THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 556/2020

In the matter between:

NIMBLE INVESTMENTS (PTY) LTD (FORMERLY KNOWN AS TADVEST INDUSTRIAL (PTY) LTD AND OLD ABLAND (PTY) LTD)	**APPELLANT**
and	
JOHANNA (ELSIE) MALAN	**FIRST RESPONDENT**
DOROTHY MALAN	**SECOND RESPONDENT**
CHARMAINE MALAN	**THIRD RESPONDENT**
MOSES MALAN	**FOURTH RESPONDENT**
JACOBUS MALAN	**FIFTH RESPONDENT**
LIZA PLAATJIES	**SIXTH RESPONDENT**
REDEWAAN BOTHA	**SEVENTH RESPONDENT**
ASHLEY MALAN	**EIGHTH RESPONDENT**

THOSE PERSONS UNLAWFULLY OCCUPYING COTTAGE NO. 5, TOPSHELL PARK BADEN POWELL ROAD, LYNEDODOCH, STELLENBOSCH, WITH OR UNDER, FIRST TO EIGHT RESPONDENTS **NINTH RESPONDENT**

STELLEBOSCH MUNICIPALITY **TENTH RESPONDENT**

DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM **ELEVENTH RESPONDENT**

Neutral citation: *Nimble Investments (Pty) Ltd v Johanna Malan and Others* (556/2020) [2021] ZASCA 129 (30 September 2021)

Coram: DAMBUZA, SCHIPPERS AND MBATHA JJA AND CARELSE and EKSTEEN AJJA

Heard: 14 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 30 September 2021.

Summary: Land – land reform – Extension of Security of Tenure Act 62 of 1997 (ESTA) – whether eviction order just and equitable – fundamental breach of relationship between occupier and owner under s 10(1)*(c)* – occupier unlawfully removing building materials and erecting illegal structure on land – fundamental breach of relationship justifying eviction – opportunity for representations under s 8(1)*(e)* of ESTA – not required in the circumstances – appeal upheld.

ORDER

On appeal from: Land Claims Court of South Africa, Randburg (Ncube AJ sitting as court of first instance):

1 The appeal succeeds.

2 The order of the Land Claims Court is set aside and replaced with the following order:

> ‘(a) An eviction order is granted against the first to eighth respondents and all those occupying the farm known as Topshell Park in Stellenbosch, Western Cape (the farm) under them.
>
> (b) The first to eighth respondents and all those occupying the farm under them must vacate the farm on or before 31 March 2022.
>
> (c) Should the respondents and all those occupying the farm under them fail to vacate it on or before 31 March 2022, the sheriff of the court is authorised to evict them from the farm by 14 April 2022.
>
> (d) The tenth respondent is ordered to provide emergency housing of a dignified nature with access to services (which may be communal) to the first to eighth respondents and all those occupying the farm under them, on or before 31 March 2022.
>
> (e) There is no order as to costs.’

JUDGMENT

Carelse AJA (Mbatha JA concurring)

[1] This is an appeal against a judgment and order of the Land Claims Court (LCC) which on automatic review under s 19(3)[1] of the Extension of Security of Tenure Act 62 of 1997 (ESTA) set aside an eviction order granted by the magistrate, Stellenbosch for the eviction of the first to ninth respondents. The appellant, Nimble Investments (Pty) Ltd is the registered owner of the farm known as Topshell Park, Portion 128 of the farm Welmoed Estate, No 468 (the farm), in the district of Stellenbosch, in the Western Cape**.** The appeal is with the leave of the LCC (Ncube AJ).

Background facts

[2] At the outset the appellant submits that the appeal before this Court turns on whether there was compliance with s 8(1)*(e)* of ESTA and if so, whether there was a fundamental breach of the relationship between the appellant and the first respondent in term of s 10(1)*(c)* of ESTA. The facts relevant to the determination of the issues are largely common cause and arise mainly from the events that took place on 28 November 2016.

[1] 'Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in the *Gazette*, shall be subject to automatic review by the Land Claims Court, which may -
(a) confirm such order in whole or in part;
(b) set aside such order in whole or in part;
(c) substitute such order in whole or in part; or
(d) remit the case to the magistrate's court with directions to deal with any matter in such manner as the Land Claims Court may think fit.'

[3] The first respondent and her husband, the late Mr Malan (the deceased) arrived on the farm in 1974. Mr Malan was employed on the farm until his death, on 4 October 2005. He was 61 years old at the time of his death. In terms of his employment contract the deceased was given permission by Mr Le Roux, the previous owner of the farm to occupy cottage 1 on the farm. The second, third, fourth and fifth respondents are the adult children of the first respondent. The sixth respondent is the daughter-in-law of the first respondent. The seventh respondent and the eighth respondent respectively, are the minor and adult grandsons of the first respondent. On 25 May 2006, the previous owner launched eviction proceedings against the respondents. In 2006, assisted by the Stellenbosch University Law Clinic, the first respondent entered into a lease agreement with the previous owner of the farm in terms of which she would lease cottage 1 at a monthly rental of R500 which settled the eviction application. At the same time, she demanded that the electricity be restored to cottage 1. The first to ninth respondents lived together in cottage 1. In April 2008, the appellant bought the farm and took over the lease agreement from the previous owner.

[4] Initially when the appellant first purchased the farm in 2008, it wanted to convert the farm from an agricultural farm to an Agri-Park and it was conditional for rezoning purposes that the area where cottage 1 was located be vacated, if the municipality was to give approval. Due to the extension of the Baden Powell Highway in 2012, the appellant required the land, on which cottage 1 was located, to relocate the business of its long-term tenant Topshell Park (Edms) Bpk in order to meet its obligations. The purpose for the relocation was to facilitate the expropriation process. During 2012 and 2013 there were negotiations with the first

respondent to vacate the farm, during which the first respondent was represented by the Stellenbosch law Clinic and that the negotiations came to naught.

[5] On 30 June 2016, a meeting was held between the first respondent and the appellant's attorneys. At this meeting, and at a further meeting held on 11 August 2016, the first respondent agreed to relocate to cottage 5. The first respondent was not legally represented at these two meetings. The appellant launched a relocation application in terms of s 8(7)[2] and s 19(1)*(b)*(i)[3] of ESTA which was heard on an unopposed basis. The first to ninth respondents were ordered to vacate cottage 1 and to take up occupation of cottage 5.

[6] On 28 November 2016, the first respondent and her family moved from cottage 1 to cottage 5. During the relocation process the fourth respondent (the son of the first respondent) and some unidentified members of the first respondent's household removed the roof tiles, roof sheets and trusses (building material) from cottage 1. In the presence of police officers and the first respondent, Mr Van der Merwe – the site manager and director of the farm, told the members of the first respondent's family that they were not entitled to do so. They refused to stop. It is not in dispute that the first respondent knowingly permitted an illegal structure to be built with the appellant's building material next to cottage 5, without the consent of the appellant, and further that the first respondent swore and shouted at

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[2] Section 8(7) of the Extension of Security of Tenure Act 62 of 1997 (ESTA) provides:
'If an occupier's right to residence has been terminated in terms of this section, or the occupier is a person who has a right of residence in terms of subsection (5) -
(a) the occupier and the owner or person in charge may agree that the terms and conditions under which the occupier resided on the land prior to such termination shall apply to any period between the date of termination and the date of the eviction of the occupier . . . .'

[3] '**19 Magistrate's courts**
. . .
(b) shall be competent-
(i) to grant interdicts in terms of this Act. . . .'

the farm manager that cottage 1 belonged to her and that she could do as she wanted with the building material.

[7] The fourth respondent who lived in cottage 5 was the only respondent that was identified when the events of 28 November 2016 occurred and thus made common cause with the first respondent's actions. On 18 January 2017, the appellant wrote to the first respondent demanding the return of the building material and told her that if she did not remedy the breach by demolishing the illegal structures and return the building material by 1 February 2017, the appellant would launch eviction proceedings against her. The first respondent refused to return the building material and to vacate cottage 5. On 1 February 2017, the first to fifth respondents received notices to vacate cottage 5 and were told that their right to reside was terminated on the ground that the first respondent committed a fundamental breach of trust as contemplated in s 10(1)*(c)* of ESTA, as a result of her misconduct arising out of the events of 28 November 2016. The first respondent was given one calendar months' notice to vacate, on or before 28 February 2017. On 28 April 2017, the appellant launched an application for the eviction of the respondents. At the launch of the application the first respondent was 68 years' old.

[8] In both the appellant's heads of argument and in its application for leave to appeal, the appellant concedes that the first respondent was not invited to make representations before her right to reside was terminated. I imagine that the same applies to the other respondents who reside in cottage 5. It is common cause that the first respondent was not afforded an effective opportunity to make representations before her right of residence was terminated as contemplated in terms of s 8(1)*(e)* of ESTA.

[9] On 28 April 2017, the appellant applied for the eviction from the farm of the first to ninth respondents. The application was opposed by the respondents. The tenth respondent filed a report. There is no indication in the record if the tenth and eleventh respondents opposed the application. After considering the affidavits and the various reports and the hearing of oral evidence on 23 September 2019, the Stellenbosch Magistrate's Court, granted an eviction order against the first to ninth respondents.

[10] The eviction order came before the LCC on automatic review in terms of s 19(3) of ESTA,[4] Ncube AJ, after considering the matter, and in a written judgment dated 7 November 2019, found that the first respondent was a long-term occupier under s 8(4)[5] of ESTA and stated that:

'. . . the Applicant is basing the eviction on section 10(1)*(c)*. In terms of that section, the right of residence of Mrs. Malan may be terminated if she has committed such a fundamental breach of the relationship between 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.

[4] '. . . Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in the *Gazette*, shall be subject to automatic review by the Land Claims Court, which may-
(a) confirm such order in whole or in part;
(b) set aside such order in whole or in part;
(c) substitute such order in whole or in part; or
(d) remit the case to the magistrate's court with directions to deal with any matter in such manner as the Land Claims Court may think fit.'

[5] Section 8(4) of ESTA provides:
'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–
. . .
(4) The right of residence of an occupier who had resided on the land in question or any other land belonging to the owner for 10 years and **–**
(a) has reached the age of 60 years; or
(b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge, *may not be terminated unless that occupier has committed a breach contemplated in section 10(1)(a), (b) or (c).* Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.' (My emphasis.)

The Applicant contends that the removal of building material from cottage No 1 constitutes a fundamental breach of relationship and it is not practically possible to restore such relationship. I do not agree. The Applicant has the option of claiming compensation for his building material if he so wishes. The other distinguishing feature in this case is that it does not appear on the papers that Mrs. Malan was given the opportunity to make representations – notices of termination of right of residence did not draw her attention to the fact that she can make representations in terms of section 8 (1)*(e)* of the Act. Under these circumstances I am unable to confirm the eviction.' (My emphasis.)

[11] A long-term occupier is a protected class of occupiers under ESTA. The appellant accepts that the first respondent is a long-term occupier[6]. The first respondent was an occupier on the land on 4 February 1997 and her eviction is governed by s 10 of ESTA.[7] ESTA is regarded as social legislation, intended to regulate the eviction of vulnerable occupiers under certain conditions and circumstances, at the same time recognising the rights of landowners to seek eviction orders under certain circumstances. The second to ninth respondents' right

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[6] *Klaase and Another v Van Der Merwe N O and Others* [2016] ZACC 17; 2016 (6) SA 131 (CC**):** Matojane AJ held the following at para 60:
'It is undisputed that Mrs Klaase lived on the premises continuously for many years with the knowledge of the second respondent and his father before him. By his own admission in the answering affidavit, the second respondent said that Mrs Klaase came to live with her prospective husband in a house that had been made available to him on the premises. There is no evidence to rebut the presumption that the respondents consented to Mrs Klaase's residing on the farm. The respondents' failure to object to Mrs Klaase's residing on the farm for decades or taking steps to evict her is telling. It implies that they consented to her occupancy. But prior to the enactment of ESTA that was always with the consent of the landowner or farmer.'

[7] **10 Order for eviction of person who was occupier on 4 February 1997**
(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 month's notice in writing to do so;
(c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or
(d) the occupier-
(i) is or was an employee whose right of residence arises solely from that employment; and
(ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act.'

of residence was terminated but neither the Stellenbosch Magistrate's Court nor the LCC considered the right of residence of the second to ninth respondents. They may well be occupiers in their own right. The appellant did not allege that any of the other respondents were invited to make representations on why their right of residence should not be terminated.

[12] Against this background two main issues arise in this appeal. The first is whether the termination of the right of residence was just and equitable both in substance and in procedure.[8] The second is, if the termination was just and equitable, would the eviction be just and equitable? ESTA envisages a two-stage eviction procedure: first, a notice of termination of the right of residence in terms of s 8, and second the notice of eviction in terms of s 9(2)*(d)*.[9] If it is found that the termination of the right of residence was not just and equitable due to non-

[8] In *Snyders and Others v De Jager and Others* (Appeal) [2016] ZACC 55; 2017 (5) BCLR 614 (CC); 2017 (3) SA 545 (CC).

[9] In *Aquarius Platinum (SA) (Pty) Ltd v Bonene and Others* [2019] ZASCA 7; [2020] 2 All SA 323 (SCA); 2020 (5) SA 28 (SCA) the Supreme Court of Appeal at paras 10 and 11 held:

'Approximately two decades ago, this Court found in *Mkangeli and Others v Joubert and Others* that there had to be a proper termination of the right of residence. It stated:

"Once an occupier's right to reside has been duly terminated, his refusal to vacate the property is unlawful. Nevertheless, it does not mean that the remedy of eviction will necessarily be available. This remedy is limited by those provisions of ESTA to which I will presently return. On the other hand, ESTA places no limitation on the other remedies attracted by unlawful occupation. It must therefore be accepted, I think, that the other remedies, such as the owner's delictual claim for his patrimonial loss caused by the unlawful occupation of his land (see, for example, *Hefer v Van Greuning* 1979 (4) SA 952 (A)) are still available to him. As to the remedy of eviction s 9(2) provides that a court may only issue an eviction order if certain conditions are met. The first such condition is that the occupier's right to residence must have been properly terminated under s 8. Other conditions prescribed by s 9(2) include the giving of two months' notice of the intended eviction application after the right to reside has been terminated under s 8 (s 9(2)*(d)*). In a case such as the present, where the appellants took occupation of Itsoseng after 4 February 1997, s 11 also finds application. This section provides that a court may only grant an eviction order if it is of the opinion that it is just and equitable to do so. In deciding whether it is just and equitable to grant an eviction order the court must have regard to the considerations listed in s 11(3), but it is not limited to them. Included amongst these is the consideration 'whether suitable alternative accommodation is available to the occupier' (s 11(3)*(c)*) and 'the balance of the interests of the owner . . . the occupier and the remaining occupiers on the land' (s 11(3)*(e)*)."

In *Sterklewies* this Court said the following:

"The Act contemplates two stages before an eviction order can be made. First the occupier's right of residence must be terminated in terms of s 8 of the Act. The manner in which this is to be done is not specified. Once the right of residence has been terminated then, before an eviction order can be sought, not less than two months' notice of the intention to seek the occupier's eviction must be given to the occupier, the local municipality and the head of the relevant provincial office of the Department of Land Affairs in terms of s 9(2)*(d)* of the Act. That notice is required to be in a form prescribed by regulations made in terms of s 28 of the Act".'

compliance with s 8(1)*(e)* then there is no need to determine the second issue. Eviction proceedings can only commence after the right of residence is terminated.[10] For the purposes of this appeal the basis upon which the appellant terminated the first respondent's right of residence was on the ground that the first respondent committed a fundamental breach of trust as contemplated in s 10(1*)(c)* of ESTA.

[13] I will now proceed to consider whether the termination of the right of residence was just and equitable, both procedurally and in substance. Section 8(1) of ESTA provides:

'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.' (My emphasis.)

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[10] *Cosmopolitan Projects Johannesburg (Pty) Ltd v Leoa & Others* [2019] ZALCC 1 para 34, The LCC held:
'What is immediately apparent is that this is a Notice in terms of section 9(2)*(d)* of ESTA which purports also to terminate the first to fiftieth respondents' rights of residence in terms of section 8 of ESTA. As Mr Botha who appeared for the thirty fifth to fiftieth respondents correctly submitted, this sort of hybrid approach is impermissible. A section 9(2)*(d)* Notice is correctly and appropriately issued only after an ESTA occupier's right of residence has been validly and fairly terminated in terms of section 8.'

[14] There are four requirements which must be met in order for an eviction application to be granted under ESTA. These grounds are located in s 9(2) of ESTA. The first is whether the respondents right of residence had been terminated in accordance with s 8; second whether the respondents have vacated the farm within the one calendar month as prescribed; third whether the conditions under ss 10 or 11 were complied with; and fourth whether the requisite two months' written notice of the appellant's intention to obtain an eviction order had been given to the respondents, the relevant municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform.[11] The two month's written notice is subject to a proviso which, if applicable will render the notice unnecessary.

[15] In determining whether the termination was just and equitable 'all relevant factors' in particular, the criteria set out under s 8(1)*(a)* to *(e)* must be considered. In *Snyders and Others v De Jager and Others* [2016] ZACC 55; 2017 (3) SA 545 (CC) para 56, the Constitutional Court held that:

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[11] '**9. 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.'

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

The appellant accepts that what is required for procedural fairness as contemplated in subparagraph *(e)* is set out in *Snyders*. The Constitutional Court held at paras 73 and 75 as follows:

‘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 s 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 place before the magistrates' court evidence that showed that the termination of Mr Snyders' right of residence was just and equitable.

. . .

Counsel for the Snyders family also contended that the Magistrate’s Court should not have issued an eviction order because the Snyders family had not been afforded any procedural fairness by way of an opportunity to be heard before they were required to vacate the property. It is common cause that the Snyders family were never invited to make representations to Ms de Jager on why they should not be required to vacate the house before they were actually required to vacate it. In my view, the submission by counsel for the Snyders family has merit. ESTA requires the termination of the right of residence to also comply with the requirement of procedural fairness to enable this person to make representations why his or her right of residence should not be terminated. This is reflected in section 8(1)*(e)* of ESTA. A failure to afford a person that right will mean that there was no compliance with this requirement of ESTA. This would render the purported termination of the right of residence unlawful and invalid. It would also mean that there is no compliance with the requirement of ESTA that the eviction must be just and equitable.’ (My emphasis.)

[16] To determine whether the termination is just and equitable, a consideration of all relevant factors and the specific criteria set out under subparagraphs *(a)* to *(e)*[12] is required. Subparagraph *(a)* is not applicable because the reasons given for seeking the eviction of the respondents is not founded on 'any agreement, provision of an agreement, or provision of law'. In light of my findings in respect of subparagraph *(e)*, I express no view on subparagraphs *(b)*, *(c)* and *(d)*.

[17] According to *Snyders*, a mere failure to comply with the procedural fairness that is required by subparagraph *(e)* would render the purported termination of the right of residence unlawful and invalid.

[18] The appellant conceded that after the events of 28 November 2016 and prior to the termination of the right of residence of the first to ninth respondents there were no discussions and negotiations between the appellant and the first respondent. The first to ninth respondents were not legally represented before their right to reside was terminated. To avoid the consequences of *Snyders*, the appellant submitted that the first respondent had adequate opportunity before her occupation was terminated and even after, but prior to being required to vacate, to approach the appellant.

[19] The appellant relies on the decision in *Le Roux NO and Another v Louw and Another* [2017] ZALCC 10 paras 91-93. In that case the LCC referred to *Snyders* and made the following remarks:

'These comments must be read in the context of the particular factual situation in *Snyders*. Section 8(1)*(e)* does not contemplate that it will be appropriate in every case that an opportunity

[12] See para 11 above.

be given to make representations before the decision to terminate the right of residence. This is clear from the wording of section 8 (1)*(e)* which reads as follows: "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."

In our view, in circumstances where, unlike in *Snyders,* the right of residence did derive solely from the contract of employment, procedural fairness in relation to the possible loss of the right of residence will have been a natural consequence of the procedural fairness afforded in the process of terminating the contract in accordance with provisions of the Labour Relations Act as envisaged in section 8(2) of ESTA. For that reason, it was not necessary for the third appellant to have afforded Louw a distinct and separate opportunity to make representations before the decision was made to terminate the right of residence. This appears to us to be one of the situations contemplated in section 8 (1)*(e)* where the words "or not" and "should have been" apply.

Even if we are wrong in stating that as a general proposition, we are satisfied that in this particular case, it was not necessary to afford Louw a distinct and separate opportunity to make representations before his right of residence was terminated, as contemplated in section 8 (1)*(e)*. *Procedural fairness was afforded through the disciplinary procedures followed in relation to Louw's employment and its eventual termination* . . . if he had any compelling reason why the third appellant should not terminate his right of residence, notwithstanding termination of his employment, it was up to him to raise it at the disciplinary enquiry." (My emphasis.)

In the case before this Court, there was no enquiry or procedure during which the first respondent (or any of the other respondents who lived on the farm) could have given reasons why their right of residence should not be terminated.

[20] In *Timothy v Sibanyoni and Others* [2020] ZALCC 8 para 56, the court held:

'One of the factors which the court is expressly required to take into account when considering this question is the fairness of the procedure followed by the owner in terminating a right of residence. This is required by 10(1)*(e)*, which in its terms accepts that the occupier need not necessarily be afforded an opportunity to make representations. The wording of the subsection is clear on this point: it provides that when considering the fairness of the procedure followed by

the owner a factor to be taken into account is "whether or not the occupier had or should have been granted and effective opportunity to make representations before the decision was taken to terminate the right of residence." (Emphasis added.)

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

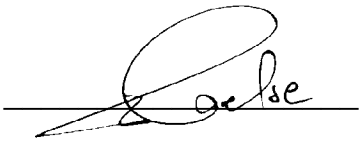
In this case before me there was no equivocal statement or conduct by the first respondent which could obviate an invitation to make representations. This, however, may not apply to other respondents living on the farm who could be occupiers in their own right.

[21] This Court is bound by *Snyders.* For the reasons stated above, the facts in *Le Roux* and *Sibanyoni* are clearly distinguishable from the facts in this case. It is common cause that the appellant did not invite the first to ninth respondents to make representations before terminating the respondents' right of residence.

[22] The appellant had previously attempted to persuade the first respondent and her family members to leave the farm voluntarily against payment of R100 000 compensation, but through discussions and negotiations the first to ninth respondents were relocated on the same land. There were no discussions or negotiations prior to the termination of the first to ninth respondents' right to reside. The first to ninth respondents should have been granted an effective opportunity to make representations before the date on which their right of residence was to be terminated, in view of the hardship they would endure if evicted.

[23] As a result hereof, it is not necessary to decide whether there was a fundamental breach of trust as contemplated in s 10(1)*(c)* of ESTA. Neither the first respondent nor any of the other respondents living on the farm have been granted an effective opportunity to make representations as required in terms of s 8(1*)(e)* of ESTA.

[24] The President of this Court appointed an *amicus curiae* to make submissions on the issues raised in this appeal. We are grateful for the heads of argument and submissions that were prepared. No costs are sought by them.



Z CARELSE

JUDGE OF APPEAL

Schippers JA (Dambuza JA and Eksteen AJA concurring):

[26] I have read the judgment of my colleague Carelse AJA in which she has come to the conclusion that the appeal should be dismissed as the respondents had not been given an opportunity to make representations before their rights of residence were terminated, as contemplated in s 8(1)*(e)* of the Extension of Security of Tenure Act 62 of 1997 (ESTA). I take a different view. In my respectful opinion the issues raised by this appeal are twofold. The first is whether an order for the eviction of the respondents from the relevant property was justified on the ground of a fundamental breach of the relationship between the first respondent, Mrs Johanna Malan and the person in charge, Mr Deon van der Merwe (the site and farm manager), which was not practically possible to remedy as envisaged in s 10(1)*(c)* of ESTA. The second is whether the eviction order was just and equitable in terms of the provisions of ESTA.

The facts and proceedings below

[27] The facts are largely common ground. The appellant is the registered owner of the farm Topshell Park in Stellenbosch, Western Cape (the farm). In September 2019 it obtained an order in the Stellenbosch Magistrates' Court for the eviction of the first to ninth respondents, in terms of ESTA. The case went on automatic

review to the Land Claims Court (LCC) under s 19(3) of ESTA.[13] The LCC (Ncube AJ) set aside the eviction order. The appeal is with its leave.

[28] Mrs Malan, is a widow and pensioner who lives on the farm, together with the second to ninth respondents. The second to fifth respondents are Mrs Malan's adult children. The sixth respondent is Mrs Malan's daughter-in-law. The seventh and eighth respondents are the minor and adult grandsons respectively, of Mrs Malan.

[29] Mrs Malan and her husband, the late Mr Moos Malan, moved to the farm in 1974 when Mr Malan was employed as a driver by the appellant's predecessor in title. In terms of his employment contract, he was provided with accommodation in Cottage 1 on the farm where he lived until he passed away on 4 October 2005. Mrs Malan continued to live on the farm and in 2006 concluded a lease agreement with the appellant's predecessor in title, in terms of which she leased Cottage 1 at a rental of R500 per month.

[30] Neither Mrs Malan nor any of the respondents however paid any rent to the appellant. This was not disputed. It appears from the founding papers that during the tenure of the lease she was legally assisted regarding payment of arrear rental. Not much turns on this, since before us the appellant contended that the ultimate reason for the termination of the right of residence, was a fundamental breach of the relationship between Mrs Malan and Mr Van Der Merwe.

[13] Section 19(3) of Extension of Security of Tenure Act 62 of 1997 (ESTA) provides, inter alia, that any eviction order by a magistrate's court shall be subject to automatic review by the Land Claims Court.

[31] In 2012 the appellant was compelled to forgo a portion of the farm because of the widening of the R310, a provincial road in Stellenbosch. As a result, the land required by the appellant's anchor tenant, Topshell (Pty) Limited (Topshell), under a long-term lease was reduced and it was forced to provide Topshell with a portion of land on which a number of cottages including Cottage 1, were located.

[32] The appellant then entered into negotiations with Mrs Malan and eight other households whose cottages were on the same land as Cottage 1, with a view to their voluntary relocation to other property with the appellant's assistance, by way of a cash amount and the provision of building materials. The negotiations with Mrs Malan which took place over a period of one year, were unsuccessful.

[33] At a meeting with the appellant's attorney on 11 August 2016, Mrs Malan agreed to move to Cottage 5 and stated that she understood the process that had to be followed under ESTA in that regard. On 2 September 2016 Mr Van Der Merwe and Mrs Malan agreed upon the repairs, changes and improvements that had to be effected to Cottage 5. These included removing a tree and an interior drywall; installing a kitchen sink, wall plugs, and switches; and painting the roof, interior and exterior of the cottage, Mrs Malan undertook to move to Cottage 5 as soon as the repairs and improvements were completed.

[34] However, after the completion of the repairs Mrs Malan refused to move to Cottage 5. The appellant then applied to the Stellenbosch Magistrate's Court for the relocation of the respondents. On 20 October 2016 that court issued an order in terms of which Mrs Malan and all those occupying Cottage 1 under her, were directed to vacate Cottage 1 and take occupation of Cottage 5 (the relocation order).

[35] On 28 November 2016 Mrs Malan moved to Cottage 5. What happened that day was the subject of oral evidence before the magistrate. The fourth respondent (Mrs Malan's son) and other members of her household removed building materials consisting of roof sheets and rafters (which the appellant had promised to its employees), window frames and various fixtures from Cottage 1. This happened in the presence of Mrs Malan, Mr Van der Merwe and police officers whom the latter had called to the scene while the building materials were being removed.

[36] Photographs annexed to the founding papers showed that only the brick-and-mortar shell of Cottage 1 remained. The building materials were then used to erect an unlawful structure right next to Cottage 5, without the appellant's consent. Mrs Malan did nothing to stop the unlawful removal of the appellant's building materials. On the contrary, she swore at Mr Van Der Merwe and shouted at him that Cottage 1 was her house and she could do with it whatever she wanted. The illegal structure, Mrs Malan testified, had been erected to store her things because Cottage 5 was too small – it was in fact 9.4 square metres bigger than Cottage 1. That structure however, was used to house persons who previously had not lived with Mrs Malan on the farm.

[37] On 18 January 2017 the appellant's attorneys sent Mrs Malan a notice that her right of occupation had been terminated on the following grounds. The unlawful removal and theft of the building materials (the appellant had laid a charge of theft with the police) constituted a material breach of the relationship between the parties. Mrs Malan had further breached the relationship by using the materials to erect an unauthorised and unlawful structure on the farm in

contravention of building regulations as well as s 6(3)*(d)* of ESTA.[14] That structure was being used to accommodate members of her family who had not lived with her before. The appellant demanded that Mrs Malan demolish the illegal structure and return the building materials by 1 February 2017. She was also informed that she and members of her family were required to vacate Cottage 5 and the illegal structure by 1 February 2017, failing which an application for their eviction would be brought.

[38] The illegal structure was not demolished, neither were the building materials returned. Consequently, on 1 February 2017 the sheriff served a notice on Mrs Malan and the second to ninth respondents to vacate the farm by 28 February 2017. In that notice it was recorded that the respondents' residence had already been terminated by a notice served by the sheriff on 20 January 2017 (on the basis of a breach of the lease agreement). The notice stated that the unlawful removal of the building materials constituted a serious breach of the relationship; that Mrs Malan had taken no steps to prevent the removal; that she had made common cause with the members of her family by stating that Cottage 1 was her house and that she could do with it as she pleased; and that a complaint had been lodged with the police.

[39] The respondents did not vacate the farm and the appellant launched eviction proceedings on 28 April 2017. In the founding papers it alleged that the termination of Mrs Malan's rights of residence was just and equitable on three alternative grounds: (i) she had failed to pay the rental under the lease agreement; (ii) if she was an occupier in terms of s 8(5) of ESTA, termination was justified

[14] Section 6(3) of ESTA provides:
'An occupier may not-
. . .
(d) enable or assist unauthorised persons to establish new dwellings on the land in question.'

under s 10(1); and (iii) if she was an occupier contemplated in s 8(4), termination was warranted in terms s 10(1)*(a)*, *(b)* or *(c)* of ESTA.

[40] Mrs Malan opposed the application and was legally represented in the magistrate's court. None of the other respondents opposed the application or asserted any independent right to reside on the farm. In the answering affidavit Mrs Malan denied that she had concluded the lease agreement and said that the appellant had never approached her for payment of rent, despite having made arrangements through her attorneys to pay-off arrear rental. She opposed the application for eviction on the basis that she was an occupier as envisaged in s 8(4) of ESTA: she had resided on the farm for ten years and had reached the age of 60. Mrs Malan also raised a special plea that in terms of s 8(5), her right of residence could be terminated only on 12 calendar months' written notice to leave the farm.[15]

[41] The magistrate found that the lease agreement was the source of Mrs Malan's right to reside on the farm. She was legally represented at the time and the lease agreement had been concluded, presumably 'to regulate and formalise her rights as opposed to not being able to occupy the property further due to her husband's demise'. None of the other respondents had acquired any independent right to reside on the farm. Further, Mrs Malan had conceded that her right of residence had been lawfully terminated in accordance with s 8(1) of ESTA.

[42] The magistrate considered the factors set out in ss 11(3) and 9(2) of ESTA and held that an order of eviction was just and equitable for the following reasons. The eviction emanated from the widening of the R310 road. Mrs Malan conceded

[15] Section 8(5) of ESTA reads:
'On the death of an occupier contemplated in subsection (4), the right of residence of an occupier or his or her spouse or dependant may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependant has committed a breach contemplated in section 10(1).'

that her right of residence had been lawfully terminated. The respondents had committed a fundamental breach of the relationship contemplated in s 10(1)*(c)* of ESTA. The unavailability of alternative accommodation came about as a result of the respondents' own conduct. The appellant had offered them the sum of R100 000 plus building materials, but the respondents wanted a minimum amount of R400 000. Four of the five adult respondents were employed elsewhere, but never paid any rent. The appellant had paid substantial amounts for water, sewerage and waste removal on behalf of the respondents and could not be expected to continue to do so. The respondents were guilty of misconduct which could not be condoned in the circumstances. The appellant had given timeous notice of the eviction proceedings to the relevant authorities.

[43] The LCC, as stated, set aside the eviction order. It concluded that Mrs Malan was an occupier in terms of s 8(4) of ESTA. As such, her right of residence could not be terminated unless she had committed a breach contemplated in s 10(1)*(a)*, *(b)* or *(c)*. The LCC found that s 10(1)*(a)* was inapplicable and s 10(1)*(b)* was no basis for termination of the right of residence. It held that there was no breach as envisaged in s 10(1)*(c)* of ESTA because the appellant had 'the option of claiming compensation' for its building materials if it wished to do so. The LCC held that the eviction order could also not be confirmed because Mrs Malan had not been informed that she could make representations in terms of s 8(1)*(e)* of ESTA.

Was there a breach of the relationship as envisaged in s 10(1)*(c)* of ESTA?

[44] On the case made out in the founding affidavit, it may be accepted that Mrs Malan is an occupier as envisaged in s 8(4) of ESTA. She has lived on the farm for at least ten years and has reached the age of 60 years. Consequently, her right of

residence could not be terminated unless she committed a breach contemplated in s 10(1)*(c)* of ESTA.[16]

[45] Section 10(1)*(c)* of ESTA provides:

'An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if–

'*(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.'

[46] The plain wording of this provision makes it clear that what is contemplated is an act of breaking the relationship on the part of the occupier that is essentially impossible to restore. The LCC has held that a fundamental breach of the relationship between an owner and an occupier contemplated in s 10(1)*(c)* 'relates to a social rather than a legal relationship' and that this requirement would be met if 'it is practically impossible for the relationship to continue due to a lack of mutual trust'.[17]

[47] In determining whether an occupier has committed a fundamental breach of the relationship envisaged in s 10(1)*(c)* of ESTA, it seems to me that the following factors must be considered. The history of the relationship between the parties prior to the conduct giving rise to the breach. The seriousness of the occupier's conduct and its effect on the relationship. The present attitude of the parties to the relationship as shown by the evidence.

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[16] Section 8(4) of ESTA, in relevant part, reads:
'The right of the residence of an occupier who has a 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; . . .
may not be terminated unless that occupier has committed a breach contemplated in section 10(1)*(a)*, *(b)* or *(c)*. . . .'

[17] *Ovenstone Farms (Pty) Ltd v Persent and Another* [2002] ZALCC 31.

[48] *Klaase*[18] is a case in point. There, the Constitutional Court held that absconding from work and absenteeism; a history of inappropriate conduct; failure to attend a disciplinary hearing; failure to vacate premises as agreed; and continuing to live on the premises rent-free while being gainfully employed elsewhere, was misconduct for purposes of s 10(1)*(c)* of ESTA.[19]

[49] Applying these principles to the present case, it was common ground that prior to the incident on 28 November 2016, the relationship between Mrs Malan and Mr Van der Merwe was one of mutual respect, trust and co-operation. Mr Van der Merwe described their relationship prior to its breakdown, as follows:

'I just also want to point out at this stage, when all this moving over and this process took place, there was not a breakdown in trust between Tadvest, myself and Ms Malan. We were on good speaking terms. So there were no malicious actions or reasons for us not to work together and facilitate this process. You may recall that I said to you, Monday morning at what time (indistinct) they should've been out by [then] but I said: let's give them a couple more hours so that they can move (indistinct) go to the house again they started breaking it down. So the breakdown of the trust relationship only happened after this whole moving over and the process where they started breaking down the house it ended.'

[50] On 28 November 2016 the appellant's employees who had been given the rafters and roof sheeting went to remove these materials from of Cottage 1. They returned and told Mr Van der Merwe that the materials were already being removed. Mr Van der Merwe went to the site where he found that the appellant's building materials were being removed and stacked. He asked Mrs Malan's son to stop but was ignored. He then called the police who came to the scene. Their presence did not deter the persons from continuing with the removal of the building materials. As Mr Van der Merwe was speaking to the police, Mrs Malan

[18] *Klaase and Another v Van Der Merwe and Others* [2016] ZACC 17; 2016 (6) SA 131 (CC).
[19] *Klaase* fn 6 para 43.

came out of Cottage 5. She was ‘very upset and emotional’. She shouted at Mr Van der Merwe that Cottage 1 was her house and she could do with the building materials whatever she wanted and, using an expletive, told him to get off the property.

[51] On hearing this, which Mr Van der Merwe described as ‘really upsetting’, he left the scene. The police remained there and did nothing to stop the wrongdoers. Despite the appellant laying criminal charges of theft against them, a few days later Mrs Malan caused the building materials to be used to erect the illegal structure annexed to Cottage 5, without the appellant’s permission and contrary to building regulations. She then allowed persons who had not lived on the farm before to occupy the illegal structure. As stated in the founding affidavit, this conduct was a breach of s 6(3)*(d)* of ESTA.

[52] The erection of the illegal structure continued, despite the fact that the appellant’s attorneys had written to Mrs Malan and demanded that it be removed and the building materials returned. She ignored this letter. When the matter was heard in the magistrates’ court – more than two years later – the illegal structure had still not been demolished. Mr Van der Merwe described Mrs Malan’s response, which was unchallenged, as follows:

‘As far as I know she didn’t react at all. There was no reaction from their side, they just carried on for the next two months, adding on to the structures around house number 1 and no building material was returned and there was no communication from their side to Abland, Tadvest or myself.’

[53] The unchallenged evidence was that it was not practically possible to restore the relationship between Mrs Malan and the appellant. When asked about the effect of her conduct on the relationship, Mr Van der Merwe said:

‘. . . as I said before we had a mutual respectful relationship . . . But after this incident, I mean there are some things that you say to another person that can’t be undone and that can’t change. So the relationship of mutual trust and goodwill was can I say, demolished, destroyed in this case. So all direct communication came to a halt.’

[54] Indeed, it was common ground that the relationship of trust between Mrs Malan and Mr Van der Merwe had been broken: they had no contact nor any relationship after the incident on 28 November 2016. It was also common ground that Mr Van der Merwe had objected to the removal of the building materials; that he had called the police; that Mrs Malan had shouted; that she had been rude to him (she admitted this and apologised during her evidence); and that she had erected the illegal structure without permission.

[55] In the light of this evidence, Mrs Malan’s explanation for the fundamental breach of trust – she had shouted at Mr Van der Merwe that he was a liar, because he had given her permission to take what she needed for Cottage 5, but subsequently withdrew it – may safely be rejected. This served only to exacerbate an already broken-down relationship. Mrs Malan did not need any building materials for Cottage 5. The appellant had already done the necessary repairs and improvements to it – which she had approved and signed for after an inspection with Mr Van der Merwe.

[56] Further, on Mrs Malan’s version, there was no reason for Mr Van der Merwe to go to Cottage 1 where the building materials were being removed, call the police or lay charges of theft. It is thus not surprising that at no stage did Mrs Malan inform the police that she had been given permission to remove the building materials. What is more, she continued with the removal of the building materials even after Mr Van der Merwe had told her that he viewed her conduct as theft. She

did this precisely because she considered that she could do with the building materials as she pleased and knew that they were going to be used to erect the illegal structure.

[57] In addition, Mr Van der Merwe testified that it was illegal to erect any structure around Cottage 5 without approved building plans. It is thus inconceivable that he would have allowed Mrs Malan to remove the building materials, or to erect any illegal structure on the farm contrary to building regulations. Mrs Malan's attitude that she could do with Cottage 1 as she pleased, also explains why she ignored the appellant's demand to demolish the structure and return the building materials.

[58] In her evidence, Mrs Malan sought to justify the illegal structure as being necessary to store her furniture because Cottage 5 was too small. This too, was false. The undisputed evidence was that Cottage 5 was bigger than Cottage 1. So, there would have been enough space for her furniture. Further, the illegal structure was not erected immediately to protect Mrs Malan's furniture. This merely underscores the reason for the illegal structure – to house persons not previously resident on the farm.

[59] For these reasons, the submission by counsel for Mrs Malan that it seemed inevitable that the respondents were being evicted for business purposes, is unsustainable on the evidence. So too, the contention that a fundamental breach of the relationship was not established 'over the use of building materials'. The reason for the eviction initially was the non-payment of rent. However, it was ultimately the events of 28 November 2016, Mrs Malan's conduct in enabling unauthorised persons to occupy the farm by erecting an illegal structure on it and her ongoing refusal to demolish the structure and return the building materials,

which culminated in the breakdown of trust to the extent that the relationship could not be restored. The misconduct was ongoing and deliberate and took place in the context of an already deteriorating relationship due to the failure to pay rental and utilities, and the refusal to relocate.

[60] The LCC thus erred in concluding that there was no fundamental breach of the relationship between Mrs Malan and the appellant, and that the appellant could simply claim compensation for its building materials. The LCC disregarded the nature and seriousness of the respondents' conduct and its effect on the relationship between the parties. Apart from this, the LCC misconstrued the appellant's case: its conclusion was based solely on the respondents' conduct in removing the building materials from Cottage 1. On the evidence however, the lack of respect and mutual trust in the relationship between the occupier and the owner or person in charge, because of the occupier's conduct, was beyond dispute.

Was the eviction order just and equitable?

[61] The requirements which an owner must meet to prove that termination of an occupier's right of residence was just and equitable depends on the facts of the particular case.[20] In this case the conduct of Mrs Malan and the respondents who removed the building materials and subsequently erected the illegal structure, which gave rise to the application for her eviction, is particularly relevant. So too, the comparative hardship to the appellant and the respondents. In this regard, the dictum by Nkabinde J in *Molusi*,[21] bears repetition:

'ESTA requires that the two opposing interests of the landowner and the occupier need to be taken into account before an order for eviction is granted. On the one hand there is the traditional real right inherent in ownership reserving exclusive use and protection of property by the landowner. On the other there is the genuine despair of our people who are in dire need of

[20] *Land & Landbouontwikkelingsbank van SA v Conradie* [2005] 4 All SA 509 (SCA) para 9.
[21] *Molusi and Others v Voges N O and Others* [2016] ZACC 6; 2016 (3) SA 370 (CC) para 39.

accommodation. Courts are obliged to balance these interests. A court making an order for eviction must ensure that justice and equity prevail in relation to all concerned. It does so by having regard to the considerations specified in s 8 read with s 9, as well as ss 10 and 11, which make it clear that fairness plays an important role.'[22]

[62] Section 8(1) of ESTA provides that 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 those listed in s 8(1)*(a)* to *(e)*.[23] These factors include the conduct of the parties giving rise to the termination; the interests of the parties, including the comparative hardship to the owner and the occupier; and the fairness of the procedure followed by the owner, including whether the occupier had or should have been given an opportunity to make representations before termination of the right of residence.

[63] While any eviction creates hardship for the persons evicted, the legislature has expressly provided for eviction on the grounds of a fundamental breach of the relationship between the occupier and the owner or person in charge. As stated, the appellant reasonably required the land when the R310 road was widened, in order

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[22] The conclusion by C P Smith *Eviction and Rental Claims: A Practical Guide* (2021) para 5.7, that it seems that a court does not have to take all relevant factors into account when considering an eviction order, but rather the specific factors in ss 10 of 11, whichever applicable; and that eviction in terms of s 10(1)*(a)* to *(d)* does not have to be just and equitable in addition to the specific requirements in each instance, is thus incorrect.

[23] Section 8(1) of ESTA 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.'

to secure its anchor tenant under a long-term lease. It then sought to obtain Mrs Malan's consent to leave the farm through a series of negotiations, but to no avail. On numerous occasions the appellant offered R100 000 and building materials as a contribution to the respondents' relocation and if that amount was insufficient, it was willing to consider reasonable suggestions by them for additional assistance. The appellant moreover offered to assist the respondents financially in purchasing serviced plots in Klapmuts (of which Mrs Malan would have become a co-owner) on which emergency housing structures could be erected by the tenth respondent, Stellenbosch Municipality (the Municipality). This assistance too, the respondents refused.

[64] As stated, the changes and upgrades to Cottage 5 were done with Mrs Malan's approval. Despite this, she refused to move and the appellant was forced to apply for the relocation order. The events leading to the breakdown of the relationship between Mrs Malan and Mr Van der Merwe have been described above. The eviction came about solely as a result of her conduct. She told Mr Van der Merwe in crude and insulting terms to get off the property when she misappropriated the building materials. She erected an illegal structure with those materials and enabled unauthorised persons to occupy it. She has no intention of returning the materials or demolishing the structure. Since her refusal to voluntarily relocate to Cottage 5, her conduct (and that of the respondents) has been audacious and defiant. In these circumstances, the belated apology by Mrs Malan during her evidence for treating Mr Van der Merwe rudely, rings hollow.

[65] As to the interests of the parties envisaged in s 8(1)*(b)*, it must be emphasised that it is only Mrs Malan who is an occupier in terms of s 8(4) of ESTA. The remaining respondents hold title under her. Mrs Malan had been living

on the farm for some 45 years when the case was heard, of which she resided for 14 years after her husband's passing in 2005. In my opinion however, given that it is practically impossible for the relationship between Mrs Malan and Mr Van der Merwe to be restored due to a lack of mutual trust, her continued residence on the farm is untenable. This is an inevitable consequence of an eviction under s 10(1)*(c)* of ESTA. According to the papers, Mrs Malan receives a state pension and was employed as a domestic worker for many years. She has family who own residential property in Stellenbosch and Wesbank in the Western Cape. Her brother owns a house in Stellenbosch in which Mrs Malan's mother was living at the time of the hearing. There seems to be no reason why the responsibility of accommodating Mrs Malan or assisting her in finding accommodation, should not be borne by her family.[24]

[66] The remaining respondents have been living on the farm, rent-free for many years. This, despite the fact that five of the six adult respondents work elsewhere and receive an income, and that the remaining adult respondent is of an employable age. This in itself is a lawful ground for the termination of the right of residency under ESTA, if the termination is just and equitable.[25] What is more, for as long as they have been living on the farm, the respondents have never paid for services such as water, refuse removal or sewerage, the monthly costs of which are borne by the appellant.

[67] The LCC failed to consider this evidence or the appellant's interests in not permitting unlawful conduct, the erection of an illegal structure on the farm, or its continued occupation by unauthorised persons. Instead, it had regard only to the

[24] *Rashavha v Van Rensburg* 2004 (2) SA 421 (SCA) para 19.
[25] *Molusi* fn 9 para 43.

fairness of the lease agreement, to a limited extent the conduct of Mrs Malan, and the apparent lack of notice regarding representations under s 8(1)*(e)* of ESTA.

[68] This brings me to s 8(1)*(e)* of ESTA. It states that an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to, inter alia:

'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.'[26]

[69] It is a settled principle that when interpreting a statutory provision, what must be considered is the language, context and purpose of the statute and the material known to those responsible for its drafting.[27] Two points must be made about this provision. First, it is clear from the language and syntax of s 8(1)*(e)* that Parliament did not require an occupier to be given an opportunity to make representations in every case.[28] The language is clear and explicit and, in my view, must be given effect to whatever the consequences. Second, on the plain language of s 8(1)*(e)*, the opportunity to make representations applies only in relation to a decision to terminate the right of residence, and constitutes the procedural fairness requirement of that provision.[29]

[70] In my opinion, this interpretation is consistent with the immediate context and is illustrated by the facts of this very case. Thus, s 9(2) of ESTA draws a distinction between the eviction of an occupier on the basis of termination of the

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[26] Emphasis added.

[27] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) affirmed in *Airports Company South Africa SOC Ltd v Imperial Group Ltd and* Others [2020] ZASCA 2; [2020] 2 All SA 1 (SCA); 2020 (4) SA 17 (SCA) para 22.

[28] *Le Roux NO and Another v Louw and Another* [2017] ZALCC 10 para 91.

[29] *Snyders and Others v De Jager and Others* [2016] ZACC 55; 2017 (3) SA 545 (CC) para 75.

right of residence in terms of s 8,[30] and the conditions for an order for eviction in terms of s 10.[31] Section 10(1)*(c)* authorises the *eviction* of an occupier on the grounds of a fundamental breach of the relationship between him or her and the owner or person in charge. It says nothing about representations on the part of the occupier. This is hardly surprising as a relationship of mutual trust and respect is fundamental to co-residence. A construction that an owner is required to grant an occupier an opportunity to make representations once it is found that the occupier has committed a fundamental breach of their relationship which is practically impossible to continue, is both insensible and intolerable. It would also render the provisions of s 10(1)*(c)* nugatory: what is contemplated is whether objectively, the relationship is at an end.

[71] Thus, in *Klaase*[32] there was no suggestion of the occupier being granted an opportunity to make representations. This was also the case in *Wichmann*,[33] in which it was held that there was a fundamental, irremediable breach of the relationship between the landowner and an occupier in terms of s 10(1)*(c)* of ESTA, where the occupier had erected a structure on a farm without permission and disregarded the landowner's instruction to stop building. The conduct of the other occupiers in intimidating and assaulting farmworkers was held to be a breach of their duty under s 6(3), which rendered them liable to eviction in terms of s 10(1)*(a)* and *(c)*.[34] In terms of s 10(1)*(a)*, an order of eviction may be granted if an occupier has committed a material breach of s 6(3) which has not been remedied. Again, the language and context exclude an opportunity to make representations.

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[30] Section 9(2)*(a)* of ESTA.
[31] Section 9(2)*(c)* of ESTA.
[32] *Klaase* fn 6.
[33] *Wichmann N O and Another v Langa and Others* 2006 (1) SA 102 (LCC).
[34] *Wichmann* fn 21 para 43.

[72] Applying the principles in *Molusi* referred to in paragraph 36 above, I do not think it can be said that an order for the eviction of the respondents would be unjust, inequitable or unfair. The appellant did not elect to use the portion of the farm on which Cottage 1 was located. It was compelled to do so because of the widening of a road, and in order to secure a long-term tenant necessary for its business. To force the appellant to continue to provide Mrs Malan with housing in the face of overwhelming evidence of a fundamental breakdown of their relationship as contemplated in s 10(1)*(c)* of ESTA, would place it in an untenable position. The appellant cannot be expected to continue to tolerate the respondents' occupation of an illegal dwelling on its land – proscribed by ESTA itself. Neither can it be expected to continue to support them financially by providing free housing and utilities. As was said in *Labuschagne*:[35]

'The Act was not intended to promote the security of opportunistic occupiers at the expense and exploitation of the rights and legitimate interests of the landowners.'

[73] The facts show that the appellant has repeatedly tried to assist the respondents in securing alternative accommodation, which has unreasonably been refused. The inference is inescapable that the appellant's offers were refused because the respondents have no intention of giving up the benefits of free accommodation and utilities which the appellant currently provides. The appellant has indicated on oath that it remains willing to negotiate with the respondents if they consider that the relocation contribution of R100 000 is insufficient, and that it remains willing to consider all reasonable suggestions from the respondents as to how it could assist them. There is no apparent reason why the appellant would renege on this offer.

[35] *Labuschagne and Another v Ntshwane* 2007 (5) SA 129 (LCC) para 23.

[74] The *amicus curiae*, for whose assistance we are grateful, submitted that Mrs Malan had committed a fundamental breach of trust as envisaged in s 10(1)*(c)* of ESTA. The *amicus* suggested that the matter be remitted to the magistrate because the report by the Municipality concerning alternative accommodation was dated 7 March 2018 and the report in terms of s 9(3) of ESTA, 25 May 2018, and that circumstances may have changed.

[75] In my view, no purpose would be served by remitting the matter to the magistrate. First, the appellant remains willing to assist the respondents in finding alternative accomodation. Second, the report by the Municipality makes it clear that it has adopted an emergency housing assistance policy to accommodate homeless persons. It is accordingly obliged to provide the respondents with alternative accommodation should they be rendered homeless, despite its claim that it was unable to provide accommodation when the case was heard, because of its policy to provide accommodation close to their former homes. The Constitutional Court has held that a municipality is obliged not only in terms of ESTA, but also s 26 of the Constitution to provide suitable alternative accomodation.[36] Third, according to the s 9(2) report, the Municipality had negotiated with the appellant to contribute the sum of R50 000 towards the relocation of Mrs Malan, provided that she agreed to leave the farm. Finally, any further delay is not justified. The respondents will be given an adequate opportunity to find alternative accommodation. The matter has dragged on for nearly five years now and the intolerable position in which the appellant finds itself, cannot be allowed to continue.

[76] In the result the following order is issued:

[36] *Baron and Others v Claytile (Pty) Ltd and Another* [2017] ZACC 24; 2017 (10) BCLR 1225 (CC); 2017 (5) SA 329 (CC) para 46.

1 The appeal succeeds.

2 The order of the Land Claims Court is set aside and replaced with the following order:

‘(a) An eviction order is granted against the first to eighth respondents and all those occupying the farm known as Topshell Park in Stellenbosch, Western Cape (the farm) under them.

(b) The first to eighth respondents and all those occupying the farm under them must vacate the farm on or before 31 March 2022.

(c) Should the respondents and all those occupying the farm under them fail to vacate it on or before 31 March 2022, the sheriff of the court is authorised to evict them from the farm by 14 April 2022.

(d) The tenth respondent is ordered to provide emergency housing of a dignified nature with access to services (which may be communal) to the first to eighth respondents and all those occupying the farm under them, on or before 31 March 2022.

(e) There is no order as to costs.’

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A SCHIPPERS

JUDGE OF APPEAL

APPEARANCES:

For appellant:	J L Williams
Instructed by:	Cluver Markotter Inc., Stellenbosch c/o McIntyre van der Post, Bloemfontein
For first to ninth respondents:	L Mfazi (with him L Tshigomana)
Instructed by:	S Morgan & Associates, Mitchell’s Plain c/o Bekker Attorneys, Bloemfontein.