. For these reasons alone, the alleged common law *lien* would not assist Mr Dale in these proceedings. It is thus not necessary, or desirable, for me to consider other possible difficulties, including prescription, raised by the applicant, or whether reliance on the *lien* is precluded on the authority of *Business Aviation Corporation (Pty) Ltd and another v Rand Airport Holdings (Pty) Ltd* [2007] 1 All SA 421 (SCA).

Is section 11 complied with?

86. I have concluded that section 11 of ESTA applies to this case. Section 11 is entitled '*Order for eviction of person who becomes occupier after 4 February 1997*' and provides:

> (1) If it was an express, material and fair term of the consent granted to an occupier to reside on the land in question, that the consent would terminate upon a fixed or determinable date, a court may, on termination of such consent by effluxion of time grant an order for eviction of any person who became on occupier on the land in question after February 1997, if it is just and equitable to do so.
> (2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.
> (3) In deciding whether it is just and equitable to grant an order for eviction in terms of this section, the court shall have regard to –
> (a) The period that the occupier has resided on the land in question;
> (b) The fairness of the terms of any agreement between the parties;
> (c) Whether suitable alternative accommodation is available to the occupier;
> (d) The reason for the proposed eviction; and
> (e) The balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land.

[51] *De Aguiar* supra at paragraph 18 where the SCA held in a case in which an improvement lien was asserted on comparable facts that 'any improvements effected before 2001, when the respondent became the owner of the property, are equally irrelevant, because the respondent could not have been enriched by such improvements.'

87. I consider section 11 on the basis that sub-sections 11(2) and (3) are applicable. To the extent that sub-section 11(1) may apply as a result of the arrangement the liquidators reached with the Dales, I am satisfied that I would reach the same conclusion.

88. I regard the considerations relevant to section 8 also to be relevant to whether the eviction sought is just and equitable as contemplated by section 11, more specifically section 11(3)(b), (d) and (e). But I do not repeat what I have already said when dealing with section 8.

89. First, Mr and Mrs Dale and their family have lived on the property for a very long time. This is material. On the other hand, for an appreciable period of this time, they have not done so as ESTA occupiers but in circumstances where Mr Dale was in a position commercially to exploit the property for the benefit of his family and effectively controlled Aeronastic's fortunes.

90. Second, both Mr and Mrs Dale have, when resisting the proposed eviction through Mr Dunn, both consistently raised Mr Dale's alleged lien, his criminal complaint against the liquidators and the parallel proceedings as reasons why they should be permitted to stay. I have dealt above with the applicant's stance to these issues when considering the justice and equity of its decision to terminate the Dales' occupation rights. Mr Montzinger did not rely on these circumstances in his argument. Nevertheless, I have considered whether they are such that render an eviction unjust and inequitable. I conclude that they are not.

91. The third business rescue application and the alleged common law *lien* can be dealt with easily. They do not assist either Mr or Mrs Dale. The third business rescue application has been withdrawn and there is no pending business rescue application. I have

concluded above that the alleged common law *lien* would provide no defence to the eviction.

92. As regards the criminal complaint, Mr Dale pleads that if his criminal complaint results in a successful prosecution for fraud, this would result in the transfer being ineffective and the applicant would have no standing. In these circumstances, and until his criminal complaint is resolved, he contends that an eviction should not proceed. While in our law, the abstract theory of transfer of ownership applies to immovable property, it is also the case that ownership will not pass despite registration if there is any defect in the 'real agreement', being the intention on the part of the transferor and the transferee to transfer and to acquire ownership.[52] Further, '*if the underlying agreement is tainted by fraud or obtained by some other means that vitiates consent (such as duress or undue influence) then ownership does not pass.*'[53] To support his submission, Mr Dale has attached to his answering affidavit his criminal complaint, which in turn attaches a portion of an affidavit of one of the liquidators and various correspondence.

93. It is well established that '*it is not open to an applicant or a respondent to merely annex to his affidavit documentation and to request the court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof.*'[54] For this reason alone the complaint cannot succeed. In any event, having regard to its content, I am unable to conclude that it assists Mr or Mrs Dale. The complaint reveals two grounds

[52] *Nedbank v Mendelow NNO* 2013(6) SA 130 (SCA) at para 13.

[53] Id at para 14.

[54] Erasmus *Superior Court Practice* RS 13, 2020, D1-58D citing eg *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324F–G. *Hunter v Financial Sector Conduct Authority and others* 2018 (6) SA 348 (CC) at para 172.

of grievance against the liquidators, one concerning the alleged performance of certain acts relating to the transfer of the property while an application for leave to appeal against the dismissal of the second application was pending and the other being that the transfer ensued after the third business rescue application had commenced. While the grounds of grievance may be distilled, the underlying facts are not adequately detailed, and to the extent that they are, they are at least substantially answered in an attached affidavit from one of the liquidators deposed to in the third business rescue proceedings. On the information to hand, and whatever a full investigation may reveal, I am not satisfied for purposes of these proceedings that the information grounds even a *prima facie* conclusion that there was any fraud on the part of the liquidators. Moreover, there are no imminent related proceedings whether of a criminal or civil nature. Not only must I accept on the papers that the applicant, as the registered owner has standing, but on the information to hand, considerations of justice and equity do not assist either Mr or Mrs Dale in relying on the criminal complaint to resist or delay an eviction application.

94. Third, the relationship between the parties is clearly fraught. While some of the individuals now associated with the applicant may historically have been associated with Mr and Mrs Dale through Skydive, the applicant is a separate entity, and in any event, relationships change. On the information before me, it is difficult to see how the parties can harmoniously reside and work in close proximity.

95. I turn to consider the availability of suitable alternative accommodation.[55] The applicant alleges that Mrs Dale is 'gainfully employed' and can afford to provide alternative

[55] '*Suitable alternative accommodation*' is defined in section 1 of ESTA to mean:

accommodation to the family and that there is no reason for the first respondent not to be so employed. In answer, Mr Dale asserts that his family will land up on the street and no properly, collective income below the prescribed amount and have no alternatives. I have dealt with their financial position and their current respective incomes above. In the March 2020 affidavits and in response to the 13 February 2020 order, Mr Dale says it is not prudent to look for alternatives as they cannot afford it and only see their future where they reside. He says a house in the nearby suburbs of Grotto Bay or Duynefontein could be rented at R12 000 to R15 000 a month. Mrs Dale says that the only way that she and her husband can accommodate their family, possibly in a two bedroomed flat, would be if the money used for school fees was re-allocated to rental, but she does not expect the funds would suffice and explains that the home would be too small. The Dales say that they would not be able to afford what they currently have, a 350 square metre home with access to a second dwelling of some 150 square metres with ample rural space. Further, a relocation would disrupt the children's schooling, they say. The applicant points out that the large thatched dwelling is not built in accordance with building requirements (which Mr Dale disputes) and that it is not a safe structure which should be demolished. Notably the property valuation Mr Dale supplied to the court records the large thatched dwelling as being of low standard construction with ample problems such as '*broken window, rainwater leakage, chipped walls, wall mounted cabling and irregular building principles.*' And the Dales complain about a serious increase in crime on the property and do not feel safe.

'Alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to –

(a) The reasonable needs and requirements of all the occupiers in the household in question for residential accommodation, land for agricultural use and services;

(b) Their joint earning abilities;

(c) The need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active.'

96. According to the City's housing report, the Dale family have not applied for any assistance with housing from the City. Of particular relevance for present purposes is the City's social housing projects in terms of which rental stock is made available at discounted rates within an income bracket of R3500 to R15000. The City pleads that the case does not trigger the City's obligation to provide emergency accommodation on the basis that it appears from the court records that the Dale family have substantial income generating capacity to ensure self-sufficiency. However, to the extent that the respondents may be rendered homeless through the pending eviction, the City can assist with emergency accommodation. At the time the report was prepared (July 2019) the site available was Kampies Informal Settlement in Philippi entailing a 6m by 3m unit constructed from corrugated iron sheets. Alternatively, the third respondent would make an emergency housing kit available to the respondents upon certain conditions.

97. According to the section 9(3) report, the Department of Rural Development and Land Reform does not have any suitable farm land in the vicinity of Cape Town or the property to accommodate the respondents. The report records that the Dale family have no other property and neither their family or friends are able to accommodate them. It concludes that in the event of an eviction, the Dale family will be rendered homeless. Mr Dale's assessment of his current position is iterated in part in the section 9(3) report which records that where Mr Dale previously operated successful business operations, he now has no income and stands to lose all that he achieved in his early life and his investments.

98. I am unable to accept on the information before me that the Dales do not have the means jointly to source modest rental accommodation on their current income. Moreover, this would probably be safer than their current abode. It is correct that what they can

probably afford may not be located in a coastal town or upmarket area. But if the Dales' earnings are still less than R15 000 per month, the City explains that they would be eligible to apply to access the City's rental housing scheme. I am also of the view that Mr Dale and James are probably able to generate additional income for the family. A move need not prejudice their ability to be access economic and educational opportunities. Their daily lives already entail significant travel for work and schooling, which may well be less onerous if the family were to move closer to Cape Town or another town in the West Coast area or its surrounds. At an appropriate time, one or more of their children may sensibly change schools. It must however be accepted that the Dales will not be able to rent a home of equivalent size of their current accommodation and they may well not be able to rent a home surrounded by similar space in a rural setting. It must also be accepted that a move will inevitably entail a level of disruption to the children's education that would require management.

99. I accept in these circumstances that the accommodation they will be able to source may not qualify as suitable alternative accommodation in terms of the definition of the term in section 1 of ESTA. This Court has held that this not an automatic bar to the grant of a just and equitable order of eviction in context of section 11 but is a factor which I must consider.[56] I have done so.

100. In all the circumstances I am of the opinion that is just and equitable to grant an order for the eviction of Mr and Mrs Dale and those who occupy through them.

Just and equitable date for eviction

[56] *Le Roux NO and others v Louw and another* [2017] JOL 38052 (LCC) at para 97.

101. In my view, the facts of this case warrant that a generous period be afforded to Mr and Mrs Dale to vacate the property. First, this will protect the interests of the children, who are all still undergoing their education which should not be unduly disrupted. The position of their second eldest who hopes soon to be starting his matric year is of particular concern. Mrs Dale appears historically to have carried the bulk of the care responsibilities, and to the extent that continues, she will face challenges over the coming months as a mother and working woman. Mr Dale's position as a parent of four children and seeking to generate an income will also be challenging. Second, the applicant's use of the property is commercial in nature and can continue in the meantime. A further delay is, in all the circumstances, a minimal limitation on their ability to exercise their rights of ownership. The applicant is not without remedy should it encounter a further impediment to its business activities in the interim. Third, it is desirable that the Dale family have adequate time to plan and arrange what will inevitably be a difficult transition for them and they should be afforded a level of flexibility in how they do so. Fourth, I am making an order that permits Mr Dale to demolish the thatched dwelling and the second dwelling and salvage building material. On the facts of this case and given what is entailed, this too will require time and planning.

102. In these circumstances I am of the view that it is just and equitable that they only be required to vacate by the end of June 2021. They may well prefer to do so earlier based on the needs of their children.

Section 13 of ESTA

103. In the notice of motion, the applicant seeks relief authorizing Mr Dale to demolish structures that he built on the property and salvage material from such structures. From the founding affidavit this is a reference to the dwellings in which Mr Dale and his family reside (the thatched dwelling and the second dwelling).

104. Under section 13(1)(a) of ESTA, a court ordering eviction '*shall order the owner or person in charge to pay compensation for structures erected and improvements made by the occupier ...., to the extent that it is just and equitable with due regard to all relevant factors, including whether (i) the improvements were made ... with the consent of the owner or person in charge; (ii) the improvements were necessary or useful to the occupier; and (iii) a written agreement between the occupier and the owner or person in charge, entered into prior to the making of improvements, provides that the occupier shall not be entitled to compensation for improvements identified in that agreement.*'

105. Under section 13(1)(c) of ESTA, '*the court may order the owner or person in charge to grant the occupier a fair opportunity to – (i) demolish any structures and improvements erected or made by the occupier and his or her predecessors, and to remove materials so salvaged; ...'.*

106. Under section 13(3), '*No order for eviction made in terms of section 10 or 11 may be executed before the owner or person in charge has paid the compensation which is due in terms of subsection (1): Provided that a court may grant leave for eviction subject to satisfactory guarantees for such payment.*'

107. Insofar as an occupier may rely on section 13 to assert a common law *lien,* (an issue I do not decide), Mr Dale's alleged *lien* does not assist him. I have dealt with this above.

108. Mr Dale was not an occupier when he made the improvements in respect of which he seeks compensation. Insofar as an occupier may rely on section 13 to receive compensation for structures erected and improvements made when the person was not an occupier (which I also do not decide) I am of the view that it is not just and equitable to order payment by the applicant of compensation in respect of the commercial and related infrastructure (such as roads and electricity infrastructure). Mr Dale effected the improvements many years ago in circumstances where he was in effective control over the property. Many years later, the applicant purchased the property including its improvements at a public auction when Aeronastics was in liquidation. Aeronastics (in liquidation) received value for the property, including all improvements. Neither the auction nor the sale and transfer have been successfully impugned. Furthermore, Mr Dale's remedies for compensation, if any, lay against Aeronastics (in liquidation). On the information before me, he has not pursued these. In my view, it would be neither just nor equitable to permit a creditor of Aeronastics who happens to occupy the property to claim via section 13 what either cannot or has not been claimed through the remedies available via the law of insolvency.

109. As regards the thatched dwelling and the second dwelling, the order sought by the applicant itself authorizes Mr Dale to demolish them and salvage the building material. In substance, this constitutes an order as contemplated by section 13(c) of ESTA. I make such an order.

Impact of Covid-19

110. I am delivering this judgment during the Covid-19 pandemic. The national disaster was, however, only declared in terms of the Disaster Management Act 57 of 2002 (the

DMA) after the matter was argued. The regulations and directions made under the DMA have an impact on the timing and executability of eviction orders. Specifically, Regulation 36 effectively requires that an eviction order should be stayed or suspended until the end of Alert-Level 3 unless justice and equity demand otherwise. At the present time, there is no certainty as to when Alert-Level 3 might end and whether it might be followed by the termination of lapse of the disaster in its entirety or the entry into a different Alert Level, whether higher or lower. It is also not known whether South Africa generally and the Western Cape specifically have passed the peak of infections or will face another surge. I have concluded above that a just and equitable date for eviction is at the end of June 2021. Given the lengthy period of time before this order takes effect, the time that has already lapsed since the applicant purchased the property and received transfer, and the need on the facts of this case (specifically the state of the parties' relationship) for a level of certainty to prevail between them, I am of the view that justice and equity demand that I do not stay or suspend the order until the end of Alert-Level 3. There is furthermore significant uncertainty about how the pandemic and associated disaster measures will unfold in the meantime and I have not heard argument on the impact of the pandemic on the parties in light of their particular circumstances.

111. Accordingly, the parties' attention is specifically drawn to the provisions of section 12(5) of ESTA in terms of which a court may, on good cause shown, vary any term or condition of an order for eviction it makes. This should not deter the Dale family from commencing planning and effecting arrangements for their future insofar as this is reasonably possible and safe to do so and within the parameters of the disaster regulations.

Costs

112. The usual rule in this court is that each party carry their own costs. I see no reason to depart from this approach in this case.

Order

113. I make the following order:

1. The application of 12 February 2020 is dismissed with no order as to costs.

2. The first and second respondent and all persons who occupy Portion 6 of the farm Brakkefontein No 32, City of Cape Town, Western Cape through them (including the Dale family and any person claiming a right of residence through them) are to vacate the property, together with all their movable possessions, by the end of June 2021.

3. Should the respondents not vacate as aforesaid, the Sheriff for the area is authorized to secure their eviction on 2 July 2021.

4. The first respondent is authorised to demolish the thatched dwelling and the nearby second dwelling and to salvage any material from such structures prior to the end of June 2021.

5. The third respondent shall provide the first to third respondents with emergency accommodation upon their eviction should this be necessary, and in that event shall liaise with the first to third respondents in that regard to facilitate their decision-making relating to schooling.

6. Each party shall pay its own costs.

COWEN AJ

ACTING JUDGE

LAND CLAIMS COURT

For the applicant: Adv P Nel instructed by Marius Hoffman Attorneys.

For the first and second respondents: Adv A Montzinger instructed by Tim Dunn of TC Dunn Attorneys.