IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

Case number: LCC06R/2021

DELETE WHICHEVER IS NOT APPLICABLE

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

23/3/2022
DATE

SIGNATURE

IN CHAMBERS
In the matter between:

BAVISHA NARANSAMY	**APPLICANT**
And	
AJAY WASSERMAN N.O.	**1ST RESPONDENT**
MOGALE CITY MUNICIPALITY	**2ND RESPONDENT**
KENNETH THEMBILE	**3RD RESPONDENT**
ALL OTHER ILLEGAL OCCUPIERS OF PORTION 579 (A PORTION OF PORTION 203 OF THE FARM RIETFONTEIN NO.189)	**4TH RESPONDENT**
PROVINCIAL OFFICE OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	**5TH RESPONDENT**

(Judgment handed down by email and despatched to SAFlii)

JUDGMENT

MIA J:

[1] This is an automatic review in terms of section 19(3) of the Extension of

Security of Tenure Act 62 of 1997 ("ESTA"). On 25 March 2021, the Magistrate, Krugersdorp granted an eviction order against the third respondent and those holding occupation under him. The order reads as follows:

"1. In order to give effect to the finding, the third and fourth respondents are ordered to vacate the premises by no later than 31 May 2021.
2. If they fail to vacate the property as at 31 May 2021, the Sheriff of the Court is then authorized to remove the third and fourth respondents from the said property and the costs thereof will be borne by the third and fourth respondents.
3. Furthermore, the Mogale City Local Municipality is ordered to assist the third and fourth respondents in securing alternative accommodation or making land available for the relocation.
4. Costs follow the successful party to be taxed by the taxing master.
5. The matter is referred to the Land Claims Court for automatic review."

[2] On 15 April 2021, and pursuant to section 19(3) of ESTA the matter was referred to this court for automatic review. No transcribed record was attached as is practice. On 20 May 2021, the third respondent filed his submissions as prescribed in which he raised a number of issues in relation to the proceedings including those that the magistrate had not dealt with. On 27 October 2021, the magistrate responded to the submissions made by the third respondent. The complete transcribed record was received thereafter.

[3] I summarise the issues raised by the third respondent in his submissions as follows:

3.1 The order granted by the magistrate was irregular and irrational. The magistrate only gave reasons when the application was dismissed on 20 January 2021. The main reason was that the magistrate upheld the point *in limine,* namely that the affidavit filed by the applicant was not properly commissioned and was thus invalid. However, despite the application being dismissed on the basis of the point *in limine*, the matter was placed before the same magistrate. The same reason for the dismissal following a successful application when the point *in limine* was raised, was again pointed out. The

magistrate became *fin des pique,* meaning that the magistrate was barred from dealing with the application on the same issue and on the same papers as she did on 24 February 2021. However, the judgment of the magistrate is silent on this issue despite the submissions having been made on this point. On this basis alone, the matter ought to have been launched afresh. Without more, this was a material irregularity that shut the door for the third respondent on the merits of the matter to his serious prejudice.

3.2 The judgment of the magistrate has a number of factual inaccuracies. First, the applicant pointed out that she has not been able to take occupation of the property when in fact she has taken occupation of the property and is using the property as a pre-school. The judgment does not indicate that the magistrate took this into account when granting the eviction order. For instance, on page 118 of the record, the probation officer indicated in her report that she visited the applicant at the property on 18 February 2020. The probation officer noted that the applicant operated a pre-school on the property, which confirmed that the applicant had taken occupation of the property and was operating a pre-school on the property. Thus, it could not be true that the third respondent was preventing the applicant from utilising the property for the purpose for which she purchased it.

3.3 Second, the report failed to indicate that the applicant had an emotional attachment to the farm. It was factually incorrect that his son was buried on the farm as his son was not buried on the farm but close to the farm. He indicated that he has an emotional attachment to the farm as he has been living on the farm for approximately 13 years.

3.4 The third factual inaccuracy is in relation to the negotiation at the CCMA regarding his retrenchment. The correspondence which appears on page 42 of the record indicated that the new owner did not want to take over any employees of the previous owners. The executor of the estate, therefore, communicated that they had no option but to retrench him. In this regard, the estate of the late Mr Roos entered into negotiations with him in respect of his retrenchment from his employment. Thus, it was not the applicant as the new

owner who entered into a settlement. Furthermore, the settlement pertained to his employment, not to his consent to reside on the property. His consent to reside on the property was not withdrawn by the executor of the estate. This inaccurate capturing of the facts only served the narrative of the applicant and was unreasonable and deceptive as he did not take any money in order to vacate the property. The money he received was a valid payment related to a retrenchment package. Paragraph 18 of the judgment was based on an entirely incorrect understanding of the facts by the magistrate. It was reiterated that he did not accept the money in return for vacating the property. Moreover, when the new owner took occupation of the property he did not say he was comfortable residing on the property without paying any rent. Neither did he say he expected the owner to secure alternative accommodation for him.

[4] It is necessary to describe the factual background to place the matter in context. The applicant purchased the property from the estate of the previous owner, who passed away on 29 December 2015. The third respondent who the applicant sought to evict from the premises was an employee of the late previous owner. The third respondent was employed by the late previous owner for approximately 25 years. The executor for the deceased estate sold the property described as portion 579 (a portion of portion 203) of the farm Rietfontein No 189, measuring 2,0350 hectares to the applicant. The transfer of the property took place on 18 September 2018. The third respondent was informed that the new owner did not want any employees of the previous owner. Therefore, the third respondent was being retrenched.

[5] The executor of the deceased estate offered the third respondent a retrenchment package for the 25 years of service with the previous owner. The third respondent referred the matter to the CCMA where a settlement agreement was reached regarding the retrenchment. The payment was to be made no later than 8 November 2018. When the applicant took occupation the third respondent was residing on the property. The applicant sent a letter to the third respondent informing him that his occupation was unlawful and requesting him to vacate the property within 30 days. The third respondent did not vacate the property. The applicant launched

an application in terms of the Prevention of Illegal Eviction from Unlawful Occupation Act 19 of 1998 (the Pie Act). This application was withdrawn as there was a dispute as to which legislation was applicable and an application in terms of ESTA was launched.

[6] The third respondent opposed the application in terms of ESTA. The matter was postponed on several occasions before the third respondent secured legal representation appointed by the fifth respondent. On 20 January 2021, a point *in limine* was raised on behalf of the third respondent. The magistrate was persuaded there was merit in the point *in limine* and found that "*... the founding affidavit was not properly commissioned and is defective*". The magistrate dismissed the application and granted costs in favour of the third respondent. Despite the dismissal, the matter was enrolled again on 24 February 2021 with the applicant filing only a recommissioned affidavit. The magistrate heard submissions from both counsel and granted an eviction order on 25 March 2021.

[7] The issues in dispute were:

7.1 Whether the proceedings which resulted in the eviction of the third respondent and others on 24 February 2021 were irregular after the matter had been dismissed on 20 January 2021?

7.2 Whether the third respondent's right of residence had been terminated in terms of section 8 of ESTA?

7.3 Whether or not there was suitable alternative accommodation?

7.4 Whether the granting of the eviction was just and equitable?

[8] The provisions of section 9(2) of ESTA are peremptory prior to the granting of an eviction order. I will consider the compliance thereof after dealing with the question of the irregularities raised by the third respondent.

WERE THE PROCEEDINGS WHICH RESULTED IN THE EVICTION ON 24 FEBRUARY 2021 IRREGULAR?

[9] On 20 January 2021, the magistrate dismissed the application with costs when the application was argued on the point *in limine*. It is trite that in application proceedings the applicant makes out its case in its founding affidavit. In the present

matter where the magistrate found that the affidavit was defective, there was no evidence in the founding affidavit before her, if the founding affidavit was not commissioned or was defective. When the applicant persisted with the application knowing that the third respondent had filed an answering affidavit raising the point *in limine*, instead of withdrawing or seeking an opportunity to address the defect, the application was correctly dismissed. The court pronounced its decision on the matter under that particular case number. This means, there was no reason to reconsider the application on the same papers.

[10] However, the applicant set the eviction application in the same matter under the same case number down on the same affidavit that it had recommissioned before the same magistrate. The same application was then re-commenced as if it was not dismissed. Counsel for the third respondent raised the point that the matter was dismissed on the point *in limine* where the founding affidavit had been found to be defective. The magistrate noted that the application had been dismissed previously but maintained the decision had no effect on the matter and proceeded on the recommissioned affidavit on the same application and under the same case number. The magistrate's response to Counsel's submission on page 60 of the record is recorded as follows:

"*Dismissed does not cancel out the application. It does not mean the applicant is without recourse to bring another application.*"

[11] This finding is not correct and to that extent the magistrate erred. In making such a finding and determination on the matter on 20 January 2021, she was thereafter *functus officio*[1] to deal with the same matter again. This means the applicant could only appeal the decision taken on 20 January 2021, alternatively, take it on review on grounds provided for under ESTA, or bring a fresh application issued

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[1] Daniel Malan Pretorius "The Origins of the *Functus Officio* Doctrine, with Specific Reference to its Application in Administrative Law" (2005) 122 *SALJ* 832. At page 832, Pretorius says the following:

> "The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. . . The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

under a different case number. The application could not proceed on the same papers on which the application had been dismissed.

[12] It follows that it was procedurally irregular for the matter to proceed before the same magistrate on 24 February 2021 without the decision made on 20 January 2021 having been overturned on appeal or set aside on review and referred back for determination.

WAS THE THIRD RESPONDENT'S RIGHT OF RESIDENCE TERMINATED IN TERMS OF SECTION 8 OF ESTA?

[13] The inquiry does not end there as this matter requires review on the merits as well which I turn to now: whether the third respondent's residence had terminated in terms of section 8 of ESTA.

Section 8 provides:

"(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."

[14] The executor of the estate entered into a settlement agreement with the third respondent at the CCMA. The agreement provided that:

"The parties consent to this agreement being made an arbitration award in terms of s 142A (1) of the Labour Relations Act."

The settlement agreement made reference to a monetary settlement and payment of an amount of R14 500 by no later than 8 November 2018 at paragraph 3 thereof. The result in the mediation reflected that the executor of the estate was willing to pay the severance pay on the basis that the third respondent vacated the premises immediately. This was not captured in the settlement agreement. The settlement was concluded between the executor of the estate and the third respondent.

[15] The magistrate found at page 113:
"*Furthermore the consent to reside on the property which was tied to his employment was withdrawn and he had to vacate the property.*"

And at p117
…"one of the terms of his retrenchment package was that consent to his residing on the property was withdrawn and the third respondent and his family had to vacate the said premises"

The magistrate had regard to s 8 of ESTA and concluded that the third respondent's employment and his right to occupy the premises were terminated properly and as provided for in ESTA and there was an agreement to vacate the premises.

[16] It is common cause that the specification that the third respondent move out of the premises was not captured in the settlement agreement. Thus, it was not an agreement in terms of the Labour Relations Act. The only agreement captured in the settlement agreement was the payment of money captured in clause 3. It is not possible to read into the agreement anything else that was not captured in the settlement agreement. Any other agreement ought to have been captured under clause 6 through which a line is drawn indicating that it was deleted. Clause 7 is a non-variation clause. It provides for the variation to be reduced to writing in order for it to be legally binding. Without reference to anything else outside this settlement agreement, it is evident that the settlement related only to the employment of the third respondent who was an occupier on the property.

[17] The magistrate then referred to the applicant sending a notice to vacate before the applicant proceeded with the application in terms of ESTA. The applicant proceeded with the ESTA application under the present case number. During the

submissions, the applicant referred to the decision in *Blue Moonlight Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue and Another* [2010] ZAGPHC 3 (4 February 2010) at para [94], and argued that *"the private sector can only carry the weight of someone who is not paying for so long*". The letter served on the third respondent by the sheriff on 30 October 2019 suggested that the occupier was occupying the property illegally. The magistrate appeared to labour under the same wrong assumption stating that:

"Notice was given to the third respondent to vacate the said property and the applicant then proceeded by way of an application in terms of ESTA to apply to the court for an order for the third respondent to be removed from the said property.

The third respondents [conduct] amount to bad faith and from social worker's report, it appears that the third respondent has become comfortable with not paying for his stay on the said property.

The new owner has not moved onto the said property since her purchase thereof and is prejudiced that she has paid for a property she and her family cannot enjoy the benefits thereof."

[18] The letter sent to the third respondent to vacate in October 2019, to the premises, appears to rely on the settlement agreement concluded at the CCMA for the termination of the third respondent's residence. The settlement agreement did not terminate the right of residence and the letter sent to the third respondent did not terminate the third respondent's residence. There was no notice terminating the third respondent's right of residence. Even if the magistrate placed reliance on the letter which requested the third respondent to vacate the premises there was nothing alluded to in the letter which could have led to a valid termination of his right of residence as an occupier as provided for in terms of section 10[2] of ESTA.

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

(*a*) the occupier has breached section 6 (3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;

(*b*) the owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar months' notice in writing to do so;

[19] In *Aquarius Platinum (SA) (Pty) v Bonene & others* [2020] 2 All SA 323 (SCA), the Court stated in paragraph [13]

"[13] Thus, both the clear meaning of the language of these sections and their context (the need to protect the rights of residence of vulnerable persons) indicate a two-stage procedure. Section 8 provides for the termination of the right of residence of an occupier, which must be on lawful ground and just and equitable, taking into account, inter alia, the fairness of the procedure followed before the decision was made to terminate the right of residence. Section 8 at least requires that a decision to terminate the right of residence must be communicated to the occupier. Section 9(2) then provides for the power to order eviction if, inter alia, the occupier's right of residence has been terminated in terms of s 8, the occupier nevertheless did not vacate the land and the owner or person in charge has, after the termination of the right of residence, given two months' written notice of the intention to obtain an eviction order. Section 8(2) must of course be read with s 8(1) and provides for a specific instance of what may constitute a just and equitable ground for the termination of a right of residence.

(*c*) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or(*d*) the occupier—

(i) is or was an employee whose right of residence arises solely from that employment; and

(ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act.

(2) Subject to the provisions of subsection (3), if none of the circumstances referred to in subsection (1) applies, a court may grant an order for eviction if it is satisfied that suitable alternative accommodation is available to the occupier concerned.

(3) If—

(*a*) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;

(*b*) the owner or person in charge provided the dwelling occupied by the occupier; and

(*c*) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,

a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to—

(i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and

(ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted.

[20] The applicant placed on record that the third respondent's breach in terms of s10(1)(b) of ESTA was that the third respondent received severance pay for 25 years of service referring to an agreement between the first respondent and the third respondent. Furthermore, the agreement was that the third respondent would receive half of the money immediately and the balance on proof of eviction. The third respondent received the full amount of R25 000 and refused to vacate the premises. He is not paying rent and is breaching her fundamental right to property. Finally, the applicant recorded as a breach that the third respondent was retrenched in accordance with the Labour Relations Act.

[21] The agreement did not support the applicant's allegation of a breach. It did not refer to any eviction from the premises or the third respondent's departure. The only agreement made in terms of the Labour Relations Act was the payment of money, there was no reference to an eviction. There was no indication that the applicant requested rent from the third respondent or that he refused to pay any rent. In view of the third respondent having been in the employment of the previous owner for 25 years and having resided on the property for 13 years without his residence having been terminated, it must have been apparent to the applicant that he acquired rights in terms of ESTA.

[22] The third respondent as an occupier on the property of the previous owner had rights in terms of ESTA as provided under section 6 which states:

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

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

(*a*) to security of tenure;

(*b*) ……:

Provided that—

(i) ..... ; and

(ii) the occupier shall be liable for any act, omission or conduct of any of his or her visitors causing damage to others while such a visitor is on the land if the occupier, by taking reasonable steps, could have prevented such damage;

(*c*) ..... ;

(*d*) ..... ;

(*d*A) ..... ;

(*e*) not to be denied or deprived of access to water; and

(*f*) ....."

[23] Having regard to the above, the executor of the estate did not terminate the third respondent's right of residence as provided for in s 8 of ESTA when the settlement agreement was concluded. Furthermore, the record indicated that the applicant had no grounds on which to terminate the third respondent's right of residence in terms of s 8 of ESTA read with s 10 of ESTA. It was not proved that there was any misconduct on the part of the third respondent. There was a legitimate expectation by the third respondent that he would have a right of residence on the property after having resided on the previous owner's property for 25 years. The applicant did not consider the hardship that the third respondent may face, or consider representations from the third respondent. There appears to have been no engagement between the applicant and the third respondent.

[24] This calls into question the procedure regarding the termination of the residence of the third respondent. The magistrate referred to the letter to vacate. The application in terms of ESTA commenced after the PIE proceedings were withdrawn. There was no termination of residence by the executor of the estate. The settlement agreement which the magistrate referred to did not terminate the third respondent's residence. The applicant placed no conduct before the court which would constitute a breach. Finally, when the magistrate deliberated on the matter the court did not grant the relief requested in prayer 1.1 that the right of residence of the third and fourth respondents be terminated in terms of s 8 of ESTA on the immovable property known as Portion 579 (a Portion of Portion 203) of the Farm Rietfontein No 198 in

the district of Krugersdorp. In view of the above, I am unable to conclude that there was a valid termination of the third respondent's right of residence as found by the magistrate.

WHETHER OR NOT THERE WAS SUITABLE ALTERNATIVE ACCOMMODATION?

[25] Even if the occupier's right of residence was terminated which was not the case, the court was required to consider the evidence including the probation officer's report, and to ascertain whether there was:

(a) suitable alternative accommodation for the occupier,

(b) to ascertain how the eviction will affect the constitutional rights of the affected persons, including the rights of children if any to education,

(c) consider any undue hardships the eviction will cause the occupier and

(d) any other matter as may be prescribed.

[26] A report was filed by the probation officer Ms. Van Greer, dated 25 March 2020, and a report from the municipal manager of the Mogale City Local Municipality dated 10 March 2020. Ms Van Greer marked the report for the attention of the State Prosecutor rather than the Court suggesting that she did not understand her mandate. The report did not at the outset indicate the sources she consulted or indicate what her mandate was. It commenced with the introductory passage:

"Investigation into the circumstances of the concerned farm-evictions"

Having regard to the content, she attributed the applicant's inability to run the preschool to justify evicting the third respondent. She noted that the third respondent was using water resulting in the applicant having to provide water for five additional persons. This was a right which an occupier had in terms of ESTA. This indicated a lack of knowledge of ESTA and the rights of an occupier and a lack of knowledge of the area in which she was conducting an investigation for the benefit of the court.

[26] The probation officer indicated that she was accompanied by the assistant probation officer to consult with the third respondent to eliminate challenges and misunderstandings suggesting there may have been a problem in the communication initially. The probation officer reported thereafter that the third respondent was more than willing to communicate to complete the "document". She noted that the third

respondent received compensation from the previous owner. The third respondent informed her that the compensation was UIF money and had nothing to do with him and his family leaving the farm. Despite this information and the third respondent indicating he had applied for an RDP home, the report indicated he was unwilling to move if he was offered alternative accommodation. The report referred to the third respondent's home as "his self-proclaimed house"

[27] The probation officer reported that the third respondent was not willing to relocate to a squatter area. He had an emotional attachment to the farm. The probation officer reported that she could see the squatter area 500 metres away and confirmed that there were many squatter areas around the area near the police station. Regarding undue hardship, she noted the emotional attachment and that the third respondent and his family stay for free without paying for additional accommodation. She noted further they made no contribution toward electricity, water, or accommodation. She recommended informal settlements as secure alternative accommodation.

[28] The magistrate accepted the probation officer's report and indicated that the third respondent refused to vacate until the new owner provided him with alternative accommodation. The report from the Municipal Manager indicated it was a "REPORT IN TERMS OF THE EXTENSION OF SECURITY OF LAND TENURE ACT", the report described the parties, discussed housing policy and qualifying criteria and subsidies and the occupants of the property, it then stated:

"Based on all the relevant factors it is unreasonable that an order be granted as prayed for. The Municipality does not have alternative accommodation to house the family or any other temporary accommodation thereof."

The magistrate noted that the third respondent was not prepared to move to an informal settlement. The magistrate also accepted that the third respondent's son was buried on the property and not nearby. Thereafter, she concluded that:

"*the third respondent and his family has not shown any steps taken to secure alternative accommodation for…[indistinct]… and their expectation that the applicant must do so at the applicant's expense is unreasonable.*

The local, Mogale Municipality's Board indicating there is no alternative accommodation even temporary accommodation for the respondent and his family in unacceptable.

...

Furthermore if the third respondent is allowed to remain on the said property of the applicant because the local municipality cannot provide alternative accommodation, this would amount to expropriation without compensation to the owner."

[29] The magistrate did not subpoena the Municipal Manager to ascertain what exactly the status of temporary accommodation was and when alternative accommodation or temporary accommodation would be available. Despite not enquiring into these factors the presiding officer made the finding that "it is just and equitable" that the third and fourth respondents are evicted from the property. It is misguided to set the bar at directing that the third respondent show that alternative accommodation is not available. The probations officer's report and the report from the municipality were meant to assist the court in this regard. The probation officer's report was not helpful at all in that it directed that the third respondent move from the current accommodation to an informal settlement. The report from the municipality placed information before the court but lacked information to enable the court to determine when suitable accommodation would be available. The report could be clarified regarding the availability of alternative or temporary accommodation. Neither the probation officer nor the magistrate appeared to find any difficulty in reducing the third respondent's standard of living. It was pointed out to the magistrate that the third respondent resides in a unit that has been customised with a toilet, a shower, running water, a geyser and the unit is tiled and that alternative accommodation could not have envisaged an informal settlement. The magistrate's response was:
"If *that was the case now, we would not have informal settlements. [indistinct]. Is that not the same issue we are faced with by this country? We have enough, we do have enough proper housing for the majority of our people. So do I punish a property owner because the government has not done its duty and provided suitable alternative accommodation*"

[30] What the magistrate's response loses sight of is that, whilst protecting the rights of owners of private property may be regarded as proactive, this must be

balanced with the protection afforded to occupiers who have security of the tenure where their rights are protected in terms of ESTA. A court faced with an enquiry before an eviction such as the court was, is expected to inquire into whether there is suitable alternative accommodation among other factors, having regard to the real challenges faced by indigent litigants in the midst of a shortage of suitable housing available. In the present instance, there clearly was no suitable alternative accommodation. Without any input from the municipality on available alternative and or emergency accommodation, the eviction to alternative accommodation proposed by the probation officer under these circumstances would mean leaving the farm to survive under unacceptable if not inhuman conditions of squalor. The conclusion that the order for eviction is "just an equitable" is inimical to justice and equity.

[31] As if that was not enough, by not calling and obtaining a report from the municipality, the magistrate then proceeded to order the municipality to make land available for the relocation of the third respondent and others living under him on the property. This order is made without receiving evidence or further information from the municipality or the Municipal Manager.

[32] The magistrate proceeded to make a costs order in favour of the successful party. This was against the third and fourth respondents who opposed the order. This does not take cognisance of the equity aspect of ESTA and the plight of litigants who appear before the court. It ignores the custom of the Land Claims Court recognised, approved and endorsed by the Supreme Court of Appeal and Constitutional Court in several cases if not all from the Land Claims Court not to make an order for costs unless there are good reasons to do so. It was evident from the outset that the third respondent was an indigent litigant. No reasons were furnished for making a costs order against an indigent litigant having regard to the different lived realities of the parties.

[33] It is apposite to conclude with the view of the Supreme Court of Appeal, in *Aquarius Platinum (SA) (Pty) v Bonene & others* [2020] 2 All SA 323

(SCA)[3], with reference to other cases including those of the Constitutional Court[4], the Supreme Court of Appeal recently had this to say on the meaning of section 8 regarding termination of residence of an occupier under ESTA. Albeit in the context of vulnerable persons it states:

" The Constitutional Court said the following in *Snyders*[5]:

'If a person has a right of residence on someone else's land under ESTA, that person may not be evicted from that land before that right has been terminated. In other words, the owner of land must terminate the person's right of residence first before he or she can seek an order to evict the person. However, it must be borne in mind that the termination of a right of residence is required to be just and equitable in terms of section 8(1) of ESTA. Section 8(2) deals with the right of residence of an occupier who is an employee of the owner of the land or of the person in charge and whose right of residence arises solely from an employment agreement. It provides that such a right of residence may be terminated "if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.'

And at para 56:

'Section 8(1) makes it clear that the termination of a right of residence must be just and equitable both at a substantive level as well as at a procedural level. The requirement for the substantive fairness of the termination is captured by the introductory part that requires the termination of a right of residence to be just and equitable. The requirement for procedural fairness is captured in section 8(1)*(e)*.'[6]

And further at para 72:

'In any event, even if it were to be accepted that Ms de Jager terminated Mr Snyders' right of residence, she has failed to show, as is required by section 8(1) of ESTA, that there was a lawful ground for that termination and that, in addition, the termination was just and equitable. At best for Ms de Jager, she purported to show no more than that there was a lawful ground for the termination of the right of residence. She did not go beyond that and

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[3] *Aquarius Platinum (SA) (Pty) v Bonene & others* [2020] 2 All SA 323 (SCA) para 10 to 13

[4] *Mkangeli and others v Joubert and others* [2002] 2 All SA 473 *(A); Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga and others* [2012] 33 All SA 655 ([2012] ZASCA 77; *Snyders and others v De Jager and others* 2017 (3) SA 545) (CC); *Nimble Investments (Pty) Ltd (formerly known as Tadvest Industrial (Pty) Ltd and Old Abland (Pty) Ltd) v Malan and others* [2021] 4 All SA 672 (SCA)

[5] *Snyders and Others v De Jager and Others* [2016] ZACC 55; 2017 (3) SA 545 (CC) para 68.

[6] *Snyders* fn 5 para 56

place before the Magistrate's Court evidence that showed that the termination of Mr Snyders' right of residence was just and equitable.'[7]

I align myself with what is stated in the above paragraphs.

[34] As a result, I find that due to the irregular proceedings and non-compliance with the peremptory requirements of the Extension of Security of Tenure Act 62 of 1997, I am unable to confirm the order for eviction.

[35] For the reasons above I grant the following order:

1. The order of the Magistrate Krugersdorp handed down on 23 March 2021 is set aside and substituted with the following:

"The application for eviction of the third and fourth respondent and any person claiming occupation through or under them from the premises known as Portion 579 (A Portion of Portion 203) of the Farm Rietfontein No 198, in the district of Krugersdorp is dismissed with costs."

Judge: S C MIA
ACTING JUDGE
LAND CLAIMS COURT

[7] *Snyders* fn 5 para 72