CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 96/15

In the matter between:

SOPHY MOLUSI	First Applicant
DAVID MAMONGALO	Second Applicant
ISAAC SELOLWANE	Third Applicant
K L THWARISANG	Fourth Applicant
JOSEPH RAMOKANE	Fifth Applicant
FRANS MOKANSI	Sixth Applicant

and

FRANCIS DANIEL JAMES VOGES N.O.	First Respondent
FREDERIKA MARIA CHRISTINA VOGES N.O.	Second Respondent
HEAD OF THE NORTH WEST PROVINCIAL OFFICE OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	Third Respondent
RUSTENBURG LOCAL MUNICIPALITY	Fourth Respondent

Neutral citation:	*Molusi and Others v Voges N.O. and Others* [2016] ZACC 6
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Nugent AJ and Zondo J
Judgment:	Nkabinde J (unanimous)

Heard on: 12 November 2015

Decided on: 1 March 2016

Summary: Extension of Security of Tenure Act 62 of 1997 — unfair eviction — termination of the right of residence — breach of lease agreement

Section 26(3) of the Constitution — right to access to housing — common law ground of termination — trial by ambush

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ORDER

On appeal from the Supreme Court of Appeal:

1. Leave to appeal is granted.
2. Condonation for the late filing of the opposing papers is granted.
3. The appeal is upheld.
4. The orders of the Land Claims Court and Supreme Court of Appeal are set aside.
5. The application for eviction in the Land Claims Court is dismissed.

JUDGMENT

NKABINDE J (insert concurrences):

Introduction

[1] Many of our people do not have secure tenure of their homes and the land that they use. They are susceptible to unfair evictions. Parliament has thus enacted the Extension of Security of Tenure Act (ESTA),[1] to promote the achievement of long

[1] 62 of 1997.

term security of tenure and regulate the eviction of vulnerable occupiers from land in a fair manner, while recognising the rights of land owners.[2]

[2] This is an application for leave to appeal the decision of the Supreme Court of Appeal[3] dismissing the applicants' appeal against their eviction which was ordered by the Land Claims Court.[4] The core issue is whether the termination of the right of residence and eviction of the applicants were in compliance with the relevant provisions of ESTA. The Supreme Court of Appeal held that they were, hence this application.

Parties

[3] The applicants[5] occupied homes on Boschfontein farm (farm). The farm is located in a peri-urban area outside Rustenburg. The first and second respondents (respondents) are the trustees of the Voges Family Trust (Trust), which owns the farm. They oppose the application. Neither the third respondent, the Head of the North West Provincial Office of the Department of Rural Development and Land Reform, nor the fourth respondent, Rustenburg Local Municipality, are before us. They were cited by virtue of section 9 of ESTA and were served with the eviction application. No relief is sought against them.

[2] See the preamble to ESTA.

[3] *Molusi v Voges NO* [2015] ZASCA 64 (Supreme Court of Appeal judgment).

[4] *Voges NO and Another v Molusi and Others* [2013] ZALCC 1 (Land Claims Court judgment).

[5] It is to be noted that the second to sixth applicants each filed a confirmatory affidavit which should have confirmed the founding affidavit of the first applicant. However, the confirmatory affidavits incorrectly confirmed the affidavit of the second applicant, which itself was a confirmatory affidavit. This Court issued directions that the second to sixth applicants file affidavits confirming the first applicant's founding affidavit in so far as they confirmed its contents as relating to each of them. The second to fifth applicants did so. The attorney for the applicants also filed an affidavit explaining the cause of the confusion. The second applicant in this Court was the lead applicant in the Land Claims Court. This changed to the first applicant in this Court but, due to an administrative error the confirmatory affidavits that were used in the Land Claims Court were submitted to this Court without reflecting this change. After this Court's directions were issued, the applicants' attorney could no longer locate the sixth applicant to depose to a further confirmatory affidavit. These circumstances do not bear on the outcome of this case but are noted for clarity and completeness.

Background

[4] The applicants' occupation of the houses was in terms of leases concluded with the Trust. It is common cause that the applicants are occupiers in terms of ESTA.[6] Most of the applicants have been in occupation since about 2001.[7] The first and second applicants had identical written leases. These leases provided for payment of a monthly rental. The third to sixth applicants had oral leases.[8]

[5] On 19 May 2009, the sheriff allegedly served the applicants with notices dated 14 May 2009 terminating their rights of residence on the farm. The reason for termination is stated as breach of the terms of the agreement by not paying rent despite demand. The uniform notice addressed to the applicants read:

> "NOTICE TO OCCUPIER OF TERMINATION OF RIGHT OF RESIDENCE NOTICE IN TERMS OF SECTION 8(1) OF [ESTA]
>
> . . . .
>
> THIS IS A VERY IMPORTANT NOTICE. THIS NOTICE IS GIVEN TO YOU IN TERMS OF [ESTA]
>
> TAKE NOTICE that the owner hereby gives you notice that your right to reside in a room (a portion of housing structure) on the premises Bochfonteinplot, Oorsaak in the district of Rustenburg is hereby terminated.
>
> TAKE FURTHER NOTICE that you *failed to perform in terms of the lease agreement* between yourselves and the owner/s of the property, *in that you failed to pay the agreed monthly rental* since May 2008, *which amounted to a fundamental*

[6] ESTA defines an occupier as-

> "a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding-
>
> . . .
>
> (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."

[7] The first applicant's first lease with the respondents was in 1999. She had lived on the farm in a room rented by her mother before 1997. See Supreme Court of Appeal judgment above n 3 at para 24.

[8] The terms of these oral leases remain unclear.

> *breach of the lease agreement*, and/or failed to rectify the position after receiving due demand, in terms of which agreement your right of residence is herewith terminated.
>
> TAKE FURTHER NOTICE that you are hereby given 2 (two) month notice to vacate the premises. Should you fail to vacate the premises within 2 (two) month of receiving this notice the owner or person in charge of the plot will apply to the Court for *inter alia* an eviction order."[9] (Emphasis added.)

The applicants did not vacate the premises.

The constitutional and legislative framework

[6] Since all law including the common law is now subject to constitutional scrutiny, the Constitution is the starting point. The preamble to the Constitution states that one of the purposes for its adoption was to establish a society based, not only on democratic values and fundamental human rights, but also on social justice. Moreover, section 26(3) of the Constitution protects everyone from being "evicted from their home, or hav[ing] their home demolished, without an order of court made after considering all the relevant circumstances" and provides that "[n]o legislation may permit arbitrary evictions".

[7] To ensure the realisation of this under section 26(3), Parliament enacted ESTA. Parliament sought to limit homelessness by respecting, protecting, promoting and fulfilling[10] the right to access to housing. The legislation was enacted, amongst other things, to improve the conditions of occupiers of premises on farm land and to afford them substantive protections that the common law remedies may not afford them. Chapter IV of ESTA, covering sections 8 to 15, deals with the rights of residence, and eviction.

[9] There is a dispute whether the respondents ever issued a demand for payment of arrear rental but the issues for determination do not turn on this.

[10] Section 7(2) of the Constitution enjoins the "state to respect, protect, promote and fulfil the rights in the Bill of Rights."

[8] Section 8 deals with circumstances under which the right of residence may be terminated. In terms of this section, the termination must be on "any lawful ground". The section further makes a proviso that the termination of the right of residence must be just and equitable, "having regard to all relevant factors". These factors, set out in section 8(1), make it clear that fairness plays an important role.[11] They are:

> "(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."

[9] Section 9 is entitled 'Limitation on eviction'. It provides:

> "(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 sections 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;

[11] *Hattingh and Others v Juta* [2013] ZACC 5; 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC) (*Hattingh*) at para 32.

(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." (Emphasis added.)

[10] Section 11 regulates the eviction of a person who becomes an occupier after 4 February 1997. It provides:

"(1) If it was an express, material and fair term of the consent granted to an occupier to reside on the land in question, that the consent would terminate upon a fixed or determinable date, a court may on termination of such consent by effluxion of time grant an order for eviction of any person who became an occupier of the land in question after 4 February 1997, if it is just and equitable to do so.

(2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.

(3) In deciding whether it is just and equitable to grant an order for eviction in terms of this section, the court shall have regard to—

(a) the period that the occupier has resided on the land in question;

(b) the fairness of the terms of any agreement between the parties;

(c) whether suitable alternative accommodation is available to the occupier;

(d) the reason for the proposed eviction; and

(e) the balance of the interests of the owner . . . the occupier . . . on the land."

Litigation history

Land Claims Court

[11] The litigation in the Land Claims Court was a sequel to the termination of the applicants' rights of residence in May 2009.[12] The case of the respondents was that the applicants were in breach of a material term of the lease in that they failed or refused to pay rental, hence the cancellation.[13] The applicants denied that they failed to pay monthly rental. They alleged that they tendered payment of the rental during May 2009 but the respondents refused to accept payment because they proposed to demolish the structures the applicants occupied. The applicants further denied that they received notices of termination. In argument the respondents changed tack more than once. They did not pursue the reason for termination mentioned in the notice of termination. First, the respondents changed from the original case based on breach for failing to pay rental to an alleged need to develop the property as the reason for the eviction.[14] They then changed tack again and relied on ownership and that under the common law a periodic lease can be terminated on reasonable notice.[15]

[12] The Land Claims Court held that, in exercising its discretion whether to grant the eviction, it was bound to consider whether "the right of [residence]" had been terminated in accordance with ESTA and whether the procedural requirements were met.[16] The Court recognised that the granting of eviction would ineluctably render the

[12] Before this litigation, the applicants had successfully approached the Land Claims Court on two previous occasions: on 26 March 2009 under case number LCC 34/2009 on an urgent basis as a result of allegations for constructive eviction of the applicants when the respondents removed corrugated iron roofs from the rooms occupied by them. The Land Claims Court ordered the respondents to rebuild the demolished structures with immediate effect. On 14 July the respondents applied to the Land Claims Court on an ex parte basis seeking directives as to the service of the eviction application on the first to the twelfth applicants. The reason for the application was that service on the applicants may be problematic, cost-prohibitive and ineffective.

[13] Supreme Court of Appeal judgment above n 3 at para 5. The respondents relied on the notice mentioned in [5] above for the cancellation of the lease agreement.

[14] Land Claims Court judgment above n 4 at para 12.

[15] Id at para 8. For this contention the respondents relied on *Tiopaizi v Bulawayo Municipality* 1923 AD 317.

[16] Land Claims Court judgment above n 4 at para 19.

applicants homeless.[17] It accorded the respondents' right of ownership greater weight than the rights of the applicants as occupiers.[18] The Court held that, although the respondents did not comply fully with the service directives, the applicants had become aware of the application and all the procedural requirements were met.[19]

[13] The Court considered whether sections 8 and 9 had been complied with, in particular whether the respondents had shown that it was just and equitable to terminate the applicants' rights of residence and to evict them. It accepted the respondents' argument that under the common law a periodic lease may be terminated on reasonable notice by either the lessor or the lessee. The Court held that section 9(2) read with section 8 had been complied with as the principal reason for termination was that the respondents needed the land for further development.[20] It granted an order evicting the applicants from the premises.[21]

Supreme Court of Appeal

[14] The appeal before the Supreme Court of Appeal was with the leave of the Land Claims Court.[22] The issues for determination were whether section 9 read with section 8 was complied with and whether the respondents, having grounded their

[17] Id at paras 19 and 21.

[18] Id at para 21. See also the Supreme Court of Appeal judgment above n 3 at para 7.

[19] The Court relied on *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654D – to hold that courts should not encourage formalism in the application of their rules and that the failure to comply fully with the substituted service order alone could not defeat the application as the principle with regard to service – to ensure both parties are in court – was still met.

[20] Land Claims Court judgment above n 4 at para 16.

[21] The Land Claims Court's order reads:

> "(a) The first to twelfth Respondents and all persons occupying under or through them are ordered to vacate portion 81 (a portion of portion 65) of the farm Boschfontein 330-JQ, Rustenburg, at the instance of the applicants by 31 March 2013.
>
> (b) The Sheriff for the district of Rustenburg is authorised to remove the first to twelfth Respondents, and all persons occupying under or through them, from portion 81 (a portion of portion 65) of the farm Boschfontein 330-JQ, on or after 3 April 2013, if they have not complied with the order in paragraph one above.
>
> (c) There is no order as to costs."

[22] The Land Claims Court granted leave to appeal in terms of section 37(1) of the Restitution of Land Rights Act 22 of 1994 and the Supreme Court of Appeal is the Court envisaged in section 37(2) of that Act.

termination of the applicants' rights of residence on a breach of a material term of each of the agreements – being failure to pay the agreed rentals – were entitled at the hearing before the Land Claims Court to rely on the common law ground of termination by reasonable notice.[23]

[15] The Supreme Court of Appeal accepted that affidavits do not only constitute evidence, but also fulfil the purpose of pleading and that they must set out the cause of action in clear and unequivocal terms to enable the respondent to know what case to meet.[24] The Court remarked:

> "[T]he ground for the *termination of the lease agreement* was not the cause of action. The cause of action upon which the respondents relied in seeking the eviction order *was cancellation of the lease agreements*, elaborated upon as follows: (1) that on 18 or 19 May 2009 the respondents cancelled the lease agreements they had concluded with each one of the occupiers; (2) that a notice of cancellation was served on each occupier; (3) that each occupier's right to occupy the property terminated on 19 May 2009; and (4) that the occupiers have failed to vacate the property. The respondents' case boiled down to this: their cancellation resulted in the occupiers' right of residence being terminated and, on termination the occupiers, as lessees, were under a duty to vacate the leased property."[25] (Emphasis added and footnote omitted.)

[16] The Court went on to say:

> "[C]ounsel for the respondents was perfectly entitled to rely (as he did) on such common law grounds as availed the respondents in support of the pleaded claim for eviction. What mattered was whether a proper foundation for such argument had been laid in the founding affidavit. In my view, the answer is in the affirmative. In this regard it is perhaps important to distinguish between a proper factual foundation in support of the relief sought, on the one hand, and legal argument, on the other and to appreciate that it is ordinarily impermissible for legal argument to be raised in an

[23] Supreme Court of Appeal judgment above n 3 at para 28.

[24] Id at para 39.

[25] Id at para 40.

> affidavit. It thus seems to me that the notion of a trial by ambush is misplaced when, as happened here, a single cause of action is relied upon, which finds support in the pleaded case. Properly understood, the respondents' case was that the lease agreement had come to an end either because they had been validly cancelled for non-payment of rentals or alternatively, as the respondents were entitled to, at common law, they had given reasonable notice of termination of the lease agreements to the occupiers. In either event the result was termination of the lease agreements, with the consequence that the occupiers were obliged to vacate the leased property."[26]

[17] The Supreme Court of Appeal concluded that reliance on the common law ground of termination of the leases was covered in the papers and the applicants were neither misled, nor ambushed at the trial.[27] The Court then said that the failure by the occupiers to pay rental was an adequate ground for termination of the leases.[28] It remarked that the respondents did not abandon the ground of termination as contained in the notice of termination but-

> "counsel . . . simply chose to argue the case on another basis which . . . he was perfectly entitled to do. That basis was that it was not necessary for the respondents to set out the ground they did in the founding affidavit and, to the extent that they did so, that was simply surplus to their cause of action."[29]

[18] The Supreme Court of Appeal held that failure by the lessee to pay the agreed rental on the due date is a lawful ground for the termination of a right of residence.[30] It held that section 8(1)(d) was not relevant to this matter.[31] Regarding section 8(1)(e) the Court said that the procedure followed in giving written notices of the termination

[26] Id at para 41.

[27] Id at para 42. The majority's remarks were directed at the minority judgment's reasoning that the respondents' reliance on common law reasonable notice, as opposed to the breach of contract set out in the notice of termination, was "trial by ambush" – see the minority judgment per Shongwe JA (Bosielo JA concurring) at para 19.

[28] Id at para 42.

[29] Id at para 43. The Supreme Court of Appeal relied on *Graham v Ridley* 1931 TPD 476 at 479, which the respondents correctly label in their written submissions as the "old case", where the owner's right of possession of the property was held to prevail in pleadings. This case does not help the respondents.

[30] Id at para 34.

[31] Id at para 38.

of the right of residence and affording the occupiers two months to vacate the premises was fair. The Court agreed with the Land Claims Court that there was compliance with section 8(1) of ESTA.[32] The Court concluded that the termination of the right of residence was just and equitable.[33]

[19] The Supreme Court of Appeal referred to *Brisley*[34] regarding the circumstances a court is required to consider before issuing an eviction order. In that case the Court, with reference to section 26(3) of the Constitution, held that the circumstances a court is required to consider can only be relevant if they are "*legally*" relevant.[35] The Supreme Court of Appeal correctly distinguished this case from *Brisley* because, here, the "ejectment against an unlawful occupier [is] limited by the provisions of ESTA", and because "reliance on the common law does not exonerate the owners from compliance with the provisions of . . . ESTA".[36]

[20] The minority in the Supreme Court of Appeal would have upheld the appeal as the conduct of the respondents, in changing tack so often, was held to be "trial by ambush".[37]

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[32] Id at para 38.

[33] Id.

[34] *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA) at para 42.

[35] Id. There, the Supreme Court of Appeal remarked:

> "Ons stem nie saam dat die bogenoemde omstandighede sonder meer relevante omstandigehede sal wees nie. Artikel 26(3) vereis dat alle relevante omstandighede in ag geneem moet word maar bepaal nie self dat enige omstandihede relevant sal wees nie. Daarvoor moet na die algemeen geldende reg gekyk word. Omstandighede kan slegs relevant wees indien hulle *regtens* relevant is. Indien die artikel aan 'n hof 'n diskresie verleen het om 'n uitsettingsbevel te weier onder sekere omstandighede, soos byvoorbeeld indien die hof dit reg en billik sou ag, sou alle omstandighede wat relevant is met betrekking tot die vraag of dit in 'n bepaalde geval reg en bilik sou wees natuurlik relevant wees by die uitoefening van daardie diskresie. Die artikel verleen egter geen diskresie aan die hof om onder sekere omstandighede te weier om 'n uitsettingsbevel toe te staan aan 'n eienaar wat andersins op so 'n uitsettingsbevel geretig sou gewees het nie." (Emphasis in original.)

[36] Supreme Court of Appeal judgment above n 3 at para 43.

[37] Id at paras 18-9 and 23.

In this Court

[21] Apart from the preliminary issues relating to condonation for the late filing of the opposing papers by the respondents and whether leave to appeal should be granted, the issues are similar to those presented before the Supreme Court of Appeal.

Condonation

[22] The respondents seek condonation for the late filing of their opposing papers which were late by two days. The application is not opposed. The delay is short and there is no apparent prejudice. The explanation given is acceptable. I would condone the belated filing of the opposing papers.

Leave to appeal

[23] There can be no doubt that the matter engages a constitutional issue of importance as the dispute relates to the courts' application of ESTA, reform-driven legislation giving effect to the Constitution, in particular, section 26(3). The matter also raises an issue regarding the interface between the common law and that legislation. The issues require consideration by this Court. There are prospects of success. It is thus in the interests of justice to grant leave to appeal.

Was reliance on the common law ground correct?

[24] The issue for determination is whether the Land Claims Court and Supreme Court of Appeal were correct in deciding the matter on the common law ground that was not pleaded. I mention at the outset that a discussion of this question will, unavoidably, somewhat encapsulate certain aspects that form part of the next question, particularly with regard to sections 9(2) and 8(1) of ESTA.

[25] The respondents maintained that cancellation of the periodic lease is not dependent on breach and that the only prerequisite for cancellation is reasonable

notice. They rely on pre-Constitution authority.[38] They submitted that the applicants' "hysteria" about the application of the common law by the Supreme Court of Appeal is inappropriate.

[26] The determination of this issue requires a consideration of the notice in terms of section 9(2) of ESTA and the pleadings. The section requires that the written notice of intention to obtain an order for eviction "shall . . . set out the grounds on which the eviction is based".[39] The case for eviction that the applicants were confronted with, in accordance with the notice and the pleadings, was based on the lawful ground for cancellation of the lease agreements because of non-payment of rentals.

[27] It is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in *Sunker*:[40]

> "If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties . . . should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who [asserts] . . . must . . . formulate his case sufficiently clearly so as to indicate what he is relying on."[41]

[28] The purpose of pleadings is to define the issues for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone.[42] Of course, there are instances where the court may, of its own accord (*mero motu*), raise a question of law that emerges fully from the evidence and is necessary

[38] *Tiopaizi v Bulawayo Municipality* 1923 AD 317. They rely also on the decision by the Land Claims Court in *Labuschagne and Another v Ntshwane* 2007 (5) SA 129 (LCC) for the proposition that it is not unreasonable for leases to be terminated when they were no longer reconcilable with the long-term development of the land.

[39] Section 9(2)(d)(iii).

[40] *Naidoo and Another v Sunker and Others* [2011] ZASCA 216; [2012] JOL 28488 (SCA) (*Sunker*).

[41] Id at para 19.

[42] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) (*Ramahlele*) at para 13.

for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed.[43] In *Slabbert*[44] the Supreme Court of Appeal held:

> "A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case."[45]

[29] The section 9(2) notice makes no mention of the reliance on ownership or common law reasonable notice. These grounds were impermissibly raised for the first time in argument before the Land Claims Court. This much was noted by that Court and the Supreme Court of Appeal. I do not agree that the respondents were "perfectly entitled to rely . . . on such common law grounds as availed [them] in support of the pleaded claim for eviction as a single cause of action". Section 9(1) is manifest that "notwithstanding the provisions of any other law, an occupier may be evicted *only* in terms of an order of court under this Act."[46] The phrase "any other law" includes the common law.

[30] Had the Court paid due regard to the constitutional imperatives in section 26(3) and the special constitutional regard for the occupiers' place of residence, which they regarded as their home, it would have reached a different decision. It would not have

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[43] See in this regard *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC) at paras 109-114; *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68 and *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 39.

[44] *Minister of Safety & Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) (*Slabbert*).

[45] Id at para 11. This Court has, in the context of constitutional challenges to legislation, acknowledged the importance of accuracy in pleadings; see *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at paras 39-40 and *Shaik v Minister of Justice and Constitutional Development* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at para 25. *Slabbert* dealt with pleadings in action proceedings; however, the principle established in that case also applies to motion proceedings. This is the general rule, to which there may be exceptions. For the rule's applicability in motion proceedings, see *Seal v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* [2008] ZASCA 28; 2008 (4) SA 43 (SCA) at para 10 and *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) at para 43.

[46] Emphasis added..

granted eviction on the mere ground that the termination of the lease was lawful. If that were the case, the considerations in sections 8, 9 and 11, including those of justice and equity, would be rendered redundant: that would make a mockery of the constitutional scheme regarding the regulation of eviction of vulnerable occupiers from land to achieve long-term security of land tenure in a fair manner.

[31] The emphasis on the phrase "just and equitable" in sections 8 and 11 of ESTA, to borrow the words used by Sachs J in *PE Municipality*,[47] "underlines the central philosophical and strategic objective of [the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)]".[48] The Court said that the phrase makes it plain that the criteria to be applied are not purely of a technical kind that flow ordinarily from the provisions of land law. It remarked:

> "The emphasis on justice and equity underlines the central philosophical and strategic objective of PIE. Rather than envisage the foundational values of the rule of law and the achievement of equality as being distinct from and in tension with each other, PIE treats these values as interactive, complementary and mutually reinforcing. . . .
>
> The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process."[49]

These remarks were made in a case relating to PIE but they are equally apposite in this case.

[32] The Supreme Court of Appeal said that reliance on the common law ground of termination of the lease agreements was "covered in the papers" in that the respondents averred in the founding affidavit before the Land Claims Court that in

[47] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC) 2004 (12) BCLR 1268 (CC) (*PE Municipality*).

[48] Id at para 35. The Court was dealing with the consideration of "just and equitable" in respect of the granting of evictions in terms of section 4 of PIE. This legislation, as was ESTA, was enacted to give effect to section 26(3) of the Constitution.

[49] Id at paras 35-6.

their capacities as trustees they are nominal owners of the farm, had concluded lease agreements and terminated the occupiers' right of residence and that the occupiers failed to vacate the property. The Supreme Court of Appeal decided the matter on the alleged alternative common law grounds and relied on what that Court said in *Putco*:[50]

> "Where a party seeks to terminate an agreement and relies upon a wrong reason to do so he is not bound thereby, but is entitled to take advantage of the existence of a justifiable reason for termination, notwithstanding the wrong reason he may have given."[51]

[33] That statement must be understood in the context in which it was made.[52] It relates to substantive grounds justifying the termination of an agreement. It does not relate to formulation of pleadings. Moreover, the case did not concern the application of a statute, more particularly ESTA. The statement above flies in the face of the requirement in section 9(2) that is couched in peremptory language. That section requires that the written notice of intention to obtain an order for eviction "shall . . . set out the grounds on which the eviction is based". It is common cause that the ground set out in the notice for the eviction as required by section 9(2) did not include the said common law grounds on which the eviction was allegedly based. Reliance on *Putco* is misplaced.

[34] Although the Supreme Court of Appeal was correct that the "reliance on the common law does not exonerate the owners from compliance with the provisions of . . . ESTA", it nonetheless said no unfairness was suggested by the applicants.[53] It

[50] *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) (*Putco*).

[51] Id at 832C-D.

[52] *Putco* concerned an interim contract granting sole and exclusive advertising rights to one party with regard to the other party's buses, pending the conclusion of a detailed agreement as a result of negotiations. The interim contract required the parties to have mutual trust and confidence in each other and it was terminable on reasonable notice. The negotiations failed and the contract was not terminable on that failure. The Court held that inclusion in the contract of a specified ground for termination did not exclude termination on a reasonable ground.

[53] Supreme Court of Appeal judgment above n 3 at para 35.

concluded that the procedure the respondents followed[54] was fair and that, save for section 8(1)(d) which the Supreme Court of Appeal held was irrelevant, section 9(2) was complied with.[55] But, as is evidenced by the circumstances of this case, the unfairness was palpable. The Land Claims Court noted that the probation officer's report set out that there was no alternative accommodation. The existence of a reasonable expectation of the renewal of the agreement from which the right of residence arose could not be excluded on the basis of irrelevance. This is so because the applicants asserted that they had not acted in violation of their leases. Although the respondents initially based the termination on non-payment, they did not pursue that course. They changed tack and relied instead on the need to develop the property as the ground for termination.

[35] The Land Claims Court stated that the respondents outlined details on which the premises were to be utilised upon vacation by the occupiers. The respondents' contentions and reliance on the proposition that it is not unreasonable to terminate leases when they are no longer reconcilable with the long-term development of the land,[56] is telling. In my view, the expectation of renewal, especially when the respondents refused to accept payment of the rentals, cannot be said to have been unreasonable. The respondents might have extended the applicants' right of residence for them to seek alternative accommodation, especially because the termination would have rendered them homeless. To that end, I think that section 8(1)(d) is relevant and should have been dealt with in the courts below. It was not.

[36] What's more, had they been given an opportunity to make representations in terms of section 8, the applicants may have explained the unjustness of the cancellation of the lease and termination of the right of residence. This did not happen. In these circumstances, given the differing reasons for the termination

[54] Supposedly the procedure contemplated in section 9(2)(d) – of giving written notices of the termination of the right of residence and affording the occupiers two months to vacate the premises.

[55] Supreme Court of Appeal judgment above n 3 at para 38.

[56] The new development was said to necessitate the termination of occupation.

provided by the respondents, the fact that no opportunity was given to the applicants to make representations[57] is telling. In any event, the applicants said that they did not deal with the fairness of the notice of termination and the hardship they could suffer, because they refuted the case as pleaded against them in the Land Claims Court. In the view I take of the matter, it is not necessary to consider the question of onus.

[37] The *volte-face* regarding the basis on which the eviction was sought was unjust to the applicants as they dealt only with the case that they were called to meet. It follows that the respondents were not entitled to rely, as they did, on the common law principles as bases for eviction when the grounds were not set out in the notice and properly pleaded. The Supreme Court of Appeal may be correct that, at common law, the land owner would "have been entitled to the relief sought".[58] But that common law claim is now subject to the provisions of ESTA. The provisions of sections 8, 9, 10 and 11 of ESTA have the result that the common law action based merely on ownership and possession, as in *Graham v Ridley*,[59] is no longer applicable.

[38] At the risk of repetition, reliance on the common law does not exonerate owners from compliance with the provisions of ESTA. The fairness of the eviction would still have to be considered having regard to all relevant factors. All such relevant factors were not considered. It follows that the reliance on the common law grounds was, in the circumstances of this case, unfair to the applicants and impermissible.[60]

[57] A consideration specifically mentioned in section 8(1)(e) when determining whether the termination of the right of residence is just and equitable.

[58] Supreme Court of Appeal judgment above n 3 at para 44.

[59] Above n 29.

[60] Section 9(2)'s further requirement regarding the service of the section 9(2) notice of intention to obtain an order of eviction on the Municipality and the Department was not complied with but the non-compliance is of no consequence because the application for eviction was served on these respondents. To this end, this part of section 9 (2) is "deemed to have been complied with".

Was ESTA complied with?

[39] The pre-reform-era land law reflected the common-law based view that existing land rights should be entrenched and protected against unlawful intrusions. The land reform legislation – ESTA in this case – changed that view. It highlights the reformist view that the common law principles and practices of land law, that entrench unfair patterns of social domination and marginalisation of vulnerable occupiers in eviction cases, need to change. 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 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 section 8 read with section 9 as well as sections 10[61] and 11 which make it clear that fairness plays an important role.

[40] In *PE Municipality* this Court remarked that it is necessary "to infuse elements of grace and compassion into the formal structure of the law" and courts need "to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern" because "we are not islands unto ourselves".[62] One immediately agrees that—

> "[t]he Judiciary cannot, of itself, correct all the systemic unfairness to be found in our society. Yet it can, at least, soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails."[63]

[61] This section deals with eviction orders of persons who were occupiers on 4 February 1997. It is not quoted above because none of the applicants were occupiers on or before 4 February 1997.

[62] *PE Municipality* above n 47 at para 37.

[63] Id at para 38.

[41] But how do courts minimise inequality and inequity in evictions? ESTA allows eviction only when it is just and equitable. In *Hattingh*, Zondo J delineates how the balancing of the rights of the owner or person in charge and that of the occupier infuses justice and equity into the inquiry. This Court said:

> "[T]he part of section 6(2) [of ESTA] that says: 'balanced with the rights of the owner or person in charge' calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner. The effect of this is to infuse justice and equity into the inquiry required by section 6(2)(d). Section 6(2)(d) is not the only provision into which ESTA seeks to infuse justice and equity or fairness. In this regard I draw attention to the requirement in section 6(4) that the landowner's rights to impose conditions . . . must be exercised reasonably, and the requirement in section 8(1) that the termination of an occupier's right of residence must not only be based on a lawful ground but also that it must be 'just and equitable, having regard to all relevant factors'. These factors . . . make it clear that fairness plays a very important role."[64] (Footnotes omitted.)

Section 9 read with section 8 of ESTA, as well as sections 10 and 11, also enjoins the courts when granting evictions to do so if it is "just and equitable", having regard to certain factors.

[42] The respondents submitted that the Land Claims Court and Supreme Court of Appeal considered all the issues and correctly concluded that it would be just and equitable to evict the applicants and that the Supreme Court of Appeal struck a balance between the respondents' rights and those of the occupiers. They seek an order dismissing the appeal on the basis of lack of prospects of success.

[43] The Supreme Court of Appeal found that ESTA makes this case distinguishable from *Brisley*.[65] The Court held that failure by the lessee to pay the

[64] *Hattingh* above n 11 at para 32.

[65] Supreme Court of Appeal judgment above n 3 at para 43.

agreed rental on the due date is a lawful ground for the termination of the right of residence. I agree. But that is not the end of the enquiry. The requirement of termination of the right of residence on a "lawful ground" is merely a portion of the requirement of section 8(1). The section contains a proviso, that the termination must be just and equitable, having regard to certain factors set out in section 8(1)(a)-(e).

[44] These include the fairness of the ground on which the owner or person in charge relies; the conduct of the parties giving rise to the termination; the interests of the parties including comparable hardship to the parties; and the fairness of the procedure followed by the owner or person in charge – including whether the occupiers were given an effective opportunity to make representations before the failure by the occupiers to pay rental.

[45] I do not agree with the Supreme Court of Appeal that section 8(1) was complied with for the purpose of granting an order for eviction. The Court relied on the common law principle of *rei vindicatio* – the action for the protection of ownership – and the reasonableness of the notice of termination. The Court's attention was thus diverted from the interests of the occupiers. In other words, the Court did not strike a balance between the interests of the owner of the land and those of the occupiers so as to infuse justice and equity or fairness into the enquiry. The Supreme Court of Appeal did not consider the fairness of the termination of the applicants' rights of residence. Nor did it give sufficient weight to the hardship that would eventuate from the termination of the rights of residence and eviction. This was despite the undisputed evidence that the eviction would render the occupiers homeless as there was no suitable alternative accommodation. This does not mean that where the terms of ESTA have been properly complied with an owner is not entitled to an eviction order.

[46] The constitutional imperatives in section 26(3), given effect to by ESTA, must be borne in mind. That sub-provision demonstrates special constitutional regard for a person's place of abode. As this Court said in *PE Municipality*, the sub-provision—

> "acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often, it will be the only relatively secure space of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world."[66]

Conclusion

[47] The eviction of the applicants without compliance with ESTA will not only render the applicants homeless but will also frustrate their security of tenure and the aims of ESTA. The Supreme Court of Appeal should not have dismissed the appeal. It erred in doing so. The appeal must be upheld. The applicants have expressly stated that they do not seek costs. The order reflects this.

Order

[48] The following order is made:

1. Leave to appeal is granted.
2. Condonation for the late filing of the opposing papers is granted.
3. The appeal is upheld.
4. The orders of the Land Claims Court and Supreme Court of Appeal are set aside.
5. The application for eviction in the Land Claims Court is dismissed.

[66] *PE Municipality* above n 47 at para 17.

For the Applicants:	C R Jansen SC and J J Botha instructed by Matshitse Attorneys
For the First and Second Respondents:	A Vorster and I Oschman instructed by Frese, Moll & Partners