

SOUTH AFRICA / JUDGMENT

Du Plessis and Another v Kriel N.O and Others (LCC88/2022) [2023] ZALCC 43; [2024] 1 All SA 702 (LCC) (14 December 2023)

[2023] ZALCC 43

COURT
Land Claims Court

BEFORE
Cowen, Ncube, Flatela

CASE / FILE NUMBER
LCC88/2022

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN
THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD
AT RANDBURG
CASE
NO: LCC88/2022
(1)
REPORTABLE: YES
(2)
OF INTEREST TO OTHER JUDGES: YES
(3)
REVISED. NO

DATE: 14
December 2023
In
the matter between
EUGENE
DE VOS DU PLESSIS
First
Appellant
(1st
Respondent in the Court a quo)
HENDRIEKA
DU PLESSIS
Second
Appellant
(2nd

Respondent in the Court a quo)
and
ALEXANDER
FLORIS KRIEL N.O
First
Respondent
(1st
Applicant in the Court a quo)
PIETER
GABRIEL KRIEL N.O
Second
Respondent
(2nd
Applicant in the Court a quo)
STEFAN
LE ROUX N.O
Third
Respondent
(3rd
Applicant in the Court a quo)
LOKATO
PATRICK GOOSEN
N.O
Fourth
Respondent
(4th
Applicant in the Court a quo)
IDA
AUDREY GOOSEN
N.O
Fifth
Respondent
(5th
Applicant in the Court a quo)
JENNIFER
MAMPI LEBAEA N.O
Sixth
Respondent
(6th
Applicant in the Court a quo)

JUDGMENT

COWEN J (Ncube J concurring)

Introduction

- [1] At issue in this appeal are the rights of occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA) when subject to an application for their relocation. The Supreme Court of Appeal (SCA) has confirmed that a relocation of an ESTA occupier to a different house on the same registered property is not an eviction under ESTA.[1] Nevertheless, the scope of the rights of persons when subject to relocation processes, remains contested.
- [2] The appeal is against a relocation order granted by the Magistrate of Worcester, on 20 April 2022, in terms of section 19(1)(b)(i) of the ESTA.[2] The relocation order was granted in the form of a mandatory interdict. It directed the appellants to vacate a three-bedroomed house on the farm Uitvlugt 310, Breede Valley Municipality, Division Worcester (the farm), and move to a smaller house on the farm.
- [3] It is common cause that the appellants, Mr Eugene De Vos du Plessis and Mrs Hendrieka du Plessis, are ESTA occupiers. They are a married couple, both over 70 years old, and are retirees who now depend for their survival on a state pension of R1860.00 each per month. [3] The first appellant is a retired veterinary technologist. The respondents are the trustees of the PG Kriel Werkers Trust (the Trust). The Trust purchased the farm in September 2013 and transfer was registered on 14 July 2014.
- [4] The Trust commenced proceedings to relocate the appellants in January 2020. The proceedings were initially delayed due to the Covid-19 pandemic and the appellants' efforts to obtain legal representation. The application was also delayed at a point to enable the parties to attempt to reach settlement. The application was ultimately heard only in January 2022. The appeal against the Magistrate's decision was initially argued in January 2023, but it became necessary to include an additional judge on the bench in terms of section 14(3) of the Superior Courts Act 10 of 2013. The appeal was then argued further on 11 September 2023 before three judges.[4] On 8 December 2023, the Appeal Court delivered its unanimous order, referred to below. This judgment contains our reasons.

Factual**background**

- [5] The appellants were residing on the farm when the respondents purchased it in September 2013 and, while their date of arrival is not known, it appears that they had been doing so for some time. They were residing in a house on the farm (the leased house) pursuant to an oral lease agreement concluded between the appellants and the erstwhile owner, Two Tone

Investments (Pty) Ltd. There is no dispute that upon the transfer of the property, and as a legal consequence, the Trust became the lessor of the leased house. There is similarly no dispute that on transfer the appellants would have obtained the protections conferred by section 24 of ESTA, which protects occupiers' rights and keeps their consent to occupy in place when properties are transferred.^[5] The material terms of the lease agreement were that the appellants would pay a monthly rental of R1500.00 (later increased to R2000.00 per month). At a point, it appears in early 2017, the appellants fell into arrears with their rent. It is common cause that the appellants derived their right of residence on the property from the lease agreement. They were at no stage employed on the property.

- [6] The trustees served the relocation application in January 2020 in circumstances where they wished to use the leased house for a farm manager to reside in. Indeed, the trustees regard the house as a manager's house. At that time, the then farm manager, Mr Lampreghts and his family resided on a smaller house on the property and the Trust wished to make the leased house available to them. One consideration was that the Trust was suffering in its reputation by not providing managers' accommodation to its manager. The Trust says the leased house is situated close to one of the farm entrances and provides

unobstructed viewed to most of the vineyards and is thus well-positioned for a manager who must both oversee access to the farm and its operations. It is also a well-sized house suitable for a family. They did not wish to evict the appellants from

the property, but would make the smaller house available to them contending that it could easily accommodate them. The Trust

contended that on 16 September 2019, it had served a notice on the appellants demanding that they vacate the house and occupy alternative accommodation to be made available by the Trust.

- [7] The notice, which is material to this appeal, is in the form of a letter written in Afrikaans, and sent from the Trust's attorneys, Döman & Kogler. Translated, it reads:

'We refer to the above matter and address this letter to you on behalf of the PG Kriel Werkers Trust.

We confirm that you currently occupy a house on the farm Uitvlugt, Worcester (the property), owned by our client. We confirm further that your occupation of the house stems from an oral agreement concluded with the previous owner of the farm, which agreement was cancelled on our client's instructions due to your breach of contract and by way of our letters to you dated of 7 August and 10 October 2017.

The house that you currently occupy is required by our client as accommodation for the manager of the property, the farm manager. There is alternative accommodation on the property that our client has available for you, which will be sufficient for your needs. We accordingly request you to vacate the house that you currently occupy and take occupation of the other house that our client has available for you.

We will be grateful to receive written confirmation from you, within five working days, that you will move from the house you are occupying no later than 13 October 2019. Should you fail to notify us or should you notify us and fail to vacate the house by 13 October 2019, we will bring an application in the High Court requesting the Court to order your relocation.’

Further, you are also welcome to contact our offices to view the other house.’

[8] The appellants did not respond to the letter. They ultimately opposed the application and delivered an answering affidavit in December 2020 without the assistance of a lawyer. The deponent to the answering affidavit is the first appellant, Mr du Plessis and there is no supporting or confirmatory affidavit from Mrs du Plessis. Mr du Plessis raises various issues, some of which warrant highlighting here. He says that the smaller house is not a feasible option for the appellants as their belongings will not be accommodated in it. He disputes that the leased house is a ‘manager’s house’ or suitable as a manager’s house, referring to other houses on the property he regards to be suitable for managers. He says he was never informed that the house is a manager’s house. Mr du Plessis claims that the application is a disguised eviction brought with the intention of downgrading or reducing the appellants’ rights. He pleads that the appellants are occupiers protected by section 8(4)(a) of ESTA and contends that there is no basis for their relocation.[6] He does not squarely dispute that the appellants are in arrears but states that he cannot recall the date of the last payment and notes that he had, on a number of occasions, requested the Trust to assist with repairs to the leased house, broken wires and an overflowing septic tank. He did not receive assistance and the appellant used his own money to repair and maintain the property, including to acquire a pump to pump water for household use.

[9] By the time that the replying affidavit was delivered (11 March 2021), Mr Lampreghts had left the Trust’s employ and the Trust had advertised a vacancy for a farm manager. In a supplementary answering affidavit (dated 21 February 2022), the appellants pointed out, and it became common cause, that a Mr Shepherd had taken over as farm manager and had moved onto the farm during July

2021. Mr Shepherd had moved into a different house on the property. The appellants also pointed out that the smaller house that had been earmarked for them was now occupied by a Mr Visagie and his family. The respondents explained that Mr

Visagie was a junior manager and that they wished to make the leased house available to him given his role on the farm.

The Magistrate’s decision

- [10] The Magistrate commenced her decision by setting out and evaluating the evidence. In dealing with the applicable law, she refers to the case law that establishes that an eviction in terms of ESTA is confined to an eviction from the land in question and not from one dwelling to another on the same property.[7] Relying on Pharo's Properties CC, Chagi and Rouxlandia 1, she concludes that the application is a relocation application and not an eviction.
- [11] The Magistrate holds that on the facts of this case, there is no termination of the right of residence of the appellants. She holds that section 8 is inapplicable because it deals with the termination of the right of residence and eviction: in effect, section 8 does not apply to relocations. Accordingly, the appellants can claim no protection from section 8(4) of ESTA.
- [12] The Magistrate is mindful of a holding in Rouxlandia 2 that a party who wishes to resist a relocation may invoke section 5(a) and section 6(2)(a) of ESTA.[8] The Magistrate then considers the facts and concludes that the proposed relocation does not constitute an infringement of the appellant's rights under section 6 of ESTA. She concludes further that the smaller house is suitable alternative accommodation. In this regard it is neither uninhabitable nor in any way inferior to the leased house and is only a little bit smaller.
- [13] The Trust, the Magistrate finds, has the right to determine how to manage its own assets. Conversely, the appellants do not have the right to dictate to the Trust how it must manage its assets including on matters such as which house it should use for its management. On the facts of the case, she found that the Trust has made out a case for an interdict in terms of section 19(1)(b)(i) of ESTA.

Issues

on appeal

- [14] The grounds of appeal are wide and varied, and raise a range of related issues, but it is not necessary to traverse each ground or issue in order to decide the appeal. Having regard to the submissions of the parties, the matters traversed during the hearings, and the grounds of appeal, the main issues that determine the appeal are as follows:

14.1 Is it permissible for the appellants, on appeal, to rely on a contention that section 8 of ESTA was not complied with and in what respects?

14.2 If so, is section 8, and accordingly section 8(4), applicable to relocations?

14.3 If so, have the appellants demonstrated that they are occupiers protected by section 8(4) of ESTA?

14.4 If not, did the Magistrate err in concluding that the Trust made out a case for an interdict mandating the appellants' relocation and that a relocation would not offend the appellants' rights in terms of section 5 and 6 of ESTA.

Issues of race and racism

- [15] Before dealing with the above issues it is necessary to deal with another matter – race and racism – which, according to the Trust, are the real factors motivating the appellants’ resistance to the relocation, and which, according to the appellants, are mere red herrings.
- [16] The Trust averred in the founding affidavit that, in addition to the commercial and practical considerations, there is a further consideration which led to the relocation application. The Trust explained that the then farm manager, Mr Lambreghts is a black South African, and an extremely competent farm manager rendering invaluable services on the farm to the Trust. The Trust explained that it is increasingly problematic for the Trust to justify why two individuals who do not pay any rental and do not contribute to farming operations and never have, and who are white and thus not previously disadvantaged, are allowed to reside in a house of considerable higher status to that of the farm manager. The situation, they explained, raises unnecessary uneasiness, and possible unrest with regards to race relations.
- [17] The difficulty emerged when, in the answering affidavit, the first appellant alleged: ‘I submit that the house earmarked for our relocation is not suitable for us and our belongings. Further it is amongst the employees of the farm and close to the farm implements and other farm related stuff. I submit that, at me and my wife’s age we cannot be exposed to unsafe conditions and be expected to lose most of our belongings gathered over a longer period.’ In reply, the Trust

avers: ‘The allegation ... is confirmation of the real reason why the respondents refuse to relocate. Being a white male and female they have a serious objection to living amongst the farm employees. These employees are all black and coloured South Africans. The allegation ... also directly accuses the black and coloured farmworkers of being thieves and criminals ... [R]aising the farm implements as a safety concern is merely an attempted smokescreen towards the fact that the respondents do not want to live amongst the black and coloured farmworkers.’

- [18] The appellants had an opportunity to deal with this issue in their supplementary affidavit of 21 February 2021, at which point they were legally represented. They did not do so, but instead assert that there had been a prior unsuccessful eviction application and that the current relocation application was ‘a shrewd attempt to make (their) stay on the farm unbearable and intolerable.’ In its further reply, the Trust reaffirmed that it seeks to maintain order and peace amongst its labour force and other occupiers on the farm contending that the appellants are not entitled to special treatment. Moreover, it maintained that it is not pursuing eviction proceedings mindful of the age of the appellants and out of a sense of reasonableness. It reiterated that it is doing so at great financial cost.
- [19] The Magistrate, in my view correctly, made the following observations as regards the appellant’s allegation in the answering affidavit:

‘The First respondent makes a very broad, general statement that is unsubstantiated. He gives no explanation as to why he cannot

live in the same vicinity as those who are employed on the farm. The First Respondent also does not state what exactly poses a threat to him and / or his wife; what it is that they will be exposed to that would be detrimental to them; what these unfavourable conditions are, and why it will be unsafe for him and his wife. ...’

[20] The Magistrate went on to say this, again, in my view, correctly:

‘The racial undertones in this application is something that the Court cannot ignore. The First Respondent is extremely careful in the way he formulates his objection to their relocation in paragraph 29 of his opposing affidavit. Instead he reverts to very vague and general averments, none of which are substantive in any way.’

[21] These issues were canvassed both in the written and oral submissions of the parties. Ultimately, the Court enquired how, on the evidence, it could be concluded that the objection in the answering affidavit is anything other than racism. In the absence of any evidence of any demonstrable safety concern in the circumstances of the particular farm, it clearly implies that the risk to safety arises from the fact that the appellants, who are known to be white, would have to live amongst employees, who are known to be black. The implication is that black employees are prone to criminal activity, indeed violence, which is not only without substance, but is highly offensive and undermining of the dignity of farm-workers (both generally and on the farm specifically)

who – due to South Africa’s history, are usually black and in this case are known to be black. Mr Magardie, in my view responsibly, did not seek to argue otherwise and made it clear that he was not relying on the related averments to motivate his clients’ case on appeal. During the first hearing the Court enquired whether he had instructions from his clients in this regard. He did not but on the Court’s urging, he obtained instructions including on whether the appellants would apologise for offence caused and withdraw the remarks. It was then confirmed that the first appellant, who was unrepresented at the time, regrets what was stated, and confirmed that he has no objection to living amongst the black employees on the farm. Mr Magardie, however, was unable formally to withdraw the remarks as they had been made on affidavit but again emphasised that no reliance would be placed on these considerations during the appeal.

[22] Even accepting the appellants’ revised stance, the issue cannot simply be left there. Not least given this country’s past, it must be emphasised that there is simply no place for racism in any legal proceedings. In context of ESTA, which is concerned with the ravages of insecure tenure in rural South Africa as a result of our past, it is vital that landowners and occupiers engage ESTA’s processes to promote racial justice. The Trust’s wish to do so on its farm warrants recognition, and race-based resistance to efforts of this sort warrants censure. Indeed, on the merits of the application, it is difficult to ignore the remarks that were made because there is not much else that is advanced substantively to resist the relocation.

[23] It may also be remarked that these issues have made this a hard case. However, it must be remembered that any decision framed by an interpretation of ESTA will impact not only on the litigants before this Court but on everyone to whom ESTA applies and protects. Accordingly, in dealing with these points, it is important to remember that for the most part, those who are subject to relocation efforts under ESTA are not in the position of the appellants but are historically disadvantaged persons, predominantly African, who continue to live in vulnerable conditions and are the direct victims of South Africa's unjust past.

The first issue: the appellant's reliance on appeal on a contention that section 8 of ESTA was not complied with.

[24] In the appeal, Mr Magardie submitted that the appeal should be upheld, because section 8 of ESTA was not complied with before the Trust sought the appellants' relocation, and in this case, the appellants contend that they are protected by section 8(4) of ESTA.

[25] Section 8 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.
- (2) The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.
- (3) Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance

with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act.

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

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

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

may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.

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

(6) Any termination of the right of residence of an occupier to prevent the occupier from acquiring rights in terms of this section, shall be void.

(7) 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; or

(b) the owner or person in charge may institute proceedings in a court for a determination of reasonable terms and conditions of further

residence, having regard to the income of all the occupiers in the household.'

[26] The Trust submitted that the appellants cannot raise this issue on appeal as it was not squarely raised in the answering affidavit, or in the grounds of appeal, at least to the extent that the issue was argued before us.

[27] What was squarely and repeatedly raised in the answering affidavit, and dealt with by the Magistrate was the appellants' contention

that they are ESTA occupiers protected by section 8(4) of ESTA and that they are protected by its provisions.[9] In rejecting the contention, the Magistrate held, as a matter of law, that section 8 is inapplicable because it deals with the termination

of the right to residence which is not in issue in the application, being a relocation and not an eviction application. The appellant's

right of residence, she held, remains intact in this case as it was not terminated. In the notice of appeal, the appellants contend that the Magistrate erred by granting a relocation order in breach of their long-term security of tenure rights, being those conferred by section 8(4) of ESTA.[10]

[28] Before the Appeal Court, the appellants' persisted with the submission that they are protected by section 8(4) of ESTA but expanded the point to include the contention that the overall protections of section 8, and specifically its procedural protections, had not been complied with. As appears from section 8, it creates a series of conditions that must be met before an occupier's right of residence may be terminated. One of these, set out in section 8(1)(e) of ESTA, is the fairness of the procedure followed by the owner or person in charge, including whether or not an occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence. The appellants submitted that in the application before the Court, the Trust has simply failed to demonstrate any compliance with section 8 of ESTA including section 8(4) of ESTA and as regards the requirements of section 8(1) including procedural fairness.[11]

[29] In my view, on the facts of this case, the only issue properly before the Appeal Court is the Trust's failure to adhere to the protections in section 8(4) of ESTA as this is the only issue concerning section 8 that is both pleaded in the answering affidavit and that was raised in the notice of appeal, which was at no stage amended. To the extent that this Court enjoys a discretion nevertheless to consider the appeal on a broader basis, in other words to consider whether there was compliance with section 8(1), I would decline to do so in the circumstances of this case, which calls for finality. There have already been significant delays in the application and the appellants had ample opportunity to ventilate their case before the Magistrate not least once they had secured legal representation. The only factual basis upon which the section 8 point was raised concerned compliance

with section 8(4). I accordingly now proceed to deal with the second issue which is whether, legally, section 8, and thus

sub-section 8(4), is applicable to relocations.

The second issue: is section 8, and accordingly section 8(4), applicable to relocations?

[30] As indicated above, the Magistrate concluded that section 8(4) does not assist the appellants because section 8 is not applicable to relocations. The question is whether the Magistrate erred in reaching this legal conclusion.

[31] The first consideration must be whether this issue has been decided by the SCA or this Court in the various cases dealing with relocations. As mentioned above, both the SCA and this Court have on several occasions considered legal principles applicable to relocations. Several points can be distilled from the case law.

[32] First, relocations are sought by way of applications for mandatory interdicts under ESTA.[12] Importantly, when seeking a relocation interdict, owners are not enforcing some common law right to relocate people, as the Trust suggested: there is no such common law right, at least independently of the law of contract.[13] In Rouxlandia, the right enforced was the common law right to terminate the residency of the occupier, Mr Oranje, in a particular house, which

right was regulated expressly by a housing agreement. The agreement conferred an entitlement on the appellant, Mr Oranje, to reside in the house in question, which was a manager's house, only as long as he occupied a management position. If he did not, the housing agreement would be terminated on 30 days' notice. In Chagi, the employment agreements contained provisions whereby the owner would provide housing on a tenancy basis as approved by the Chief Executive of the owner and arranged where necessary at its discretion. It was the exercise of these rights that gave rise to the relocation process.

[33] Secondly, the SCA has held in Chagi that a relocation of an ESTA occupier to another house within the same boundaries of a registered land unit is not an eviction in terms of ESTA.[14] This is because the definition of evict in section 1 of ESTA is 'deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of the Act and section 6 of ESTA similarly confers on an occupier the right to reside and use the land on which he or she resided ... '[15] Further, the SCA held, ESTA must be construed in a manner that least interferes with existing rights, specifically ownership rights.[16] The SCA has also held, in this context, that 'ESTA was not enacted to provide security of tenure to an occupier in the house of his or her choice.'[17]

[34] Thirdly, an ESTA occupier can nevertheless resist a relocation relying, at least, on section 5(a) read with section 6(2)(a) of ESTA.[18] This means, for example, that a person can resist relocation to an uninhabitable house as this would offend a person's

dignity.[19]

[35] The question remains whether in articulating these principles the SCA and this Court have held, either expressly or by necessary implication that this means that section 8 does not apply to a relocation. Or put differently, whether the SCA in effect held, especially in Rouxlandia 2, that the only basis upon which a person can resist a relocation is by relying on section 5(a) read with section 6 of ESTA. As I understand the authorities, that is not the case and the Courts have not decided squarely whether section 8 applies to relocations.

[36] The SCA's judgment in Chagi suggests that the issue was not canvassed. The appeal was against a Magistrates' refusal of an interdict seeking to restrain an imminent relocation and the grant of a declaratory order in favour of the owner to the effect that the owner's actions were not an eviction under ESTA. The SCA considered whether the imminent actions constituted an eviction by assuming, in the appellant's favour that section 8, which must be complied with before section 9 can be invoked, had been complied with.[20]

[37] In Rouxlandia, it was common cause that Mr Oranje was a long term occupier protected by section 8(4) of ESTA. In those circumstances, the SCA held ‘because Mr Oranje is a long-term occupier with his right to reside on the land guaranteed in terms of ESTA, Rouxlandia correctly accepted that they had an obligation to provide suitable alternative accommodation’[21] as defined in section 1 of ESTA. In circumstances where Rouxlandia had offered Mr Oranje and his family suitable alternative

accommodation, albeit in a smaller house, the SCA was satisfied that his right to secure tenure protected by section 6(2)(a) was

protected.[22] The SCA did not, however, deal squarely with the application of section 8 generally or section 8(4) in particular in context of a relocation.[23] However, in Rouxlandia 1, this Court, per Meer J, noted that: ‘in Drumearn ... at paragraph 9, it was recognized that relocation affects the rights of occupiers and it was therefore necessary that the accommodation to which occupiers are relocated, be suitable alternative accommodation.’

[38] In Drumearn, this Court, again per Meer (then AJ), was exercising its automatic review jurisdiction in terms of section 19(3) of ESTA in circumstances where a Magistrate had ordered the eviction and relocation of various occupiers. For present purposes the positions of the third, fourth and fifth respondents in that case, are material as the Magistrate ordered their relocation to another house on the same property pending their eviction. Meer AJ found that she was unable to find that their rights of residence had been terminated under section 8. Moreover, the fourth respondent was a long-term occupier and the Court found on the facts that no basis had been established for terminating his rights of residence under that subsection. In the result the Court found that the Magistrate erred in ordering their eviction. Meer AJ then went on to consider whether the Magistrates’ order relocating these parties pending their eviction was competent and it was in that context that she made the finding alluded to above.

[39] In my view, the rights that are affected by any relocation are rights of residence protected by section 8 of ESTA. In other words, properly interpreted, section 8 of ESTA is invoked where an occupier’s right of residence is terminated whether or not that termination is intended to lead to an eviction either at the time it is terminated or at any time thereafter.

[40] The Constitutional Court has described ESTA as ‘remedial legislation umbilically linked to the Constitution’ which seeks

to protect people whose tenure of land is insecure.[24] When interpreting ESTA, that constitutional purpose must be advanced,[25] a ‘blinkerered peering’ at the language must be avoided and an approach must be adopted that promotes the spirit, purport and objects of the Bill of Rights. The Court must prefer a generous construction over a merely textual or legalistic one in order to afford occupiers the ‘fullest protection of their constitutional guarantees.’[26] The Constitutional Court’s injunctions in Goedgelegen about contextual interpretation is also relevant here. The Court held that when interpreting legislation, Courts:

'must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.'[27]

[41] ESTA is, centrally, legislation that seeks to give effect to s 25(6) of the Constitution, which provides that '(a) person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'. South Africa's history of dispossession of land through colonial and apartheid rule must be kept front of mind when interpreting ESTA.[28]

[42] The language in section 8 is notably different to the language used in the definition of 'evict', section 3 of ESTA and section 9 of ESTA. Section 8 speaks only of a right of residence. On the other hand, the definition of evict refers to residence and use of 'land', section 3 of ESTA (concerned with consent to reside on land) similarly refers to residence or use of 'land' and section 9(2)(b) refers to a failure to vacate 'land'. The distinction is telling, and in my view, signals an intention by the legislature to confer a broad protection through section 8 to any termination of a right of residence whether in respect of the 'land' as a whole or otherwise. It is only section 8(4) that refers to residence on 'land'. Also notable is that the protection of section 8(4) is not invoked only when an occupier resides for 10 (ten) years on a registered land unit, but also if an occupier has resided on any other land belonging to the owner for 10 (ten) years. This also signifies that section 8(4) protection is not restricted to termination of the right of residence on land for eviction purposes. A further signifier that section 8 protection extends beyond such protection is in section 8(7)(b) which provides a mechanism to determine reasonable terms and conditions of 'further residence', having regard to the income of all the occupiers in the household. Section 8(7)(b), on its own terms, does not deal only with residence for a period between the date of termination and the date of an eviction, this being the subject of section 8(7)(a) agreements.

[43] The purpose and effect of section 8 of ESTA is to impose statutory protections governed by justice and equity in respect of terminations

of rights of residence, both substantively and procedurally.[29] These operate independently of any eviction process and any process of terminating contractual rights. Thus, while a termination of a right of residence is a requisite for the invocation of the eviction process regulated by section 9 of ESTA, it comprises a distinct process with its own requirements.[30] Moreover, while termination of a right of residence under section 8 of ESTA may often coincide with a termination of residence right under a contract, such as a housing agreement related to employment or a lease agreement, it is a separate legal act governed by statute.[31]

- [44] In my view, an interpretation of section 8 that entails its application even where a person's right to reside on land is not being terminated will promote and advance the spirit, purport and object of the bill of rights and the security of tenure of people whose land rights were eroded as a result of South Africa's past. It will also not unduly impede the exercise of ownership rights as an owner would be able to terminate a right of residence, and secure a relocation provided it is just and equitable to do so and the requirements of substantive and procedural fairness entailed by section 8 warrant it. Furthermore, it is a practical and sensible approach, as it enables engagement on terms and conditions of further residence of the land, and section 8(7)(b) provides a mechanism to determine reasonable terms and conditions of further residence on the land should parties be unable to reach agreement. Long-term occupiers will enjoy the protections of section 8(4) but if suitable alternative accommodation is available, they can still be relocated as is clear from *Rouxlandia 2*.
- [45] Indeed, a restrictive interpretation that limits the application of section 8 to cases where a person's right to reside on land is being terminated can lead to arbitrary and harsh results. It would mean that relocations can ensue without any fair process or engagement on terms and conditions of further residence. People would be subjected to relocation without prior consideration of how it may impact upon them and irrespective of the fairness of the agreement relied upon.
- [46] Furthermore, a restrictive interpretation would mean that people who are relocated have even more limited rights than people whose eviction falls short of a loss of the right of residence on land. The broad definition of 'evict' in section 1 warrant emphasis. 'Evict' means 'to deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of this Act, and 'eviction' has a corresponding meaning.' Thus, those whose right of access to water linked to a right of residence is lost or those whose use rights are lost even if their residence rights are not lost would enjoy the protections of both section 8 and 9 of ESTA but a person subject to relocation would enjoy no protection even of section 8. In my view this leads to arbitrary results.
- [47] The same may be said in respect of section 3 of ESTA which deals with consent to reside on land. Under section 3(1), consent to an occupier to reside on or use land shall only be terminated in accordance with the provisions of section 8. On the restrictive interpretation, a person whose consent to use land, but not to reside on land, would enjoy the protection of section 8 but not a person whose right of residence in a particular house is terminated and is then subject to a relocation. This too is arbitrary.

[48] In the result, I conclude that section 8 applies not only to terminations of rights of residence on land but to termination of rights of residence of a house on land even where the right to reside on the land is not being terminated. It thus applies in context of relocation applications. In turn, this means that if the appellants are long-term occupiers as contemplated by section 8(4) then their rights of residence had to be terminated in accordance with that section.

The third issue: Are the appellants long-term occupiers and protected by section 8(4)?

[49] Because the Magistrate adopted the view that section 8 does not apply to relocations, she did not consider whether the appellants are occupiers protected by section 8(4). In this regard, it is common cause that the appellants are ESTA occupiers and that they are over 60 years of age. However, there is no evidence upon which this Court can conclude that they are long-term occupiers. Even assuming that they had resided on the property for the requisite period (ten years), they have provided no details of their financial position over time. In this regard, it is known that they are now dependant for their livelihoods on their SASSA grants, but it is also known that the first appellant is a retired veterinary technologist and the first appellant may thus have acquired his status as an ESTA occupiers only recently. There is no information regarding the second appellant.

[50] In these circumstances, I am unable to conclude that the appellants enjoy the protections of section 8(4) of ESTA.

Fourth issue: Did the Magistrate err in concluding that the Trust had established a case for an interdict?

[51] I am unable to fault the Magistrate's reasoning in concluding that the Trust had established a case for an interdict. I am of the view that no ground of appeal is advanced that can upset her factual findings, which are justified on the evidence, or her conclusions.

Costs and order

[52] This Court only grants cost in special circumstances of which there are none in this appeal. Given the lapse of time it is necessary to substitute the dates for the implementation of the relocation order.

[53] In the result, the following order, granted on 8 December 2023, is appropriate:

53.1 The appeal is dismissed.

53.2 The date for implementation of the Magistrate's order is 29 February 2024.

53.3 There is no order for costs.

Flatela J

- [54] I have read the judgment of the majority penned by my sister Cowen J. I agree with it, except on one issue which was raised for the first time on appeal. The issue is whether the provisions of section 8 of ESTA apply to all relocations or apply only to evictions. The majority concluded that the requirements of section 8 of ESTA apply not only to termination of rights of residence on land, but also to termination of rights of residence of a house on land, even where the right of residence on the land is not terminated. I am unable to agree with the majority on its approach on dealing with the new issue raised on appeal and its interpretation of section 8 of ESTA. I am of the view that the appellant failed to satisfy the requirements and applicable test governing the raising of the new point of law on appeal and the new issue ought not to have been entertained.
- [55] The background facts have been correctly set out in the judgment I do not intend repeat them here, it is however prudent to briefly set out the grounds upon which the appellants based their appeal. This will clearly demonstrate why I differ with the majority on its interpretation.
- [56] This is an appeal against the whole judgment and orders of the Magistrate's Court, Worcester, who granted a relocation order against the appellants from the manager's house to another house within the property.
- [57] It is common cause that the appellants derived their right of residence on land in the specific house they occupy from an oral lease agreement they concluded with the erstwhile owners of the farm in or about 2013. The Trust acquired the property in 2014 and accepted being bound by agreements concluded by the previous owner. The appellants failed to honour their rental obligations in terms of the lease agreement. Consequently, the Trust gave them a notice of termination of the lease agreement on 7 August and 10 October 2017. The respondents made available another house for the appellants to occupy. The appellants were advised by way of a letter to relocate from the house and were given notice to relocate by 13 October 2019 failing which the respondents advised that they would bring an application for their relocation.
- [58] The appellants did not respond to the letter demanding their relocation. An eviction application was instituted but later abandoned by the respondent. Instead, an application for their relocation in terms of section 19(1)(b) of ESTA was launched. The appellants resisted their relocation on the following grounds:
- 58.1 They are long term occupiers in terms of section 8(4)(a) of ESTA, and this is occasioned by effluxion of time as they have been on the farm for more than 10 years. They have been residing on the specific premises in issue for more than 10 years, and such right of residence tied to the specific house by the oral lease agreement.

58.2 An order for relocation would interfere with the contractual relationship between the appellants and the respondents which flows from the lease agreement. Furthermore, if relocated, it is unclear what the terms of the lease agreement would be and how it would affect the appellants' rights to residence, of which have been allegedly terminated by the respondents in 2017.

58.3 The relocation is a veiled eviction, and the Court application a deliberate form to interfere with the use and enjoyment of the appellants' premises, thus constituting a constructive eviction. In this application, the appellants contend that the Trust should pursue normal eviction process enshrined by ESTA rather than coming to evict them from the house by a relocation application.

58.4 The relocation order would infringe on their section 5 and 6 rights.

58.5 The relocation to the specific house would not be a feasible option as it would be unable to accommodate all of their belongings, of which if relocated stand risk of being stolen by the farmworkers.

58.6 The house offered for relocation is presently occupied by the Visagie family since 2011 and therefore no longer available for them to be relocated for purposes alleged by the applicant. Also, there is the real chance that the order may not be enforceable against the Visagie family as they may refuse to relocate to the bigger house.

58.7 The house they were occupying is optimal and best for his needs and his family rather than the house currently occupied by the appellants.

58.8 The above the relocation would be irregular and invalid in instances where the rights of residence have been terminated and they no longer enjoy the applicants' consent to reside on the farm. Consequently, the only alternative action that would be available to the applicants is to launch a fresh eviction application in terms of ESTA.

58.9 The respondents did not place before Court suitability particulars of the smaller house to the appellants needs, for instance such as whether there is electricity and running water. However, in a twist, they simultaneously submit that the house is more suited for the Visagie family.

[59] The Magistrate's findings which I fully agree with are summarised below.

59.1 The proposed relocation does not constitute an infringement of the appellant's rights in terms of ESTA. Relocation does not constitute eviction.

59.2 There was no termination of the right of residence, and it is not the intention of the applicant to move the respondents off the land that they have occupied for a number of years.

59.3 The respondents do not have a right to choose which house they would prefer to occupy.

59.4 The house that the respondents are to be relocated to is not uninhabitable or in any way inferior. It is most definitely suitable, alternative accommodation.

On appeal

[60] In the interests of brevity, I do not repeat the appellants' grounds of appeal as is in their notice of appeal other than to state that the appeal against the whole of the Magistrate's decision on the submissions advanced supra. However, a new ground was first raised on appeal which is that consent to reside in that specific house was not terminated in terms

of section 8.

[61] In support of the new ground the appellant submits that the previous owners granted them consent to occupy the specific leased premises. They were never informed that they were leasing a manager's house and that their occupation thereof was conditional on the leased premises being made available in the future. The consent given to the appellants in terms of the lease agreement and consequently the right which arose from it was consent which could only be terminated in terms of section 8 of ESTA. There is no suggestion or indication that such consent was given to the appellants and the right to reside on the leased premises was terminated in terms of section 8 of ESTA. In essence, it is the appellants case that consent to reside on the specific house within the premises, can only be terminated in terms of section 8. This they say by logical extension applies to relocations as well and not just in the case of evictions. The majority agrees, I do not.

[62] On 23 May 2023, the parties were directed to file submissions on the following issues:

62.1 Whether the ESTA applies in circumstances where the consent to reside arises from a commercial lease agreement, which has apparently been terminated.

62.2 Assuming ESTA applies;

62.2.1 Whether it is open to the appellants to rely on non-compliance with the section 8 of ESTA on the pleadings and affidavits in this matter, and in circumstances where the point is only raised squarely on appeal.

62.2.2 Assuming it is, the correct interpretation of section 8 of ESTA, and specifically whether it applies to all relocations or whether. It only applies to evictions, in other words, where there is a termination of a consent to reside on land and not a particular house.

[63] Both parties delivered written submissions.

[64] On the first question, both parties agreed that ESTA is applicable in this matter although the agreement between the parties was an oral commercial lease.

[65] On the second question, the appellants submitted that the respondents had not pointed out any prejudice that they will suffer as a result of a new ground raised on appeal and that the issue is of substantive and procedural importance and its

determination

is in the public interest. The appellant further submitted that this Court is enjoined by section 22(cA) of the Act to determine any matter involving the interpretation or application of ESTA. I should think that the appellants wanted to refer to section 22 (1)(Cc) as it is the correct section that will be dealing with this matter.

[66] The respondents on the other hand submitted that the appellants failed to satisfy the requisites and requirements of and applicable test governing the raising of a new point of law on appeal. The respondents correctly stated that this Court is not at liberty to entertain the new point of law, it can only do so where the question of law is emerged fully from the evidence and is necessary for the decision of the case.

[67] The respondents cautioned this Court not to venture in the academic exercise of interpreting section 8(1) of ESTA where it was not pleaded and is not necessary for the decision on this matter. I agree with the respondents on this issue. It is common cause that there are no facts in the papers that supports the new point. The only issue that was raised by the appellants was that they are long-term occupiers in terms of section 8(4) of ESTA and they were therefore protected against relocation.

[68] Whilst the majority stated in paragraph 29 of the judgment that ‘on the facts of this case the issue that was properly before us is the Trust’s failure to adhere to the protections in section 8(4) of ESTA as this is the only issue concerning section 8 that can be said to have been raised in the notice of appeal’. The majority declined to consider the appeal on broader grounds, having declined to consider the appeal on broader basis the majority went on to entertain the second issue when it was clear that it was irrelevant to the case at hand. On that point the matter should not have been entertained.

The second issue: whether section 8, including section 8 (4) is applicable to relocations.

[69] The issue for determination is whether the provisions of ESTA apply when an owner or a person in charge seeks to relocate an occupier from one house to another on the land. In my view the right to reside on the land has not been terminated, therefore the protections afforded by section 8 of ESTA are not applicable to relocations.

[70] It is settled law that relocation is not eviction. This Court and the Supreme Court of Appeal has confirmed this position in several

judgments. This Court in *Boplaas Landgoed (Pty) Ltd v Van der Merwe and others*[32] Meer AJP held that:

‘It is settled law that a relocation in terms of ESTA is the removal from one housing unit to another on the same farm, and that removal off the land or farm, as in the instant case, is an eviction. In *Pharo’s Properties CC and Others v Kuilders and Others* at paragraph 13, this Court found that relocation in terms of ESTA was movement from one housing unit to another on the same registered

farm. A similar finding was made in *Drumearn (Pty) Ltd v Wagner and Others* at 504F, and in *Mjoli v Greys Pass Farm (Pty) Ltd* at paragraph 11. The Supreme Court of Appeal has confirmed this. In *Chagi*, at paragraphs 19 and 20, it was similarly held that a relocation from one house to another on the same land does not constitute an eviction. Likewise, in *Rouxlandia* where, as aforementioned, with reference to *Chagi*, it was held that an eviction in terms of ESTA is confined to an eviction from the land, not from one dwelling to another.’[33]

[71] It is trite that the aim of statutory interpretation is to give effect to the object or purpose of the legislation in question.[34] In *Cool Ideas 1186 CC v Hubbard and Another*[35] Majiedt J stated that:

‘A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively.
- (b) the relevant statutory provision must be properly contextualised;
- (c) and all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).’ [36] (footnotes omitted)

[72] Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[37] said: ‘... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’[38] (internal footnotes omitted)

[73] I agree that when interpreting ESTA, the constitutional purpose must be advanced as was stated in Daniels *supra*. The logical starting point in interpretation exercise would be the preamble of ESTA.

Legislative framework

Preamble

To provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land; and to provide for matters connected therewith.

WHEREAS many South Africans do not have secure tenure of their homes and the land which they use and are therefore vulnerable to unfair eviction;

WHEREAS unfair evictions lead to great hardship, conflict and social instability;

WHEREAS this situation is in part the result of past discriminatory laws and practices; AND

WHEREAS it is desirable—

that the law should promote the achievement of long-term security of tenure for occupiers of land, where possible through the joint

efforts of occupiers, landowners, and government bodies; that the law should extend the rights of occupiers, while giving due recognition

to the rights, duties and legitimate interests of owners; that the law should regulate the eviction of vulnerable occupiers from land in a fair manner, while recognizing the right of landowners to apply to court for an eviction order in appropriate circumstances; to ensure that occupiers are not further prejudiced. ‘

The definitions of section 1 of ESTA provides that an “occupier” means a person residing on land which belongs to another person, and

who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding—

- (a) a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996); and
- (b) a person using or intending to use the land in question mainly for industrial, mining, commercial, or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who a member of is not his or her family; and
- (c) a person who has an income in excess of the prescribed amount;

and further, consent means express or tacit consent of the owner or person in charge of the land in question, and in relation to a proposed termination of the right of residence or eviction by a holder of mineral rights, includes the express or tacit consent of such holder respectively.

“Consent” means express or tacit consent of the owner or person in charge of the land in question, and in relation to a proposed termination of the right of residence or eviction by the holder of mineral rights., includes the express or tacit consent of such holder.

To evict in the definition of ESTA is to deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of the Act and eviction has a corresponding meaning.[39].

terminate includes to withdraw consent to a person to occupy or use land. (my emphasis)

[74] Section 3 of ESTA deals with the consent to reside on land. It provides:

Consent to reside on land – (1) Consent to an occupier to reside on or use land shall only be terminated in accordance with the provisions of section 8.’

[75] In proper historical context ESTA was enacted to protect millions of South Africans who lived worked and lived in farms, the majority being Africans. Their tenure was not secured in law as resided in the land at the will of the landowner who could be evict them whenever he wished to do so, even when the eviction would render them homeless.

[76] ESTA is the legislation envisaged in section 25(6) of the Constitution.

[77] In support of their position that the protection of section 8 is also applicable in relocations, the majority seeks to differentiate the language used in the definition of evict, section 3 of ESTA and section 9 of ESTA. The majority states that section 8 speaks only of right to residence whilst the definition to evict and other sections of ESTA refers to “residence on land”. It is stated that the distinction signals the intention of the legislature to confer broad protection through section 8. I am unable to agree.

[78] The distinction drawn by the majority based on language use in section 8 of the chapters is not supported by the law or rules of

interpretation. This is in my view is semantics and the statutory interpretation should not be stuck in semantics and dictionary

definitions lest the context and purpose of an Act be frustrated. Again, in the words of Collin J in *Graspan Colliery SA (Pty) Ltd v Commissioner for the South African Revenue Service*[40] ‘it is not the individual words used in the phrase which calls for interpretation, but indeed, interpretation should be given to the phrase itself.’

[79] The consent as envisaged by ESTA is a consent to reside on land and the termination of consent is the termination of right of residence on land in terms section 3(4) and or (3)(5) of ESTA. Once the consent is granted, it shall only be terminated in terms of section 8 of ESTA.

[80] It is my considered view that the statutory protections imposed by section 8 of ESTA are only applicable where the right of residence on land has been terminated, simply put, in eviction proceedings.

[81] The SCA confirmed this position in *Sterklewies (Pty) Ltd v Msimanga & others* [41] where Wallis JA said :

The Act provides statutory protection against eviction for occupiers of agricultural land. An occupier is defined in s 1 of the Act as: '[A] person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so . . .'

Consent is in turn defined as meaning the:

'[E]xpress or tacit consent of the owner or person in charge of the land in question'.

In terms of s 3(1) of the Act consent to an occupier to reside on or use land shall only be terminated in accordance with the provisions of s

8. That section refers to the termination of an occupier's 'right of residence' on the land in question. Plainly that is the right to occupy that arises from the express or tacit consent of the owner of the land. In most cases that consent will arise from some agreement between the owner and the occupier, but an agreement, at least if that expression is understood to refer to a contractually binding arrangement, is not in my view required. The Act does not describe an occupier as a person occupying land in terms of an agreement or contract, but as a person occupying with the consent of the owner. One can readily imagine circumstances in which in the rural areas of South Africa people may come to reside on the land of another and the owner, for one or other reason, takes no steps to prevent them from doing so or to evict them. That situation will ordinarily mean that they are occupying with the tacit consent of the owner and will be occupiers for the purpose of the Act. Accordingly, when in *Landbounavorsingsraad v Klaasen* 2005

(3) SA 410 (LCC) para 35[42] it is said that 'consent must originate from an agreement, or exist by operation of law', I think that an unnecessarily

restrictive view of the provisions of the Act. It suffices that persons claiming the Act's protection show that the owner of the land has consented to their being in occupation, irrespective of whether that occupation flows from any agreement or has its source elsewhere. Whatever its origins it is the right of residence flowing from that consent that must be terminated in terms of s 8 before an eviction order can be obtained.'

[82] Regard being had to my views expressed above, I am unable to agree with the majority that protections afforded by section 8 are applicable to relocations.

[83] I support the order proposed in the

judgment.

SJ Cowen

Judge of the Land Claims Court

PP

TM Ncube

Judge of the Land Claims Court

L Flatela

Date of hearing: 11 September 2023

Date of order: 8 December 2023

Date of judgment: 14 December 2023

Appearances

Appellants: Adv S Magardie instructed by Elton Shortles Attorneys Respondents: Adv A Montzinger instructed by Doman & Kogler Attorneys

- [1] Chagi v Singisi Forest Products (Pty) Ltd [2007] ZASCA 63; 2007 (5) SA 513 (SCA) (Chagi) and Oranje and Others v Rouxlandia Investments (Pty) Ltd [2018] ZASCA 183; 2019 (3) SA 108 (SCA) (Rouxlandia 2).
- [2] In terms of section 19(1)(b) of ESTA, a Magistrate's Court is competent to grant interdicts in terms of the Act. The scope of this power, and its operation beyond evictions, reinstatements and criminal proceedings under the Act, was considered in Tsotetsi and Others v Raubenheimer N.O and Others
- [2021] ZALCC 2; 2021 (5) SA 293 (LCC).
- [3] Thereby squarely qualifying them as ESTA occupiers in terms of sub-paragraph
- (c) of the definition of occupier in section 1. An 'occupier' means 'a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding, (a) [deleted]; (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and
- (c) a person who has an income in excess of the prescribed amount.' The prescribed amount is currently R13 625.00 per person.
- [4] All judges had access to the recording of the initial hearing and further queries were directed to the parties.

- [5] Section 24 is titled ‘Subsequent owners’ and provides: (1) The rights of an occupier shall, subject to the provisions of this Act, be binding on a successor in title of an owner or person in charge of the land concerned. (2) Consent contemplated in this Act given by the owner of person in charge of the land concerned shall be binding on his or successor in title as if he or she or it had given it.
- [5] Section 24 is titled ‘Subsequent owners’ and provides:
- (1) The rights of an occupier shall, subject to the provisions of this Act, be binding on a successor in title of an owner or person in charge of the land concerned.
- (2) Consent contemplated in this Act given by the owner of person in charge of the land concerned shall be binding on his or successor in title as if he or she or it had given it.
- [6] Section 8(4) of ESTA is cited below, in paragraph 25.
- [7] The often cited cases in this regard are Pharo’s Properties CC and Others v Kuilders and Others [2001] ZALCC 1; 2001
- (2) SA 1180 (LCC) (Pharo’s Properties); Drumearn (Pty) Ltd v Wagner and Others [2002] ZALCC 30; 2002
- (6) SA 500 (LCC) (Drumearn), at 504F; Mjoli v Greys Pass Farm (Pty) Ltd [2019] ZALCC 25 (Mjoli); Chagi, supra n 1; Rouxlandia Investments (Pty) Ltd v Oranje and others [2017] ZALCC 3 (Rouxlandia 1) and Rouxlandia 2, supra n1. The Magistrate relied on Pharo’s Properties CC, Chagi and Rouxlandia 1 and Rouxlandia 2. For recent cases on the topic, see Boplaas Landgoed (PTY) Ltd and Another v Jonkies and Others [2022] ZALCC 38 (Boplaas Landgoed) and Pieterse and Others v Drumearn (Pty) Ltd and Others
- [2023] ZALCC 13 (Pieterse).
- [8] Rouxlandia 2, supra n1 at para 17.
- [9] At paragraphs 18, 24, 33 and 41 of the answering affidavit.
- [10] See paragraph 2.2
- [11] The Constitutional Court dealt with this requirement in Snyders and others v de Jager and others
- [2016] ZACC 55; 2017(5) BCLR 614 (CC); 2017(3) SA 545 (CC) at para 56 and para 76. In para 76 the Constitutional Court held: ‘ESTA requires the termination of the right or residence to also comply with the requirements or procedural fairness to enable this person to make representations why his or her right of residence should not be terminated. This is reflected in s 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.’

[12] Rouxlandia 1, supra n7, at paras 6 and 7; Rouxlandia 2, supra n5 at para 24. This Court has the power to grant interdicts under section 20(1)(b) of ESTA and Magistrates have the power to do so under section

19(1)(b)(i) of ESTA.

[13] Boland Landgoed, supra n7 at para 13 and 14.

[14] Chagi, supra n7 at paras 19 and 20.

[15] Id.

[16] Id at para 17 and 18.

[17] Rouxlandia, para 21 with reference to Snyders at para 77.

[18] Section 5 is titled ‘Fundamental rights’ and provides: ‘Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to-

(a) human dignity; ... with due regard to the objects of the Constitution and this Act. Section 6 is titled ‘Rights and duties of occupier’ and provides, in most relevant part:

(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; ...

[18] Section 5 is titled ‘Fundamental rights’ and provides: ‘Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to-

(a) human dignity; ...

with due regard to the objects of the Constitution and this Act.

Section 6 is titled ‘Rights and duties of occupier’ and provides, in most relevant part:

- (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; ...
- [19] Rouxlandia 2, supra n 1, para 17: 'Adapting the same broad interpretative approach [as in Daniels], there can be little doubt

that the right to refuse relocation can be accommodated within the rubric of s 6 of ESTA. The specified rights and duties

conferred on an occupier in terms of s6 of ESTA are not exhaustive. The right to security of tenure in terms of s6(2)(a) could, conceivably, have application in such situations. Relocation to an uninhabitable dwelling would offend an occupier's right to live in accordance with basic human dignity, as was found by the Constitutional Court in Daniels. In such circumstances, where a relocation infringes an occupier's human dignity, this could be successfully resisted by invoking ss5(a) and 6(2)(a) of ESTA.' The reference to Daniels is a reference to the Constitutional Court decision in Daniels v Scribante and another [2017] ZACC 13; 2017(4) SA 341 (CC); 2017(8) BCLR 949.

[20] At para 8.

[21] See para 19.

[22] See para 23.

[23] The issues with which it was concerned on appeal were narrow and are set out clearly in its judgment.

[24] Klaase and Another v Van der Merwe NO and Others [2016] ZACC 17; 2016

(6) SA 131 (CC); 2016 (9) BCLR 1187 (Klaase), with reference to Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd [2007] ZACC 12; 2007

(6) SA 199 (CC); 2007 (10) BCLR 1027 (Goedgelegen).

[25] Daniels v Scribante and Another [2017] ZACC 13; 2017

(4) SA 341 (CC); 2017 (8) BCLR 949 (CC) (Daniels) para 24.

[26] Klaase supra n24 para 51. Daniels supra n25 paras 24 and 25, with reference to Goedgelegen supra n24 para 53.

- [27] Goedgelegen, supra n22 para 53. The approach in Goedgelegen is consistent with the approach to statutory interpretation articulated in Cool Ideas 1186 referred to in the minority judgment, below at n34.
- [28] Recounted in Daniels, supra n 23, paras 14 to 23.
- [29] Snyders, supra 56.
- [30] Snyders, para 67 and 71. See too Miradel Street Investments CC v Mnisi and Others [2017] ZALCC 13 at para 59 where this Court recognises that although terminations of rights of residence often lead to evictions, they will not necessarily lead to an occupier's eviction. The preamble to ESTA does not limit its purview to regulating evictions and is focused also on promoting security of tenure and extending the rights of occupiers.
- [31] Molusi v Voges NO and others [2016] ZACC 6; 2016(3) SA 370 (CC); 2016(7) BCLR 839 (CC) at paras 30, 37 & 38.
- [32] Boplaas Landgoed (Pty) Ltd v Van der Merwe (LCC37/2022) [2022] ZALACC 38.
- [33] *ibid*, para 12.
- [34] Bastian Financial Services v General Hendrik Schoeman Primary School (207/2007)
- [2008] ZSCA 70, para 19.
- [35] Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16
- [36] *Ibid*, para 28.
- [37] Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13 (15 March 2012)
- [38] *Ibid*, para 18.
- [39] Section 1(1)(vi) of 62 of 1997.
- [40] Graspan Colliery SA (Pty) Ltd v Commissioner for the South African Revenue Service (8420/18) [2020] ZAGPPHC 560
- [41] Sterklewies (Pty) Ltd v Msimanga & others (456/11)
- [2012] ZASCA 77 (25 May 2012)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCC/2023/43.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/du-plessis-and-another-v-kriel-unknown-topic-alcc-2023>

Prepared on 9 October 2026 · Esheria