



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 23/15

In the matter between:

**JAN KLAASE**

First Applicant

**ELSIE KLAASE**

Second Applicant

and

**JOZIA JOHANNES VAN DER MERWE N.O.**

**(ON BEHALF OF THE NOORDHOEK TRUST)**

First Respondent

**JOZIA JOHANNES VAN DER MERWE**

Second Respondent

**CEDERBERG MUNICIPALITY**

Third Respondent

and

**WOMEN ON FARMS PROJECT**

Amicus Curiae

**Neutral citation:** *Klaase and Another v van der Merwe N.O. and Others* [2016] ZACC 17

**Coram:** Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J

**Judgments:** Matojane AJ (majority): [1] to [68]  
Zondo J (minority): [69] to [154]  
Jafta J (concurring): [155] to [161]

**Heard on:** 3 September 2015

**Decided on:** 14 July 2016

**Summary:** Extension of Security of Tenure Act 62 of 1997 — Definition of “occupier” — Express and Tacit Consent — Rights of Occupiers — Occupiers’ protections under ESTA — Right to Family Life — Joinder in Eviction Proceedings — variation of eviction order

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## **ORDER**

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On appeal from the Land Claims Court (hearing an automatic review from the Clanwilliam Magistrates’ Court):

1. Leave to appeal is granted to Mr and Mrs Klaase.
2. Condonation for the late filing of additional documents by the amicus curiae is refused.
3. The applications for the admission of new evidence by Mrs Klaase and the amicus curiae are dismissed.
4. The appeal by Mr Klaase is dismissed.
5. The appeal by Mrs Klaase succeeds.
6. The decision of the Land Claims Court confirming the Clanwilliam Magistrates’ Court order for the eviction of Mrs Klaase is set aside.
7. The application by Mr Klaase for suspension of the execution of the eviction order against him pending the determination of the rights of Mrs Klaase in terms of the Extension of Security of Tenure Act 62 of 1997 is refused.
8. There is no order as to costs.

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## JUDGMENT

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MATOJANE AJ (Moseneke DCJ, Cameron J, Madlanga J, Nkabinde J, Wallis AJ concurring):

### *Introduction*

[1] The applicants seek leave to appeal against certain decisions of the Land Claims Court. The appeal by the first applicant relates to that Court's confirmation of his eviction on automatic review.<sup>1</sup> The appeal by the second applicant is against the decision of that Court<sup>2</sup> dismissing her applications for joinder, suspension of the further proceedings and consolidation of her application with the eviction application against the first applicant. Her appeal principally concerns the decision of the Land Claims Court that she is not an "occupier" as defined in terms of the Extension of Security of Tenure Act<sup>3</sup> (ESTA). At their core, the issues involve the interpretation and application of the protections under ESTA.

[2] Most people who are occupiers of farm land are a vulnerable group in our society. These include female occupiers who are frequently not joined in eviction proceedings instituted against their spouses or partners. This makes that class of occupiers susceptible to arbitrary evictions as a consequence of the actions of their spouses or partners. As a result, no substantive grounds for their evictions are made and properly considered by a court before they are evicted with their spouses or partners. The upshot of this is hardship, conflict and social instability. ESTA seeks, among other things, to regulate the eviction of vulnerable occupiers from land while recognising the right of land owners to apply to court for eviction in appropriate

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<sup>1</sup> *Van der Merwe NO and Another v Klaase*, unreported judgment of the Land Claims Court, Case No LCC 09R/2014 (28 March 2014) (Land Claims Court review judgment).

<sup>2</sup> *Van der Merwe and Another v Klaase; In re: Klaase v Van Der Merwe and Others* [2014] ZALCC 15 (7 October 2014) (Land Claims Court joinder judgment).

<sup>3</sup> 62 of 1997.

circumstances, to promote the achievement of security of tenure for occupiers of land and to extend the rights of occupiers while giving due recognition to the rights, duties and legitimate interests of owners.<sup>4</sup>

### *Parties*

[3] The first applicant (Mr Klaase) is a farm worker. His wife, the second applicant (Mrs Klaase), was not a party to the proceedings before the Magistrates' Court and Land Claims Court. The first respondent, Jozia Johannes van der Merwe, is cited in his capacity as a trustee of the Noordhoek Trust which owns Noordhoek farm (farm). He is also cited as the second respondent in his personal capacity as the lessee of the farm on which he conducts a citrus farming operation. They are collectively referred to as the respondents. The third respondent is the Cederberg Municipality (Municipality). It was joined to the proceedings.<sup>5</sup> The Women on Farms Project was admitted as a friend of the Court (*amicus curiae*).

### *Background*

[4] Mr Klaase started working on the farm in 1972. He worked as a general labourer and lived in the same house with his father.<sup>6</sup> Mr Klaase and Mrs Klaase entered into a romantic relationship.<sup>7</sup> Mrs Klaase fell pregnant with the couple's first child. After the child was born, Mrs Klaase moved onto the farm and resided with Mr Klaase, in his father's house. At the instance of Mr Klaase's father, the second respondent's father built a small cottage on the premises, to accommodate Mr Klaase, Mrs Klaase and their child. When the cottage was completed they took occupation. The couple later married, on 31 January 1988. They have lived on the farm for 30 years or more. Their three children and three grandchildren live with them.

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<sup>4</sup> The preamble to ESTA is set out in full at n 55 below.

<sup>5</sup> The Municipality was joined by way of an order of this Court dated 12 August 2015.

<sup>6</sup> Mr Klaase's father was a pensioner and was entitled to reside on the farm for as long as he deemed fit.

<sup>7</sup> Mrs Klaase was born on a neighbouring farm where she lived with her mother before she moved onto the farm.

[5] Mr Klaase was evicted on 14 January 2014. The relationship between him and the respondents came to an end on 19 January 2010 when a disciplinary hearing was initiated against Mr Klaase after a charge of absconding and absence from work. Mr Klaase, duly represented by the Building and Allied Workers Union of South Africa (Union), referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and the matter was referred for arbitration. Mr Klaase alleged constructive dismissal due to abusive conduct by the management of the farm.

[6] The dispute between the parties was settled before the arbitration could be finalised. In terms of the settlement agreement, Mr Klaase agreed to a monetary settlement of R15 000 and undertook to vacate the premises by not later than 30 June 2010. He did not vacate the premises. On 22 October 2010 the respondents informed Mr Klaase in writing that his right to occupy the premises was terminated as it was dependent on his continued employment. The letter demanded that he vacate the farm within 30 days, failing which an application for eviction would be brought against him.

#### *Litigation history*

##### *Magistrates' Court*

[7] The respondents launched eviction proceedings about eight months later in the Clanwilliam Magistrates' Court (Magistrates' Court). Only Mr Klaase was cited as a respondent, but the order sought prayed for his eviction and that of all persons occupying through him. A probation officer's report was requested.<sup>8</sup> The report recommended that Mr Klaase and his family remain on the farm until alternative accommodation was available. According to the report, Mr Klaase was prepared to pay rent in the amount of approximately R60 per week. Mr Klaase continued residing on the farm at no cost whilst working elsewhere.

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<sup>8</sup> Section 9(3) of ESTA requires reports to be prepared by a probation officer to assess whether the requirements of section 10 and 11 of ESTA are met.

[8] Subsequent to a pre-trial conference held in 2012, a meaningful engagement meeting was held under the auspices of the Municipality to discuss the possibility of alternative accommodation. The parties agreed that there was no possibility of Mr Klaase getting alternative accommodation in the foreseeable future due to the housing shortage in the district.

[9] On 14 January 2014 the Magistrates' Court granted the order evicting Mr Klaase and all those occupying through him, including Mrs Klaase, from the farm. The Court held that Mr Klaase's right of occupation arose from his employment on the farm. It found that there had been an irretrievable breakdown in the employment relationship between the parties as contemplated in section 10(1)(c) of ESTA. The Court further found that the formal requirements of section 9(2)(a) of ESTA<sup>9</sup> had been complied with and that it was not necessary to provide Mr Klaase with alternative accommodation as no alternative accommodation was available.

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<sup>9</sup> Section 9(2) sets out the peremptory requirements for an eviction order under the Act, which are amongst others—

- “(a) the occupier's right of residence must be terminated in terms of section 8;
- (b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
- (c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and
- (d) the owner or person in charge must, after the termination of the right of residence, given—
  - (i) the occupier;
  - (ii) the municipality in whose area of jurisdiction the land in question is situated; and
  - (iii) the head of the relevant provincial office of the Department of Land Affairs, 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.”

*Land Claims Court**Automatic review*

[10] The order of the Magistrate was automatically subject to review by the Land Claims Court in terms of section 19(3) of ESTA.<sup>10</sup> Mr Klaase claimed that, before he died, Mr Van der Merwe's father gave him a right to occupy the premises for life. In a judgment delivered on 28 March 2014, confirming the eviction order by the Magistrate,<sup>11</sup> the Land Claims Court found that there was no evidence to support the claim and that, absent his employment, Mr Klaase did not have any other right to reside on the farm. The Court held that Mr Klaase's employment was terminated when the parties entered into a settlement agreement. Therefore, the requirements in section 8(2) of ESTA had been complied with and his right of occupancy had been terminated.

[11] The Court held that section 9(2)(a) and (b) of ESTA had been complied with because Mr Klaase, the Municipality and the provincial office of the Department of Land Affairs (Department) were served with the application.<sup>12</sup> Regarding

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<sup>10</sup> Section 19(3) provides:

“Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in the Gazette, shall be subject to automatic review by the Land Claims Court, which may—

- (a) confirm such order in whole or in part;
- (b) set aside such order in whole or in part;
- (c) substitute such order in whole or in part; or
- (d) remit the case to the magistrate's court with directions to deal with any matter in such manner as the Land Claims Court may think fit.”

<sup>11</sup> The Land Claims Court's confirmation order reads:

“The Magistrate's order dated 14 January 2014 is hereby confirmed save that the dates of eviction are amended as follows:

- 29.1 The respondent and all persons who occupy through him shall vacate the premises they occupy on the farm known as Noordhoek Citrusdal (“GEDEELTE 15” (GEDEELTE VAN GEDEELTE 4) VAN DIE PLAAS MISGUNT NR. 499, AFDELING CLANWILLIAM, PROVINSIE WES-KAAP) by no later than 31 May 2014.
- 29.2 In the event of the respondent failing to vacate the premises on 31 May 2014, the Sheriff, for the area, is authorised to evict him and all persons who occupy through him on 02 June 2014.”

<sup>12</sup> Land Claims Court review judgment above n 1 at para 16.

Mr Klaase's contention that the service was not in compliance with the regulations,<sup>13</sup> the Land Claims Court said there was substantial compliance with the regulations – Form E. It held that the Union and the legal representatives must have informed Mr Klaase of the information contained in Form E and he must have been aware that the eviction application was brought by a certain date.<sup>14</sup>

[12] It would appear from the review decision that the respondents relied on Mr Klaase's non-attendance at his disciplinary hearing, absconding from work, bad temper, rudeness and disrespect for authority as reasons for the irreparable breakdown of the relationship in an attempt to meet the requirements in section 10(1)(c).<sup>15</sup>

[13] Contrary to the grounds pleaded by the respondents for the breakdown of the relationship, the Land Claims Court found that Mr Klaase's breach of the settlement agreement as well as his continued residence on the premises for a period of four years while working elsewhere constituted a fundamental breach of the relationship. Thus the section 10(1)(c) requirement was fulfilled.

[14] The Land Claims Court found that the respondents had adduced sufficient evidence to comply substantially with the test for the just and equitable termination of a former worker's right of residence.<sup>16</sup> This was the test the Supreme Court of Appeal set out in *Sterklewies*.<sup>17</sup> The Land Claims Court held that the requirements in

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<sup>13</sup> Regulation 6 provides:

“A notice to an occupier, municipality, or head of a provincial office of the Department of Land Affairs in terms of section 9(2)(d) of the Act must be completed on Form E or F or must conform substantially to Form E or F in the Annexure as the case may be.”

Form E is a notice in terms of section 9(2)(d)(i) of ESTA which sets out the requirements to be fulfilled in order for an eviction of an occupier to be effected lawfully, with court approval. See above n 9 for section 9(2)(d)(i) of ESTA.

<sup>14</sup> Land Claims Court review judgment above n 1 at paras 27-8.

<sup>15</sup> Id at para 18.

<sup>16</sup> Id at para 24.

<sup>17</sup> *Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga & Others* [2012] ZASCA 77; 2012 (5) SA 392 (SCA) (*Sterklewies*) at para 3.

section 9(2)(d) had been met.<sup>18</sup> Save for the dates of eviction, the Court confirmed the eviction order of the Magistrates' Court. During April 2014 Mr Klaase applied for leave to appeal the decision of the Land Claims Court to the Supreme Court of Appeal.<sup>19</sup> The Land Claims Court dismissed Mr Klaase's application for leave to appeal on 7 October 2014.<sup>20</sup>

*Mrs Klaase's joinder application*

[15] Following the review decision by the Land Claims Court, Mrs Klaase launched an application, referred to as the joinder application, in the Land Claims Court. She sought an order (a) to be joined as the second respondent in the eviction application; (b) for the suspension of the further proceedings, including the execution of the eviction order, pending the determination of her rights in terms of ESTA; and (c) for the consolidation of the application with the eviction application. Mr Klaase also applied for an order suspending the eviction order pending the determination of Mrs Klaase's rights in terms of ESTA.<sup>21</sup> All these applications were opposed by the respondents.

[16] Mrs Klaase asserted that she continuously resided on the farm for many years in her own right as a general farm employee and with the consent of the owner. She contended that it was an essential term of her oral employment contract that she be entitled to housing on the farm. Mrs Klaase relied on *Mkangeli*<sup>22</sup> and argued that she was protected by the provisions of ESTA, as an ESTA occupier, because she lived on

<sup>18</sup> Land Claims Court review judgment above n 1 at para 28.

<sup>19</sup> See Land Claims Court joinder judgment above n 2.

<sup>20</sup> Id at para 4 of the order.

<sup>21</sup> The facts in support of this application were similar to those in Mrs Klaase's application for the suspension of the eviction order.

<sup>22</sup> *Mkangeli and Others v Joubert and Others* [2002] ZASCA 13; 2002 (4) SA 36 (SCA) at para 19. In this case the appellants were evicted from land by a Community Trust that sought eviction on two causes of action, namely, that the appellants occupied the land contrary to provisions of the applicable town-planning scheme and that the appellants caused nuisance that could only be abated by the eviction. The respondent had conceded that the appellants did qualify as occupiers as defined in section 1(1) of ESTA. The appellants' main argument was that they were protected against eviction by the provisions of ESTA. The Court held, among other things, that ESTA protected a particular class of impecunious tenants on rural and semi-rural land against eviction from that land. It said that the underlying basis for the protection was that they acquired their tenancy with the consent of the owner.

the premises with the knowledge of the second respondent, for at least 30 years. She submitted that the presumption set out in section 3(4)<sup>23</sup> of ESTA was thus applicable.<sup>24</sup> Mrs Klaase argued that the presumption placed the onus on the respondents to disprove that she did not have the requisite consent. She relied on *Sterklewies* for the argument that once a person has shown that she has occupied land with consent, she will be an ESTA occupier. Mrs Klaase argued that the respondents failed to discharge that onus and that she is consequently entitled to the protections ESTA affords to occupiers.

[17] Although the respondents contended that Mrs Klaase never asked for, nor was she given, an independent right to occupy the farm, they accepted that she came to live on the farm with Mr Klaase as her “prospective husband” in the house that had been made available to him in his capacity as a permanent employee. They maintained that seasonal employees were never given a right of occupation and that Mrs Klaase was never given an independent right to occupy the premises.<sup>25</sup>

[18] The respondents said that Mrs Klaase, like many of the spouses and other family members of permanent employees on the farm, worked on a seasonal basis. They maintained that her right of residence on the farm derived from her marriage to Mr Klaase, and that it continued only until his right of residence was lawfully terminated in terms of section 8 of ESTA. The respondents contended that they needed the premises to be vacated to make it available to permanent employees who needed accommodation.<sup>26</sup> The respondents argued that Mrs Klaase’s alleged rights under ESTA were based on bald and vague allegations that did not attract an onus to rebut.<sup>27</sup>

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<sup>23</sup> In terms of section 3(4), “a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved.”

<sup>24</sup> Land Claims Court joinder judgment above n 2 at para 16.

<sup>25</sup> Id at para 15.

<sup>26</sup> From the statements attached to the respondents’ opposing papers, certain Messrs Patrick Owies and Brendon Engelbrecht were the said permanent employees who were entitled to be accommodated on the premises.

<sup>27</sup> As authority for this argument, the respondent relied on *Syntheta (Pty) Ltd (formerly Delta G Scientific (Pty) Ltd) v Janssen Pharmaceutica NV and Another* [1998] ZASCA 74; 1999 (1) SA 85 (SCA) at 91C.

[19] In dismissing Mrs Klaase’s joinder application the Land Claims Court held, among other things, that there was no evidence to support Mrs Klaase’s allegations. It held that she did not “[make] out a case to be joined” and so effectively found that she did not have a direct and substantial interest in the matter.<sup>28</sup> As to whether Mrs Klaase is an ESTA occupier, it held that there are different classes of persons who can occupy the premises of another in terms of ESTA. First, “those who are granted consent to occupy the property and thus enjoy protections under ESTA as occupiers”. Second, those persons who, in terms of section 6(2)(d) of ESTA, although not occupiers, are entitled to reside on the premises by virtue of being entitled to family life in accordance with the culture of that family.<sup>29</sup>

[20] The Court relied on *Klaasen*<sup>30</sup> to conclude that Mrs Klaase is a “resident” and not an “occupier in her own right”.<sup>31</sup> It remarked:

“The term ‘occupier’ in ESTA is used in a narrow and wide sense. The narrow one being applicable only to persons who have the consent of the owner or person in charge of the property or have another right in law to reside thereon. The wide sense refers to those who derive their right of residence through or under occupiers in the narrow sense. The persons falling within the latter group are not occupiers in terms of ESTA. It is probably easier to distinguish between the two classes of ‘occupiers’ by using the term ‘occupiers in their own right’ for persons to whom the eviction procedures of ESTA apply, and to the others as ‘residents’. The right of an ‘occupier in his own right’ to stay on a farm derives from consent given by the owner or person in charge of the farm, whilst the right given to a ‘resident’ to stay on the farm derives from a different source, usually a family relationship with an ‘occupier in his or her own right’.”<sup>32</sup>

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<sup>28</sup> Land Claims Court joinder judgment above n 2 at para 26.

<sup>29</sup> Id at para 22.

<sup>30</sup> *Landbounavorsingsraad v Klaasen* [2001] ZALCC 43 2005 (3) SA 410 (LCC) (*Klaasen*) at para 33. See also *Simonsig Landgoed (Edms) Bpk v Vers and Others* [2007] ZAWCHC 20; 2007 (5) SA 103 (C) (*Simonsig*) at para 18.

<sup>31</sup> Land Claims Court joinder judgment above n 2 at para 24.

<sup>32</sup> Id at para 23.

[21] The Court went further to say that Mrs Klaase misconstrued *Sterklewies* by arguing that a person residing on premises with consent without more becomes an ESTA occupier. It said:

“Wallis JA in *Sterklewies* found that ESTA does not require consent to be an agreement or contract strictly construed. I consequently agree with [the respondents] that a person claiming ESTA occupation must be residing on the property without any other right to do so and with the apparent consent of the owner thereof or the person in charge of the land. Mrs Klaase’s presence on the property was due, initially, to her living there with her mother and subsequently as a result of her marriage to [Mr Klaase]. ESTA and the Constitution barred the [respondents] from denying her access to the property by virtue of [Mrs Klaase’s] right to family life.”<sup>33</sup>

[22] The Court concluded that Mrs Klaase had not made out a case to be joined as a party. It held that her prospects of being found to be an “occupier” by another court were remote. The Court thus held that no useful purpose would be served by staying the proceedings.<sup>34</sup> In respect of Mr Klaase’s application for a stay of the execution of the eviction order the Court concluded that, as there was no merit in Mrs Klaase’s application for a stay, Mr Klaase’s application “also stands to be dismissed”.<sup>35</sup>

[23] As regards Mr Klaase’s application for leave to appeal the Land Claims Court held that *Magodi*<sup>36</sup> made it clear that a confirmed order of a Magistrate, following a review process by the Land Claims Court, remains the Magistrate’s order. The Land Claims Court concluded that the application for leave to appeal was therefore defective. It dismissed the joinder application and made the following order:

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<sup>33</sup> Id at para 25.

<sup>34</sup> Id at para 26.

<sup>35</sup> Id.

<sup>36</sup> *Magodi and Others v Van Rensburg* [2002] ZALCC 5; 2002 (2) SA 738 (LCC) at paras 5-6. The Court also relied on *Rashavha v Van Rensburg* [2003] ZASCA 132; 2004 (2) SA 421 (SCA) at para 5.

- “1. The application by Mrs Klaase to be joined as the second respondent in Case No LCC 09/2014 is refused.
2. The application by Mrs Klaase that further proceedings in Case No LCC 09/2014, including the execution of the eviction granted against the respondent be suspended pending the determination of her rights in terms of [ESTA] is refused.
3. The application by the respondent for suspension of the execution of the eviction order granted against him in Case No LCC 09/2014, pending the determination of the rights of Mrs Klaase in terms of [ESTA] is refused.
4. The application by the respondent for leave to appeal to the Supreme Court of Appeal or to this Court is refused.
5. The date on which the respondent and all persons who occupy through him must vacate the premises on the farm, Noordhoek, Citrusdal (“GEDEELTE VAN GEDEELTE 4) VAN DIE PLAAS MISGUNT NR.499, AFDELING CLANWILLIAM, PROVINCE WES-KAAP) is changed to 14 November 2014.
6. The date on which the eviction order against the respondent may be carried out if the premises have not been vacated, is changed to 17 November 2014.
7. There is no order as to costs.”

*Supreme Court of Appeal*

[24] Aggrieved by the Land Claims Court’s decisions Mr and Mrs Klaase petitioned the Supreme Court of Appeal.<sup>37</sup> Mr Klaase sought to appeal the confirmation of the eviction order and Mrs Klaase sought leave to appeal the refusal of the joinder application. On 26 January 2015 the Supreme Court of Appeal dismissed the petition with costs.

*In this Court*

[25] Both Mr and Mrs Klaase sought leave to appeal the decisions of the Land Claims Court. They also sought to tender new evidence. In addition, Mrs Klaase asked that her failure to apply to the Land Claims Court for leave to

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<sup>37</sup> Mrs Klaase did not apply to the Land Claims Court for leave to appeal against the dismissal of her application to be joined in the eviction application.

appeal against the dismissal of her joinder application be condoned. Both Mr and Mrs Klaase sought an order setting aside the decisions of the Land Claims Court. The respondents opposed the application. They submitted that the matter does not raise a constitutional issue merely because it relates to ESTA which was “purportedly enacted to give effect to section 25(6) of the Constitution”. For this proposition they relied on *Loureiro*.<sup>38</sup> They urged this Court to dismiss the applications on this ground alone. On the section 10 of ESTA inquiry the respondents argued that Mr Klaase’s appeal should fail.

[26] The Chief Justice issued directions that written argument, including argument on the merits of the appeal, must be lodged before 10 April 2015. In further directions the parties were asked to make submissions on Mrs Klaase’s right under ESTA and the potential prejudice to women who, under ESTA, find themselves in a similar position to Mrs Klaase.<sup>39</sup> I deal with the submissions below.

[27] Mrs Klaase contended that she qualified as an occupier under ESTA in her own right. The respondents argued that she did not allege that express or tacit consent was given to her and that contrary to the rule that a case must be properly presented and pleaded, her case has since segued between three differing and mutually exclusive versions. They maintained that spouses, dependants or family members of a person who have been granted consent do not themselves qualify as occupiers in terms of ESTA but are rather persons holding under that occupier. The respondents submitted

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<sup>38</sup> *Loureiro v Umvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 33, where this Court said:

“[T]he mere fact that a matter is located in an area of the common law that can give effect to fundamental rights does not necessarily raise a constitutional issue.”

<sup>39</sup> The directions read in relevant part:

- “2. Consideration of the application will be limited to the determination of the following issues only:
- a) the second applicant’s rights under the Extension of Security of Tenure Act 62 of 1997 (ESTA); and
  - b) the potential prejudice to women who, under ESTA, find themselves in similar positions to the second applicant.”

that, as this Court said in *Thubelisha*,<sup>40</sup> consent, express or tacit, “must be actual”.<sup>41</sup> They argued that Mrs Klaase is not an ESTA occupier in her own right.

[28] The amicus curiae submitted that section 39(2) of the Constitution requires that the provisions of ESTA should be interpreted generously so as to afford protection to women who would otherwise not be regarded as occupiers for the purposes of ESTA. It contended that the dignity of women, who are seasonal workers, is negatively impacted when the provisions of ESTA are interpreted in a way that does not respect their equal worth. The amicus curiae argued that the effect of insecure tenure is to impose dependency on women notwithstanding the fact that ESTA, properly interpreted, affords them protection as occupiers.

#### *Issues*

[29] The issues are whether—

- (a) leave to appeal should be granted to Mr Klaase and Mrs Klaase;
  - (b) Mrs Klaase’s failure to seek leave to appeal in the Land Claims Court should be condoned;
  - (c) the new evidence should be admitted;
  - (d) the confirmation of the eviction order by the Land Claims Court should be set aside;
  - (e) the Land Claims Court’s order dismissing Mrs Klaase’s joinder application should be set aside;
  - (f) Mrs Klaase is an “occupier” under ESTA. If so, whether her eviction is just and equitable;
  - (g) the execution of the eviction order should be suspended in respect of Mrs Klaase pending the determination of her rights in terms of ESTA;
- and

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<sup>40</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC) (*Thubelisha*) at para 50.

<sup>41</sup> In that case, the Court was dealing with ostensible consent.

- (h) Mrs Klaase's application should be consolidated with the eviction application against Mr Klaase.

*Leave to appeal*

[30] The question that arises is whether the Land Claims Court erred in its approach to section 10(1)(c) of ESTA and whether, on the evidence before it, the requirements for Mr Klaase's eviction had been met. ESTA is the legislation that was enacted to give effect to section 26(3) of the Constitution and to provide security of tenure to people living on farm land whose tenure was insecure as a result of past racially discriminatory legislation. This matter raises a constitutional issue. It is in the interests of justice to grant Mr Klaase leave to appeal.

[31] In her application for joinder before the Land Claims Court, Mrs Klaase contended that she resided on the farm for many years and is an "occupier" entitled to the protection conferred by ESTA. Her application not only raises constitutional issues of public importance regarding the interpretation and application of and protections under ESTA, but also implicates her constitutional rights to equality and human dignity.

[32] The eviction of an individual on the basis of the conduct of a spouse or partner alone has a significant impact on tenure security, not only for Mrs Klaase but also other similarly situated persons. The decision of this Court regarding who qualifies as an "occupier" and what protections such an occupier is entitled to in terms of ESTA, will provide legal certainty. In my view, her application has prospects of success. It is in the interests of justice to grant Mrs Klaase leave to appeal.

*Condonation*

[33] Mrs Klaase applied for condonation of her failure to apply to the Land Claims Court for leave to appeal against the dismissal of her application to be joined in the review proceedings. Ordinarily, she would have been required to approach that Court

for leave to appeal. This is so because section 16 of the Superior Courts Act<sup>42</sup> prescribes the sequence of appeals. It stipulates that “an appeal against any decision of a Division as a Court of first instance lies, upon leave having been granted”.

[34] The Constitution requires this Court to allow litigants direct access if it is in the interests of justice to do so.<sup>43</sup> Even if leave has not been sought or granted by another court, it is open to this Court to hear an application for leave to appeal. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, prejudice and reasonableness of the applicant’s explanation for the delay or defect.<sup>44</sup>

[35] Both Mr and Mrs Klaase brought interlocutory applications for the suspension of the eviction order granted against Mr Klaase pending the determination of Mrs Klaase’s rights based essentially on the same grounds. The application for leave to appeal, joinder and the suspension applications were heard at the same time by the Land Claims Court. It dealt with them in a single judgment under one case number, even though in the joinder application that Court was sitting as a court of first instance. The Court found that the prospects of another court finding Mrs Klaase to be an occupier in terms of ESTA were remote.

[36] In my view, to require Mrs Klaase to bring a separate application for leave to appeal would be a mere formality with no practical effect. In any event, section 38 of the Constitution empowers a competent court to grant appropriate relief where the rights in the Bill of Rights have been infringed or threatened. Given the importance of the issues and that there is no prejudice as a result of failure to apply to the Land Claims Court for leave to appeal, it is in the interests of justice to grant condonation.

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<sup>42</sup> 10 of 2013.

<sup>43</sup> Section 167(6).

<sup>44</sup> *MM v MN and Another* [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) at para 16.

*New evidence*

[37] The amicus curiae sought to introduce new evidence in terms of rule 31 of the Rules of this Court.<sup>45</sup> It asked this Court to condone its late filing of additional documents. The respondents opposed the application to tender new evidence.

[38] In *Certain Amicus Curiae Applications*, it was stated that rule 31—

“permits a duly admitted amicus ‘to canvass factual material which is relevant to the determination of the issues before the Court and which do not specifically appear on the record’. However, this is subject to the condition that such facts ‘are common cause or otherwise incontrovertible’ or ‘are of an official, scientific, technical or statistical nature, capable of easy verification.’ This rule has no application where the facts sought to be canvassed are disputed. A dispute as to the facts may and, if genuine, usually will demonstrate that they are not ‘incontrovertible’ or ‘capable of easy verification.’ Where this is so, the material will be inadmissible.”<sup>46</sup>

[39] The evidence sought to be introduced contains various reports and studies. These are:

- (a) A study providing statistics on farm evictions done by Social Surveys and the Nkunzi Development Association in 2005, titled *Still searching for security: the reality of farm dweller evictions in South Africa* (the Nkuzi study). This study sought to determine the number of people

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<sup>45</sup> Rule 31 reads:

- “(1) Any party to any proceedings before the Court and an *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—
  - (a) are common cause or otherwise incontrovertible; or
  - (b) are of an official, scientific, technical or statistical nature capable of easy verification.
- (2) All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court.”

<sup>46</sup> *In re: Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 13; 2002 (5) SA 713 (CC); 2002 (10) BCLR 1023 (CC) (*Certain Amicus Curiae Applications*) para 8.

evicted from farms in South Africa during the 21 year period from 1984 to 2004. It included evictions that took place prior to the enactment of ESTA in 1998 and cannot provide conclusive evidence of prejudice to women on farms.

- (b) A study by the Centre for Rural Legal Studies that resulted in a report by Du Toit and Ally *The Externalisation and Casualization of Farm Labour in Western Cape Horticulture* Research Report no.16 (2003) (the CRLS report). It is so that the information presented in the report is not common cause or otherwise incontrovertible nor is it official, scientific, technical or statistical in nature. Most importantly, the study on which the report is based took place in 2003.
- (c) A study on *The Position of Women Workers in Wine and Deciduous Fruit Value Chains* (2008) (the SANPERI study). This study represents a follow-up to an earlier study commissioned in 2003. The information and findings presented in the study are not capable of easy verification, especially about 12 years after the study.
- (d) The inquiry conducted on behalf of the South African Human Rights Commission *National Inquiry into Human Rights Violations in Farming Communities* (2003) (the SAHRC Inquiry). The report, according to the respondents, does not provide the nature and extent of the research and how it was conducted and by whom.
- (e) The report by the Women on Farms Project, titled *Behind the Label II*, (2005). The conclusions on this report, according to the respondents, are based on a combination of qualitative and quantitative data and do not provide indication of how the information gleaned from various sources was analysed to reach the conclusions presented in the study.

[40] The application to introduce new evidence was filed shortly before the hearing. The evidence sought to be introduced canvassed statistical and factual material that was not capable of easy verification by the respondents. The respondents raised valid concerns about the methods used to gather and collate information and qualifiers of the statistical methods that are taken as indicators of accuracy. Besides, the belated application brought unwarranted pressure on the other parties when preparing for the hearing of the matter. I would refuse condonation and dismiss the application to tender new evidence.

[41] Mrs Klaase also brought an application for the admission of further evidence in the form of a report.<sup>47</sup> This application was also brought at the eleventh hour. The pressure on the other parties in preparation for the hearing that this new evidence produces was pronounced. The application should be refused.

*Confirmation of Mr Klaase's eviction*

[42] Mr Klaase challenged the Land Claims Court's confirmation of his eviction on review. He submitted that the Court misdirected itself in finding firstly that he committed a fundamental breach of the relationship between himself and the owners and secondly, that it is not practically possible to remedy the breach. I do not agree. It is not in dispute that any and all of the circumstances giving rise to the termination of the employment and accommodation agreement were settled by agreement after Mr Klaase had referred a dispute to the CCMA.

[43] Mr Klaase did not deny that he (a) absconded from work and remained absent; (b) had a long history of inappropriate conduct; (c) failed to attend his disciplinary hearing; (d) failed to vacate the premises as agreed; and (e) continued to live on the premises rent-free whilst being gainfully employed elsewhere. In my view, there is no possibility that the relationship between the parties can be salvaged. The Land Claims

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<sup>47</sup> The report is titled *Farm Workers' Living and Working Conditions in South Africa: Key Trends, Emergent Issues and Underlying and Structural Problems* and was prepared by Margareet Visser of the University of Cape Town and Stuart Ferrer of the University of Kwa-Zulu Natal.

Court was correct in concluding that section 9(1) and (2)(a), (b) and (d) were complied with.

[44] The decision of the Land Claims Court confirming the eviction order cannot be faulted. His appeal must fail.

*Mrs Klaase's joinder application*

[45] The test for joinder is that a party must have a direct and substantial legal interest that may be affected prejudicially by the judgment of the court in the proceedings concerned.<sup>48</sup> In *ITAC*,<sup>49</sup> this Court confirmed the test and said that a party seeking joinder must have a direct and substantial interest in the subject matter. The Court held that the overriding consideration is whether it is in the interests of justice for a party to intervene in litigation.

[46] Mrs Klaase has a direct and substantial interest in the relief sought against Mr Klaase. It is undisputed that she has lived on the farm, continuously and openly for at least 30 years, with the knowledge of the respondents. Her right to housing will be affected negatively if the eviction order is executed. It is apparent from the probation officer's report that Mrs Klaase, together with her children and grandchildren, will be rendered homeless because of the unavailability of alternative accommodation if evicted. The Land Claims Court did not have regard to these relevant circumstances when determining the joinder application. Neither did it consider the provisions of section 3(4) and (5) of ESTA,<sup>50</sup> in terms of which a person

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<sup>48</sup> See *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115; 2013 (1) SA 170 (SCA); at paras 11-2; and *Bowring NO v Vrededorp Properties CC* [2007] ZASCA 80; 2007 (5) SA 391 (SCA) at para 21.

<sup>49</sup> *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (*ITAC*) at paras 11-2.

<sup>50</sup> In relevant parts, section 3 of ESTA provides:

- “(4) For the purpose of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year or more *shall be presumed* to have consent unless the contrary is proved.
- (5) For the purpose of civil proceedings in terms of this Act, a person who has continuously and openly resided on and for a period of one year shall be deemed to

in the position of Mrs Klaase would be presumed and deemed to have consent of the owner if she has continuously and openly resided on land with the knowledge of the owner.

[47] Mrs Klaase should have been cited as a party or joined in the eviction proceedings against Mr Klaase. Separate substantive grounds for her eviction should have been alleged and eviction should have been sought specifically against her. That did not happen.

[48] The Land Claims Court erred in dismissing Mrs Klaase’s application for joinder. That order should be set aside. In my view, the Land Claims Court should have joined Mrs Klaase and varied the terms of the eviction order in so far as it pertained to her.<sup>51</sup> The order I make will reflect this. Next for determination is whether Mrs Klaase is an “occupier” under ESTA.

*Is Mrs Klaase an “occupier”?*

[49] ESTA defines “occupier” in section 1(1) as meaning “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”.<sup>52</sup> “Consent” means—

“express or tacit consent of the owner or a 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 or eviction by a holder of mineral rights, includes the express or tacit consent of such holder.”

[50] In determining the meaning of “occupier” as defined in section 1(1) of ESTA, the starting point is the Constitution. Section 39(2) of the Constitution enjoins courts,

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have done so with the knowledge of the owner or person in charge.” (Emphasis added.)

<sup>51</sup> Section 12(5) of ESTA provides:

“A court may, on good cause shown, vary any term or condition of an order for eviction made by it.”

<sup>52</sup> Emphasis added.

“when interpreting legislation . . . [to] promote the spirit, purport and objects of the Bill of Rights”. In line with a purposive approach to statutory interpretation, a meaning that places the definition within constitutional bounds should be preferred.<sup>53</sup> Because we are concerned with the meaning of “occupier” as defined, the definition must be read not only in light of the purpose of ESTA but also in the context of the legislation, as a whole.<sup>54</sup> It is thus necessary to read the meaning of “occupier” in conjunction with the purpose set out in the preamble<sup>55</sup> and other relevant provisions of ESTA, for example, sections 3, 6, 8, and 9.

[51] As this Court said in *Goedgelegen*, ESTA is “remedial legislation umbilically linked to the Constitution”.<sup>56</sup> It seeks to protect people, like Mrs Klaase, whose tenure to land is insecure.<sup>57</sup> In construing the provisions of ESTA a “blinker peering”<sup>58</sup> at

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<sup>53</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1097 (CC) at para 26.

<sup>54</sup> See *Bertie van Zyl v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 31-2.

<sup>55</sup> The preamble to ESTA reads:

“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 recognising the right of land owners to apply to court for an eviction order in appropriate circumstances;

to ensure that occupiers are not further prejudiced.”

<sup>56</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) (*Goedgelegen*).

<sup>57</sup> Section 25(6) of the Constitution provides:

“A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”

See also the preamble to ESTA, above n 55.

<sup>58</sup> *Goedgelegen* above n 56 at para 52.

the language in the legislation must be avoided. An approach that will “afford [occupiers] the fullest possible protection of their constitutional guarantees” must be adopted. This Court, in *Goedgelegen*, per Moseneke DCJ, remarked:

“[W]e must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We 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.”<sup>59</sup>

[52] The rights implicated here include Mrs Klaase’s right to have access to adequate housing,<sup>60</sup> and not to be evicted from her home without an order of court made after considering all relevant circumstances,<sup>61</sup> to equality<sup>62</sup> and to have her human dignity respected and protected.<sup>63</sup>

[53] The definition of “consent” is broad. It encompasses both “express” and “tacit” consent. The word “tacit” means “understood or implied without being stated”.<sup>64</sup> The respondents argued that “consent” must be actual. They relied on *Thubelisha*.<sup>65</sup> In my view, *Thubelisha* does not assist them. Consent is no less “actual” because it is given tacitly. The question is whether there was consent.

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<sup>59</sup> Id at para 53. This approach has been endorsed in subsequent decisions of this Court, for example *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25; 2015 (6) SA 32 (CC); 2015 (10) BCLR 1139 (CC) at para 35 and *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* [2013] ZACC 45; 2014 (2) SA 603 (CC); 2014 (2) BCLR 212 (CC) at para 47. The Supreme Court of Appeal has also endorsed this approach in *Brown v Mbhense* [2008] ZASCA 57; 2008 (5) SA 489 (SCA) at paras 23-5.

<sup>60</sup> Section 26(1) of the Constitution.

<sup>61</sup> Section 26(3) of the Constitution.

<sup>62</sup> Section 9 of the Constitution.

<sup>63</sup> Section 10 of the Constitution.

<sup>64</sup> See the Soanes and Stevenson *Concise Oxford English Dictionary*, 11th Ed Revised (OUP, Oxford 2009) at 1464.

<sup>65</sup> *Thubelisha* above n 40.

[54] The Land Claims Court’s reliance on the narrow construction in *Klaasen*<sup>66</sup> for the conclusion that Mrs Klaase is a “resident” and not an “occupier” is, in the circumstances of this case, misconceived. It impermissibly construed the definition of “occupier” narrowly and without regard to the mischief ESTA sought to remedy. The narrow meaning does not take into account instances, like those in this case, where an occupier has lived for more than the prescribed period<sup>67</sup> on the premises with the knowledge of an owner who sits back and does not seek the occupier’s eviction. There the ESTA presumption and deeming provision favour the occupier. If the construction of “occupier” adopted by the Land Claims Court is – in the circumstance of this case – correct, occupiers like Mrs Klaase will be evicted arbitrarily from farms without being afforded their constitutional guarantees and their protection under ESTA.

[55] On the meaning of “consent”, the Land Claims Court in *Klaasen* held that its primary meaning is “voluntary agreement to”<sup>68</sup> and that “the person concerned must be or must have been a party to a consent agreement with the owner of the land”.<sup>69</sup> The Land Claims Court held that a “person claiming ESTA occupation must be residing on the property without any other right to do so and with the apparent consent of the owner thereof or the person in charge of the land”.<sup>70</sup> It restricted, impermissibly, the meaning of “consent” in a manner that ignores the significance of “tacit” consent. The corollary of this limitation would be that many people who would otherwise qualify as occupiers would be excluded from the protection of ESTA.

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<sup>66</sup> *Klaasen* above n 30 and *Simonsig* above n 30 at para 18.

<sup>67</sup> See above n 50.

<sup>68</sup> *Klaasen* above n 30 at para 20.

<sup>69</sup> *Id* at para 21.

<sup>70</sup> Land Claims Court joinder judgment above n 2 at para 25.

[56] The observations by the Supreme Court of Appeal in *Sterklewies* are correct. The Court, per Wallis JA, remarked:

“The Act does not describe an occupier as a person occupying land in terms of an agreement or contract, but 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 [ESTA]. Accordingly, when in [*Klaasen*] it was 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 [ESTA] arose. It suffices that persons claiming [ESTA’s] protection show that the owner of the land has consented to their being in occupation, irrespective of whether that occupation flows from an 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 section 8 before an eviction order can be obtained.”

[57] The Land Claims Court’s finding that the ESTA occupier must be residing with “apparent consent” and “without any other right to do so” is not supported by the wording of ESTA which requires only that an occupier must reside with “consent or another right in law to do so”. The restricted meaning of consent is not justified. The breadth of the concept “consent” in section 3 of ESTA is not insignificant. This section deals with the concept of consent, in greater detail. In terms of section 3(1), the consent of an “occupier” to reside on or use land shall “only” be terminated in accordance with the provisions of section 8 of ESTA.

[58] Section 8 falls under Chapter IV of ESTA that deals with “termination of right of residence and eviction”. It provides that an occupier’s right of residence may be terminated on any lawful ground, provided that the termination is just and equitable having regard to certain relevant factors. These factors include: the fairness of any agreement or provision of law on which the owner or person in charge relies; the conduct of the parties giving rise to the termination; the interest of the parties,

including the comparative hardship to the owner or occupier concerned and 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 representation before the decision was made to terminate the right of residence.

[59] Section 3(3) focuses on the substance rather than the form of consent by providing that consent shall be effective regardless of whether the occupier has to obtain some other official authorisation required by law for the occupier's residence. Additionally, ESTA provides that for the purpose of civil proceedings in terms of ESTA, a person who has continuously and openly resided on land for a period of (a) one year shall be presumed to have consent to do so unless the contrary is proved<sup>71</sup> and (b) three years shall be deemed to have done so with the knowledge of the owner or person in charge.<sup>72</sup>

[60] It is undisputed that Mrs Klaase lived on the premises continuously for many years with the knowledge of the second respondent and his father before him.<sup>73</sup> By his own admission in the answering affidavit, the second respondent said that Mrs Klaase came to live with her prospective husband in a house that had been made available to him on the premises. There is no evidence to rebut the presumption that the respondents consented to Mrs Klaase's residing on the farm. The respondents' failure to object to Mrs Klaase's residing on the farm for decades or taking steps to evict her is telling. It implies that they consented to her occupancy. But prior to the enactment of ESTA that was always with the consent of the landowner or farmer.

[61] The respondents submitted that the phrase "another right in law to do so" in the definition of "occupier", despite its wide ambit, does not encompass the right of a

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<sup>71</sup> Section 3(4).

<sup>72</sup> Section 3(5).

<sup>73</sup> This is borne out by the parties' agreed statement of facts prepared in accordance with the Chief Justice's directions. There, it is recorded that Mrs Klaase had resided continuously and openly on the farm for many years.

spouse of an ESTA occupier to live with the ESTA occupier as a result of the duty of spouses to live together. They argued that the same applies to the right of a family member dependent on an ESTA occupier to live with him. As I understand the submission, a family member like Mrs Klaase is only a resident and not an occupier. According to the respondents, this is so because ESTA deals, separately in section 6(2)(d),<sup>74</sup> with the right to cohabitation between spouses and family members, under the rubric of an ESTA occupier's right to family life in accordance with the culture of that family.

[62] In *Hattingh*<sup>75</sup> this Court had to decide whether an occupier's right to family life as provided for in section 6(2)(d) of ESTA encompassed two of her adult sons and her daughter-in-law whom she had given consent to reside on the premises with her. That section provides that an occupier shall have the right to family life in accordance with the culture of that family. Mrs Hattingh's self-reliant adult children contended that, as an occupier, Mrs Hattingh had a right to family life as provided for in section 6(2)(d) and that in terms of that right, she could live with them on the farm.

[63] The Court held that reference to "family life" meant that, despite living on somebody else's land, the occupiers were entitled to enjoy "as normal a family life as possible, having regard to the landowners' rights".<sup>76</sup> It concluded that the occupier may not reside on the landowners' property with more family members than is justified by considerations of justice and equity when the occupier's right to family life is balanced with the rights of the landowner. It follows that an occupier exercising his or her right to family life can live with members of his or her family on the farm

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<sup>74</sup> Section 6(2)(d) provides, in relevant part:

"[B]alanced with the rights of the owner or person in charge, an occupier shall have the right—

...

- (d) to family life in accordance with the culture of that family: Provided that this right shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997."

<sup>75</sup> *Hattingh and Others v Juta* [2013] ZACC 5; 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC).

<sup>76</sup> *Id* at para 35.

even without the consent of the owner provided this is just and equitable. Section 6(2)(d) requires consent of the occupier and not that of the owner for a family member to reside with an occupier on the property of another but, once again, this is limited by what is just and equitable on a proper balancing of the rights of the occupier and owner.

[64] *Hattingh* is distinguishable. Mrs Klaase does not rely on the rights provided for in section 6(2)(d) to resist her eviction. Instead, she relies on being an “occupier” and being entitled to the protection in terms of ESTA when she, as an occupier, is evicted from the land. Her case is that Mr Van der Merwe senior consented to her occupation of the cottage with her husband and is accordingly an occupier as defined. It is not possible that she could have moved into the cottage without the consent, actual or presumptive, of Mr Van der Merwe senior.

[65] In my view, Mrs Klaase has made out a case that she is an occupier in terms of ESTA. As an occupier, Mrs Klaase is entitled to the protections set out in ESTA. An eviction order may be granted against her only if certain conditions are met. The first is that her right of residence must have terminated on lawful grounds, provided that the termination is just and equitable, having regard to certain listed factors.<sup>77</sup> So, for as long as the right of residence of an occupier like Mrs Klaase has not been terminated in terms of section 8, the occupier may stay. Obviously, section 8 has not been complied with and there was no suggestion that it was. It follows that

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<sup>77</sup> Those factors are listed at section 8(1) and 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.”

Mrs Klaase's right of residence was not lawfully terminated. It is accordingly unnecessary for us to consider whether her consent to reside on the property was subject to any conditions, such as the continuation of her marriage or Mr Klaase's continued employment. It is also unnecessary to consider whether, if proper notice had been given, her eviction would have been just and equitable.

[66] The Land Claims Court's finding that Mrs Klaase occupied the premises "under her husband" subordinates her rights to those of Mr Klaase. The phrase is demeaning and is not what is contemplated by section 10(3) of ESTA. It demeans Mrs Klaase's rights of equality and human dignity to describe her occupation in those terms. She is an occupier entitled to the protection of ESTA. The construction by the Land Claims Court would perpetuate the indignity suffered by many women similarly placed, whose rights as occupiers ought to be secured.

*Suspension of execution of eviction and consolidation*

[67] The Land Claims Court held that Mrs Klaase's prospect of being found to be an "occupier" by another court were remote. For this reason, the Court found that no useful purpose would be served by staying the proceedings. I have concluded that Mrs Klaase should have been joined in the eviction proceedings, as an "occupier" and is entitled to the protections under ESTA. In my view, the Land Claims Court should have varied the terms of the eviction order in so far as it pertained to her. In the view I take of the matter, it is not necessary to deal with the issue regarding consolidation.

*Order*

[68] The following order is made:

1. Leave to appeal is granted to Mr and Mrs Klaase.
2. Condonation for the late filing of additional documents by the amicus curiae is refused.
3. The applications for the admission of new evidence by Mrs Klaase and the amicus curiae are dismissed.

4. The appeal by Mr Klaase is dismissed.
5. The appeal by Mrs Klaase succeeds.
6. The decision of the Land Claims Court confirming the Clanwilliam Magistrates' Court order for the eviction of Mrs Klaase is set aside.
7. The application by Mr Klaase for suspension of the execution of the eviction order against him pending the determination of the rights of Mrs Klaase in terms of the Extension of Security of Tenure Act 62 of 1997 is refused.
8. There is no order as to costs.

ZONDO J (Mogoeng CJ, Van der Westhuizen J concurring)

### *Introduction*

[69] I have had the opportunity of reading the judgment prepared by my Colleague, Matojane AJ (first judgment). The first judgment entails that this Court has jurisdiction in respect of this matter. I agree. The matter raises the interpretation and application of the Extension of Security of Tenure Act<sup>78</sup> (ESTA). That is a constitutional matter.<sup>79</sup> Indeed, this Court would also have jurisdiction on the basis that the matter raises a question of law of general public importance that should be considered by this Court.<sup>80</sup> That question would be: how or when does a family member of an occupier<sup>81</sup> as defined in ESTA cease to be a section 6(2)(d) resident family member<sup>82</sup> and become an occupier as defined in ESTA? Another question that this matter raises is: what is the nature of the consent to reside on the land

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<sup>78</sup> 62 of 1997.

<sup>79</sup> See *Hattingh* above n 75.

<sup>80</sup> Section 167(3)(b)(ii) of the Constitution provides that the Constitutional Court may decide—

“any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court.”

<sup>81</sup> The definition of “occupier” in ESTA is in [104] below.

<sup>82</sup> See [74] and [82] below.

contemplated by the definition of “occupier” in ESTA? In this judgment I shall consider whether the consent is qualified or unqualified.

*Leave to appeal*

[70] I also agree with the first judgment that both the first applicant to whom I shall refer as Mr Klaase Jr and the second applicant to whom I shall refer as Mrs Klaase should be granted leave to appeal. Mrs Klaase should be granted leave on the basis of her own case which is reasonably arguable and can, therefore, be said to have reasonable prospects of success and raises important issues of interpretation for determination by this Court. Mr Klaase Jr should be granted leave to appeal because, if it is found that Mrs Klaase is an occupier as defined, the eviction order should not have been granted against Mr Klaase Jr. This would be so because Mr Klaase Jr would be entitled to continue to reside on the farm by reason of Mrs Klaase’s exercise of her right to family life in terms of section 6(2)(d) of ESTA.

[71] Even if Mrs Klaase is found not to have been an occupier as defined, she would have had to be joined in the eviction proceedings between Mr Klaase Jr and the respondents if it was found that she had a direct and substantial interest in the eviction order sought by the respondents. If Mrs Klaase should have been joined in those proceedings but was not joined, that may have vitiated the eviction order granted by the Magistrates’ Court. It is reasonably arguable that the Court should have had all the parties before it before it could make the eviction order.

[72] The eviction order in issue was granted against Mr Klaase Jr and all those occupying the house through or under him. Mrs Klaase’s appeal is against a decision of the Land Claims Court dismissing her application for her to be joined in the automatic review proceedings in which the Land Claims Court had already handed down a judgment in the matter between Mr Klaase Jr and the respondents. The respondents had opposed the application and delivered an answering affidavit by the second respondent. I shall refer to the second respondent as Mr Van der Merwe Jr. Mr Klaase Jr’s appeal is in essence against the decision of the Land Claims Court in

the automatic review proceedings confirming the Magistrates' Court judgment to be correct.

### *Background*

[73] The first judgment has sufficiently set out the factual background to this matter. I, therefore, do not propose to set out the background. I shall only refer to certain aspects of that background as and when I deal with the various issues that need to be decided.

### *The appeal*

[74] The main question in this case is whether on the farm Mrs Klaase is an occupier as defined in section 1 of ESTA or whether she is what, for convenience, I call a section 6(2)(d) resident family member of an occupier as defined. I explain below what a section 6(2)(d) resident family member is.<sup>83</sup> If Mrs Klaase was an occupier as defined, Mr Klaase Jr would be entitled to live with her on the farm as a member of her family. There can be no doubt that, in that event, Mrs Klaase would have had to be joined in the eviction proceedings between Mr Klaase Jr and the respondents because she would have had a direct and substantial interest in that matter. Indeed, this would mean that the eviction order was wrongly granted and should be set aside. Even if Mrs Klaase was not an occupier as defined but was a section 6(2)(d) resident family member of Mr Klaase, it would mean that the eviction proceedings in the Magistrates' Court should not have proceeded to the stage of the grant of an eviction order against her without her having been joined in the proceedings.

[75] Mrs Klaase's case before the Land Claims Court and before us was that on the farm she was an occupier as defined. In written and oral argument Counsel for Mrs Klaase referred to Mrs Klaase as an occupier in her own right. The reference to Mrs Klaase as an occupier in her own right may have been influenced by the

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<sup>83</sup> See [76] and [82] below.

Land Claims Court in *Klaasen*.<sup>84</sup> In *Klaasen*<sup>85</sup> Gildenhuis AJ used this phrase to distinguish an occupier as defined from an occupier falling outside the definition of “occupier”. Being an occupier in her own right would make her an occupier as defined.

[76] The respondents’ case, both before the Land Claims Court and this Court, was that Mrs Klaase was not an occupier in her own right or an occupier as defined but that she resided on the farm solely as a result of her relationship with Mr Klaase Jr. In his answering affidavit in the Land Claims Court, Mr Van der Merwe Jr said that Mrs Klaase “came to occupy the property by virtue of her relationship with [Mr Klaase Jr].” Later on Mr Van der Merwe Jr said: “[Mrs Klaase] came to live with her prospective husband in a house that had been made available to him in his capacity as a permanent employee on the property”. In the Land Claims Court Mrs Klaase did not deliver any replying affidavit that contradicted these two statements. What Mr Van der Merwe Jr said is another way of saying that Mrs Klaase resided on the farm through or under Mr Klaase Jr. That would have been the case both before ESTA and after the commencement of ESTA. Since she is a member of Mr Klaase Jr’s family, this is another way of saying she was a section 6(2)(d) resident family member once ESTA had come into operation.

[77] After the commencement of ESTA, section 6(2)(d) applied to Mrs Klaase’s residence on the farm. Consequently, under ESTA Mrs Klaase would be what I call a section 6(2)(d) resident. The fact that, before ESTA, there would have been no section 6(2)(d) right would not change anything because, even then, the respondents’ point that Mrs Klaase resided on the farm through or under Mr Klaase Jr would still have been applicable.

[78] The first judgment concludes that Mrs Klaase was an occupier, as defined, on the farm. Two reasons are advanced in support of this conclusion. The first is that

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<sup>84</sup> See *Klaasen* above n 30.

<sup>85</sup> *Id* at para 24.

Mrs Klaase resided on the farm over many years with the knowledge of the owners of the farm without any objection from them and without them taking any steps to evict her. The first judgment says that this failure by the farm owners to object implies that they consented to Mrs Klaase residing on the farm and that, consequently, she acquired the status of an occupier as defined.<sup>86</sup>

[79] The second reason is given as being that “Mr Van der Merwe senior consented to [Mrs Klaase’s] occupation of the cottage with [her] husband and [she] is accordingly an occupier as defined”.<sup>87</sup> It then says in the next sentence: “It is not possible that she could have moved into the cottage without the consent, actual or presumptive, of Mr Van der Merwe senior”.<sup>88</sup> These reasons make it necessary to consider the concept of one person occupying a house or land through or under another and to also consider the nature of the consent that the definition of the word “occupier” in ESTA requires for a person to acquire the status of an occupier as defined.

[80] In my view the first judgment’s conclusion is a result, with respect, of a literal construction of the word “consent” in the definition of “occupier”. It is an approach that says: the definition of “occupier” has two requirements, namely, that the person must (a) reside on the land and (b) do so with the consent of the land owner or person in charge and, if those two requirements are met, nothing else matters and the person is an occupier as defined. On the approach of the first judgment, a spouse or partner and every child of the occupier whom he or she brings to the farm to live with him or her in the exercise of his or her right to family life “graduates” into an occupier as defined after residing on the farm for some time without the owner of the farm or person in charge objecting to their residence or without them taking any steps to evict him or her despite knowing that he or she resides on the farm.

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<sup>86</sup> See [60] of first judgment.

<sup>87</sup> See [64] of first judgment.

<sup>88</sup> *Id.*

[81] On the basis of the first judgment's approach to, and, construction of, the statute, even when an occupier as defined brings to the farm an employee, for example, a domestic worker, to live with him or her while employed by him or her, after residing on the farm for some time, the domestic worker also becomes an occupier as defined. This means that the domestic worker may, from that stage onwards, also bring his or her spouse or partner and children to live on the farm in the exercise of his or her right to family life. This is the result one gets if one approaches the word "consent" in the definition of "occupier" on the basis that it refers to unqualified consent to reside on the land. As will be seen below, my view is that the word "consent" in that definition refers to qualified consent.

[82] It may be thought that it would be unusual for a farm worker to employ anybody and that, therefore, the scenario to which I refer above is unlikely to happen in reality. To this I offer a few answers. The one is that there are occupiers who are not employed on the land or farm where they are occupiers. In terms of the definition of "occupier", employment by the land owner or person in charge is not a requirement. Therefore, one may have occupiers who reside on land or farm without being employed by the farm owner. Another is that even with an occupier who is employed by the farm owner or person in charge of the land or farm there certainly will be cases where a family that works on someone else's farm employs a nanny to look after their small children. Yet another one will be where the relationship of such a person may not be that of employment but someone who is not a family member but lives with the family and "helps" out in the household. It may also be a friend of the occupier that the occupier brings to the farm to live with him or her for a certain period with the consent of the farm owner. A supervisor on the farm or farm manager may employ a domestic worker. On the approach and construction of the first judgment all these people graduate to being occupiers in their own rights after living on the farm with an occupier as defined for a long time without the farm owner or person in charge objecting or taking steps to have them evicted.

[83] I am unable to agree with the conclusion of the first judgment that Mrs Klaase is an occupier as defined in section 1 of ESTA. Nor am I able to agree with its approach to the matter and its construction of the word “consent” in the definition of the word “occupier”. In my view Mrs Klaase resides on the farm through or under Mr Klaase Jr and is a section 6(2)(d) resident. A purposive approach to the construction of the word “consent” in the definition of “occupier” is required. The meaning I give to this word in this judgment is a result of that approach. I set out below my approach to the matter, my construction of the word “consent” and, generally, my reasons for my conclusion. My approach begins with the concept in our law that one person may occupy property under or through another person. I later conclude that, prior to ESTA, Mrs Klaase resided on the farm through or under Mr Klaase Jr and that, when ESTA came into operation, this continued to be the case but now under section 6(2)(d) of ESTA when she became a section 6(2)(d) resident which she continues to be.

*Occupation by one person through or under another person*

[84] At common law we have the concept that a person may live in a house or occupy a house or property “under” or “through” someone else.<sup>89</sup> In regard to this concept, I shall consider certain of its effects in law for such a person and for the owner of the house or property. One example of a case in which one person occupies or lives in a house or on property through or under another person is a sub-lessee. If a lessor concludes with a lessee a lease which does not preclude the lessee from sub-letting the property or a portion thereof to someone else, the lessee may conclude a sub-lease with another person, the sub-lessee, in respect of either the whole property or a portion thereof. One example will suffice.

[85] Let us say Mrs A, the lessor, concludes a lease with Mr B, the lessee. In such a case Mr B may conclude a sub-lease with Mr C. In the relationship between Mrs A and Mr B, Mr B is the lessee and Mrs A is the lessor. However, in the relationship

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<sup>89</sup> See n 89 below.

between Mr B and Mr C the former is the sub-lessor and the latter the sub-lessee. Mr C occupies the property under or through Mr B. There is no nexus or agreement between Mrs A and Mr C. Mr C's right of occupation of the property is wholly dependent upon Mr B's right of occupation of the property. If Mr B's right to occupy the property in terms of the lease between himself and Mrs A is validly terminated, Mr C's right to occupy the property also comes to an end.

[86] The same principles apply to a family situation. If a wife or a partner acquires a right to live in a property, unless the instrument giving her that right – whether it be legislation or a lease – provides otherwise or unless there is not enough space, she has a right to occupy it with her husband or partner and children. In that situation the husband's right to occupy the house or property is dependent on the wife's. The same applies to the children's right. The husband or partner and the children occupy the house or property through or under the wife/mother. If her right is lawfully or validly terminated, the husband's and the children's rights to occupy also come to an end. What I have said above accords with case law on the subject.<sup>90</sup>

[87] ESTA did not change the above legal position. On the contrary, there are indications that under it as well the concept of a person occupying property through or under another lives on. A good example thereof is a family member of an occupier as defined who lives with the occupier on the land or farm pursuant to the exercise by the occupier of his or her right to family life in terms of section 6(2)(d). Such a family member lives or resides on the farm or land under or through the occupier as defined.

[88] Another example is to be found in section 8. Section 8 deals with the termination of the right of residence. Subsection (1) provides for the termination of the right of residence of an occupier as defined “on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in

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<sup>90</sup> *Ellerine Brothers (Pty) Ltd v McCarthy Ltd* [2014] ZASCA 46; 2014 (4) SA 22 (SCA) at 24D-F; *Floral Displays (Pty) Ltd v Bassa Land and Estate Co (Pty) Ltd* 1965 (4) SA 99 (D) at 100F-101A; *Gajraj v Hoosen* 1958 (2) SA 630 (D) at 631E-G; *Ntai & Others v Vereeniging Town Council & Another* 1953 (4) SA 579 (A) at 589E, 589G-H, 590D-F and 590G.

particular” certain factors listed in paragraphs (a) to (e). The first reference to an “occupier” in section 8(1) is a reference to an occupier as defined. Paragraph (c) refers to “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”.<sup>91</sup> The reference to “any other occupier” is obviously not a reference to the occupier as defined. It is a reference to any other occupant.

[89] Section 8(4) precludes the owner or person in charge from terminating the right of residence of an occupier as defined who meets one of two prescribed conditions unless he or she 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”. The two conditions are that the occupier must have 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.”

[90] Section 8(5) reads:

“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).” (Emphasis added.)

[91] The first reference to an “occupier” is a reference to an occupier as defined but the second reference is not a reference to an occupier as defined. The second reference is a reference to an occupant. Whereas the right of residence of an occupier

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<sup>91</sup> Emphasis added.

as defined may only be terminated in terms of section 8(1) and (2), the right of residence of an occupier who was his or her spouse or dependent may be terminated in terms of section 8(5). Whereas section 8(1) and (2) does not provide for the termination of the right of residence merely by giving 12 months' notice of termination in the absence of any lawful ground, section 8(5) makes it clear that in the case of an "occupier" who was the spouse of or dependent of the occupier as defined, his or her right of residence after the death of the occupier as defined may be terminated merely by giving 12 months' notice.

[92] Part of the effect of section 8(5) is that the right of residence of the spouse or partner or dependent of an occupier as defined depends on that of the occupier as defined. That this is so is made plain by the ease with which that right of residence may be terminated after the death of the occupier as defined. The owner of the farm or person in charge is only required to give a 12 months' notice of its termination and that is enough to terminate the spouse's or dependent's right of residence and this even if the spouse, partner or dependent had done nothing wrong. This means that such a person resided on the land through or under the occupier as defined. That is why, after the death of the occupier as defined, those persons cannot reside on the land for too long unless that is the wish of the owner or person in charge. Section 8(7) reinforces the notion that an occupant who was the spouse or dependent of an occupier as defined is not an occupier as defined. It reads in part "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) . . .*"<sup>92</sup>

[93] Yet another example is to be found in section 10(3)(c). That provision refers to the grant by a court of—

"an order for eviction of the occupier and *of any other occupier who lives in the same dwelling as him or her and whose permission to reside there was wholly dependent*

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<sup>92</sup> Emphasis added.

*on his or her right of residence* if it is just and equitable to do so, having regard to [various factors set out in the provision]”. (Emphasis added.)

The reference in this provision to the grant of an order for eviction “of any other occupier who lives in the same dwelling as [the occupier as defined] and whose permission to reside there is wholly dependent” on the right of residence of the occupier as defined denotes the concept of one person residing on land through or under another.

[94] Section 10 deals with an eviction order in respect of a person “who was an occupier on 4 February 1997”. In the present case Mr Klaase Jr was an occupier as defined on 4 February 1997. Therefore, section 10 is relevant. Mrs Klaase also contends that she was an occupier as defined on that date. Subsection (1) sets out the circumstances under which an order for the eviction of a person who was an occupier as defined on 4 February 1997 may be granted. Subsection (2) deals with the situation where a court may grant an eviction order against such an occupier even when none of the circumstances set out in subsection (1) apply.

[95] Section 10(3) reads:

- “(3) If—
- (a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;
  - (b) the owner or person in charge provided the dwelling occupied by the occupier; and
  - (c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,
- a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to—*

- (i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and
- (ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted.” (Emphasis added.)

[96] Where the word “occupier” is mentioned for the first time in section 10(3)(c), it refers to an occupier as defined but the second reference to “occupier” cannot be a reference to an occupier as defined. It is simply a reference to an occupant. Although there is a presumption that, where a word appears in different parts of a statute, it carries the same meaning, this presumption may be rebutted by the context in which the word is used in a particular part of the statute. As with most, if not all, statutes, ESTA opens its definition section with the phrase: “In this Act, unless the context indicates otherwise. . .”. Thereafter, the terms and their respective definitions are given. They include the meaning of the word “occupier”. The context in which the word “occupier” is used in section 10(3)(c) where it is mentioned for the second time makes it clear that it does not carry the same meaning as where it is mentioned for the first time.

[97] The thrust of my approach to the question whether Mrs Klaase is an occupier as defined is that there is a difference between a person whose right to reside on a land or property or to occupy land or property is dependent upon someone else’s right of residence or right of occupation of that land or property and someone whose right of residence or occupation is not dependent upon anyone else’s right of residence. I have said that not only did ESTA not abolish or alter this principle when it came into operation but it in fact embraced it. No provision in ESTA demonstrates ESTA’s embrace of this principle more clearly than does section 10(3)(c) where it envisages a court granting “an order for eviction of the occupier *and of any other occupier who*

*lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence . . .*”<sup>93</sup> The reference to “his or her right of residence” is a reference to the right of residence of the occupier as defined. It is clear from section 10(3)(c) that two categories of occupiers are contemplated. The one is the occupier as defined and the other is one whose permission to reside “there” – which is a reference to the dwelling – was wholly dependent on the right of residence of the occupier as defined.

[98] What this provision makes plain is that, when an order for the eviction of an occupier as defined is granted, “an order for eviction . . . of any other occupier” may also be granted. This is a reference to any other occupant who lives in the same dwelling as the occupier as defined and whose permission to reside “there” is wholly dependent on the right of residence of the occupier as defined. It is to be noted that section 10(3)(c)(ii) also makes reference to both categories of “occupiers”. Indeed, sections 11(3)(e)<sup>94</sup> and 12(4)<sup>95</sup> do the same.

[99] The next question is whether a section 6(2)(d) resident family member of an occupier as defined falls under the second occupier referred to in section 10(3)(c). A resident family member of an occupier as defined who resides on the land by virtue of the exercise by an occupier as defined of his or her right to family life is a person “whose permission to reside there was wholly dependent on [the right of residence]” of the occupier, as defined, as contemplated in section 10(3)(c). Therefore, such a person falls under section 10(3)(c).

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<sup>93</sup> Emphasis added.

<sup>94</sup> Section 11(3)(e) reads—

“(e) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land.”

<sup>95</sup> Section 12(4) reads:

“Any order for eviction of an occupier in terms of section 10 or 11 shall be determined by the court, having regard to the income of all of the occupiers in the household.”

[100] Another question that arises from section 10(3)(c) is whether the second reference to an occupier in section 10(3)(c) is confined to a section 6(2)(d) resident family member of an occupier as defined. It seems to me that it is not so confined. In regard to the second reference to an occupier in section 10(3)(c), it must be highlighted that the right of residence of such an “occupier” is not said to have been “wholly dependent” upon the permission of the occupier as defined. It is the permission of that occupant to reside “there” that is wholly dependent upon the right of residence of the occupier as defined.

[101] Section 10(3)(c) does not specify who the grantor of the “permission” contemplated therein would be. Textually, there is no basis for confining that permission to one granted only by the occupier as defined. Nor is there a basis for confining the permission to only one granted by the owner or person in charge. It can be permission granted by the occupier as defined or by both the occupier as defined and the owner of the land. Where an occupier as defined brings his or her family member to reside with him or her on the land in the exercise of his or her right to family life, his or her permission suffices and can fall under the permission referred to in section 10(3)(c). However, where, for example, an occupier as defined brings an employee on to the land to live with him and work for him, he would need the consent of the farm owner or person in charge to do so. If the owner or person in charge gives his or her consent, that consent would constitute the permission that would be “wholly dependent on” the right of residence of the occupier as defined. It, therefore, seems to me that the second reference to “occupier” in section 10(3)(c) includes both a family member of an occupier as defined who resides on the land pursuant to the occupier as defined exercising his or her right to family life as well as a person who is not a family member but whose permission to reside “there” is wholly dependent on the right of residence of the occupier as defined irrespective of whether that permission is given by the occupier only or the occupier and the owner or person in charge.

[102] The advantage of this construction of section 10(3)(c) is that an employee or even a family friend of any occupier as defined who temporarily resides on the farm

together with the occupier with the permission of the farm owner fits into ESTA. If one construes section 10(3)(c) so as to exclude such a person and say that section 10(3)(c) only caters for a section 6(2)(d) resident family member of an occupier as defined, then there is no provision in ESTA for the eviction of such a person. If one includes him or her in section 10(3)(c), then that person may be evicted under section 10(3)(c). Another significance of this construction of section 10(3)(c) is that it reinforces the construction of the word “consent” in that definition of “occupier” excludes consent to reside on the land through or under someone else. The word “consent” must be construed so as to mean consent to reside on the land independently of anyone else’s right of residence on the land or farm.

[103] On this construction a section 6(2)(d) resident, an employee and a friend of an occupier as defined are all not occupiers as defined because the consent or permission that they all have been given individually<sup>96</sup> to reside on the land does not confer upon them the right to reside on the farm independently of the right of residence of the occupier as defined. What is common among all three of them is that their right of residence depends on that of the occupier as defined. This is so despite the fact that the one (section 6(2)(d) resident) only requires the consent of the occupier as defined to reside on the farm whereas the others (those are a friend and an employee of the occupier as defined) require the consent of both the occupier as defined and the owner of the farm or person in charge. Their rights of residence differ from that of the occupier as defined simply in the sense that an occupier’s right of residence exists independently of anyone else’s right of residence whereas theirs are dependent upon his or hers. Another difference is that an occupier as defined may only be evicted from the dwelling and from the farm or land by the owner or person in charge whereas others they may be evicted by the occupier as defined and by the owner of the land.

[104] In *Klaasen* the Land Claims Court expressed the view that section 10(3) is one of the provisions in ESTA in which the word “occupier” is not used in the same sense

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<sup>96</sup> By the occupier in the case of a section 6(2)(d) resident and by the occupier and the owner of the land in the case of the employee and the friend.

throughout the section. I agree. The first reference to an “occupier” in section 10(3) is an occupier as defined. However, the reference to “*any occupier who lives in the same dwelling as him or her and whose permission to reside there was wholly dependent on his or her right of residence*”<sup>97</sup> reflects the concept of a person residing in the same house but through or under the occupier as defined. It seems to me that the second reference to an “occupier” is a reference to simply any other occupant in the house such as an employee of the occupier.

[105] In *Klaasen* the Land Claims Court said that the conclusion is inevitable that in ESTA the word “occupier” is used in two senses. The Court said that the first is a narrow sense. It said that this sense is where the word means “persons who are or were parties to a consent agreement with the owner or person in charge of the land or who are the bearers of another right in law to reside.”<sup>98</sup> For the reasons given by Wallis JA in *Sterklewies*,<sup>99</sup> consent should not be tied to an agreement. I would simply say that the one sense is where it refers to a person whom the owner of the land or the person in charge has given consent to reside on the land or farm *in his or her own right and not through or under anyone else or the bearer of another right in law to reside on the land*.

[106] The Court said that the second sense in which the word “occupier” is used is “a wide sense”. It said that “in the wide sense” the word “occupier” refers to “residents who derive their rights to reside *through or under occupiers* in the narrow sense”. The latter group falls outside the statutory definition of “occupier”.<sup>100</sup> In my view this category would include a category of residents on the farm or land who do not have the consent of the farm owner or person in charge to reside on the farm but have the consent of an occupier as defined to reside with him as family members. Those would be section 6(2)(d) residents. An employee of an occupier as defined

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<sup>97</sup> Section 10(3)(c) of ESTA (Emphasis added).

<sup>98</sup> *Klaasen* above n 30 at para 33.

<sup>99</sup> See *Sterklewies* above n 17.

<sup>100</sup> *Klaasen* above n 30 at para 33.

who resides on the farm with the occupier with the consent of the farm owner would fall under residents who derive their rights to reside through or under an occupier as defined. A friend of the occupier who, for example, is in need of accommodation who is brought by the occupier to the farm to live with him with the permission of the farm owner would also reside on the farm through or under him if the permission of the farm owner was not given on the basis that he or she may reside independently of the occupier's right of residence.

[107] Family members of an occupier reside on the land through or under him or her when they reside there pursuant to the exercise by him or her of his or her right to family life in terms of section 6(2)(d). When ESTA came into operation, Mrs Klaase lived in the cottage through or under Mr Klaase Jr within the meaning of that concept as understood in our law. Once ESTA had come into operation, she lived there by reason of Mr Klaase Jr's exercise of his right to family life as provided for in section 6(2)(d). For that, only Mr Klaase Jr's consent was required. The consent of the owner of the farm was not required.

*The meaning of "consent" in the definition of occupier*

[108] The relevant part of the definition of "occupier" in section 1 of ESTA is—

"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 . . .".

[109] The "consent" that is an essential element of the definition of an occupier may be express or tacit. This is reflected in the definition of the word consent in section 1. The definition of "occupier" refers to "consent to do so". This refers to consent to reside on land which belongs to another. While the definition of "occupier" does not expressly state who must give the consent contemplated in that definition, it expressly states that the contemplated "consent" is that of the owner or person in charge of the land.

[110] On the face of the definition of “occupier”, a person who seeks to be an occupier as defined in section 1 must ask the owner of the land or the person in charge of the land for consent to reside on the land. If the owner or person in charge gives such a person consent to reside on the land, on the face of the definition, that should bestow on the person the status of an occupier as defined in ESTA. That would be a case where consent has been given expressly. A case where consent may have been given tacitly would be where a person comes on to a piece of land and, without any express consent from the owner of the land, starts building a house and lives in it and the owner fails over a long time to object to this or to take steps to have the person evicted from the farm despite knowing that he or she lives on the farm without his or her consent. In that case the owner or person in charge will be said to have tacitly consented that that person reside on the farm.

[111] I have discussed above the situation where a person occupies property through or under another person. It is possible that the owner of land would give a person, for example, a man, consent to reside on the land on the clear understanding that the man would live on the farm with his family but that the family members’ right to reside on the land is dependent on the man’s right. In other words, the family members would reside on the land through or under the man.

[112] In that case the owner could not object to the man’s wife and children residing on the land because the understanding between him and the man would have been that the man’s wife and children may live on the land through or under him. On the reasoning of the first judgment, the fact that the owner did not object to the man’s wife and children residing on the farm for many years and did not take steps to have them evicted would imply that he would have given them tacit consent contemplated in the definition of “occupier” to reside on the farm and, thereby, made them occupiers as defined in ESTA. The question that arises is this: can it be said that simply because the owner did not object over a long time, he tacitly gave them the

type of consent contemplated in the definition of “occupier” and that the wife and children later become occupiers as defined?

[113] Another scenario is where the owner of the land gives a person, for example, a woman, consent to reside on the land without any discussion about family members also coming to live with her on the land but later on the woman brings her husband and children and they all live on the land together as a family. The owner becomes aware that the woman lives with a man and children as a family in the house but, as far as he is concerned, the man and children live on the farm through or under the woman and will leave when she leaves or when she no longer has a right to continue living on the farm. The owner, therefore, does not object to the man and children living on the farm with the woman and over many years does not take any steps to evict them because either he has no problem with this since the man’s and children’s rights to reside on the farm stand or fall with that of the woman or because he appreciates that the woman is exercising her right to family life and he has no basis in law for objecting. The question that arises is: can it be said that merely because the owner did not object to the man and children living with the woman over many years, he tacitly gave them the type of consent contemplated in “occupier” to reside on the farm and that, therefore, the man and the children have become occupiers in their own right themselves?

[114] On the reasoning of the first judgment, the answer to the questions in both cases would be: yes, it is the type of consent contemplated in the definition of “occupier” and in both cases the wife or man, as the case may be, and the children would become occupiers as defined after they have resided on the farm or land over a long period without the owner objecting or taking steps to evict them. This would be the answer that the first judgment gives to the question in each of the above cases because this answer accords with the basis upon which the first judgment concludes that Mrs Klaase is an occupier as defined in ESTA.

[115] In terms of the first judgment all a person needs in order to become an occupier as defined in ESTA is to reside on the land or farm for some time with the knowledge of the owner or person in charge who fails to object or to take steps to evict such a person and the owner is then taken to have tacitly given that person the contemplated consent to reside on the farm. In my view, this construction of “consent” to reside on the land is untenable. It makes no distinction between a person who resides on the land or farm under or through someone else like a spouse or a child of an occupier as defined and a person who resides on the land or farm not through or under anybody but in his or her own right and is given consent to reside on the land or farm independently of anyone else’s right of residence on the land or farm.

[116] This construction produces untenable results. On this approach every family member of an occupier’s family who resides with him or her on a farm or land, pursuant to his or her exercise of the right to family life “graduates” at some undefined stage from being a section 6(2)(d) resident to being an occupier as defined. This means that, if a man were given consent by a farm owner to reside on the land and he later brought his wife and children to the farm to live with him, in due course they would all become occupiers as defined. The construction adopted by the first judgment has the result that, if the occupier has an employee who resides with him or her and whose right to reside on the farm is through or under him and, therefore, dependent on his, he or she, too, becomes an occupier in his or her own right in due course. That is if he or she lives with the occupier for a long time without the farm owner objecting or taking steps to evict him or her.

[117] In such a case each child and employee of the occupier would qualify to then exercise his or her right to family life in terms of section 6(2)(d) and bring his or her spouse or partner and children to live with him or her on the farm as well. When their children also get married, they can also bring their spouses or partners and children to live with them on the farm. This process could go on and on for some time. Where would all these people live? Would they be limited to the house given to the first occupier or would the other “occupiers” be entitled to build their own houses on the

farm away from and independently of the original house given to the first occupier? If they have no right to build other houses on the farm and they must all live together in the house occupied by the first occupier, the house would soon burst at its seams. If they may build their own houses on the farm, soon the farm would be overpopulated and there would be no space for the farmer to conduct his or her farming operations.

[118] The approach of the first judgment does not inquire into the reason why the farm owner did not object. Nor does it inquire into whether in law he had a right to object or had a right to evict the person. Indeed, this construction ignores the fact that the person may have resided on the farm for a long time without any objection from the owner because that person is a family member of the occupier or she is an employee whose residence on the farm is necessitated by employment by the occupier and nothing else. In my view, the consent referred to in the definition of the word “occupier” is not an unqualified consent but a qualified one. The better construction of the word “consent” in the definition of “occupier” is that it is consent that the owner or person in charge gives to a person to reside on the land independently of anyone else’s right of residence on the land. This is not in line with the “occupier” referred to in the second reference to the word “occupier” in section 10(3)(c) as discussed elsewhere in this judgment.

[119] The “occupier” referred to in the second reference to “occupier” in section 10(3)(c) is an occupier whose permission to reside on the land is wholly dependent on the right of residence of the occupier as defined. In that provision that person, though referred to as an “occupier”, is not recognised as an occupier as defined but is in effect simply an occupant. My construction of the word “consent” excludes consent that the owner or person in charge may give to a person or for a person to reside on the farm or land through or under someone else.

[120] On this construction, family members of occupiers only become occupiers as defined where the consent that they have been given – either expressly or tacitly– is consent for them to reside on the land or farm independently of the right of the family

member who is an occupier as defined. In other words, the consent is consent given with the intention that the person will not occupy or reside on the land, farm or house through or under someone else or that his or her right to reside on the land will not be dependent upon anybody else's right of residence.

[121] This construction of "consent" ensures that, if the owner of land gives a person consent to reside on the farm or land, the spouse or partner or child or family member that the person may bring to live with him or her on the farm through or under him or her is a section 6(2)(d) resident if he or she is a family member. Such person's status would not at some stage suddenly change and become that of an occupier as defined without the knowledge of the owner or person in charge. In terms of this construction an occupier's employee does not become an occupier as defined. This construction is in line with the status that this Court acknowledged for Mrs Hattingh's children in *Hattingh*<sup>101</sup> whereas the construction in the first judgment is inconsistent with *Hattingh*. I say it is inconsistent with *Hattingh* because in *Hattingh*<sup>102</sup> this Court held Mrs Hattingh's children to have been in effect section 6(2)(d) residents on Mr Juta's farm despite the fact that they had resided there for many years without any objection from Mr Juta and without him taking any steps to evict them prior to the time of the litigation that brought the matter to this Court.

[122] The first judgment says that Mrs Klaase, who indisputably came to live on the farm as a result of her relationship with the Klaase family and lived with Mr Klaase Jr, as his wife, became an occupier as defined in ESTA just because the owners of the farm did not object to her staying on the farm. Failure to object cannot be relied upon to draw the inference sought to be drawn when there is a plausible explanation for the failure to object. The question is whether on the facts on record before us it can be said that such consent as she may have been given by the owners of the farm was consent for her to reside on the farm independently of Mr Klaase Jr's right of residence. In my view the answer is an unequivocal no.

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<sup>101</sup> See *Hattingh* above n 75.

<sup>102</sup> *Id* at para 34.

[123] Out of the two reasons relied upon by the first judgment for its conclusion that Mrs Klaase is an occupier as defined, I have dealt with one. That is that, since Mrs Klaase resided on the farm for a long time with the knowledge of the farm owners and they did not object or take steps to evict her, they tacitly consented to her residing on the farm and that changed her status to that of an occupier as defined. The other is given as being that—

“Mr Van der Merwe senior consented to [Mrs Klaase’s] occupation of the cottage with her husband and is accordingly an occupier as defined. It is not possible that she could have moved into the cottage without the consent, actual or presumptive, of Mr Van der Merwe senior.”<sup>103</sup>

[124] The second reason is related to the first reason. It is based on the fact that, even on the respondents’ version, although Mr Van der Merwe Sr may have built the cottage for Mr Klaase Jr, he must have known that Mr Klaase Jr would probably occupy it with Mrs Klaase, as Mr Klaase Jr in fact did, and Mr Van der Merwe Sr did not object to this and did not take any steps to have Mrs Klaase evicted. The idea is that Mr Van der Merwe Sr’s failure to object and to take steps to evict Mrs Klaase constituted tacit consent for Mrs Klaase to reside on the farm and that that is enough to have made her an occupier as defined.

[125] That when Mr Van der Merwe Sr built the cottage for Mr Klaase Jr, he must have known that in all probability Mr Klaase Jr would occupy it with Mrs Klaase and that he did not object then nor did he object thereafter when he must have known that Mr Klaase Jr was living with Mrs Klaase in the cottage is all very well and cannot be disputed. However, the real question is this: to the extent that it may be said that Mr Van der Merwe Sr tacitly consented to Mrs Klaase residing on the farm, would his tacit consent have been for Mrs Klaase to reside on the farm under or through

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<sup>103</sup> See [64] of first judgment.

Mr Klaase Jr or would it have been for her to reside on the farm independently of and irrespective of Mr Klaase Jr's right of residence?

[126] On my approach, that question is critical to a determination whether or not a person is an occupier as defined. On the approach of the first judgment, that question is irrelevant. On the approach of the first judgment, the terms in which consent is given or the understanding underlying the consent or the conditions attached to the consent do not matter. In my view, it is on this aspect of the case where the first judgment errs fundamentally. If the position is that the consent that Mr Van der Merwe Sr may be said to have tacitly given for Mrs Klaase to reside on the farm was for her to reside independently of Mr Klaase Jr's right of residence, she would be an occupier as defined. If, however, the consent was one that conferred upon her a right to reside on the farm that was dependent on the right of residence of Mr Klaase Jr, then she would not be an occupier as defined.

[127] There is not a shred of evidence to support any suggestion that Mr Van der Merwe Sr's consent would have been for Mrs Klaase to reside in the cottage or on the farm independently of and irrespective of Mr Klaase Jr's right of residence. I have no doubt that, if anybody had asked Mr Van der Merwe Sr whether Mrs Klaase's right of residence on the farm was independent of Mr Klaase Jr's right of residence, his answer would have been "of course not!". I am sure that, even Mr Klaase Jr would have given the same answer if asked. Indeed, even Mrs Klaase would have given the same answer to the question if she was asked at the time.

[128] All the evidence overwhelmingly points to the conclusion that, to the extent that Mr Van der Merwe Sr may have given his consent for Mrs Klaase to reside on the farm, that consent was for her to reside on the farm through or under Mr Klaase Jr. That consent is not the type of consent contemplated in the definition of "occupier" and does not turn a person who is not an occupier as defined into an occupier as defined.

[129] Mr Van der Merwe Sr built a cottage for Mr Klaase Jr but, when Mr Klaase Jr started occupying the cottage, he took his wife-to-be along. In *Klaasen* the Land Claims Court gave a similar example in considering the scope of the term “occupier”.

It said:

“The scope of the term ‘occupier’ can best be illustrated with reference to particular examples. I will use the example of a farm owner *who employs a labourer to work on his farm and, as a term of his employment contract, allows him to occupy a house on the farm.* If the labourer moves into the house with his wife and children, the occupation by the wife and children would be lawful by virtue of the labourer’s right to family life in terms of [ESTA], but the wife and children would not become ‘occupiers’ in their own right.”<sup>104</sup> (Emphasis added and footnotes omitted.)

[130] Later on, the Court said in regard to the position of the wife, the children and a friend that the occupier may have brought into the house to live with him:

“The person who holds the consent is the labourer himself, and the wife’s, children’s or friend’s right of residence is *under or through the labourer.* The labourer may allow them to reside in the house by virtue of the consent given to him by the owner or person in charge. If the labourer wants to evict the friend, the friend will not be entitled to any protection under [ESTA].”<sup>105</sup>

What was said by the Land Claims Court as quoted above supports the construction of “consent” adopted in this judgment and the conclusion that Mrs Klaase is not an “occupier” as defined.

*Section 6(2)(d) residents*

[131] Section 6(2)(d) reads:

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<sup>104</sup> *Klaasen* above n 30 at para 24.

<sup>105</sup> *Id.*

- “(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 -
- ...
- (d) to family life in accordance with the culture of that family.”

[132] In *Hattingh* Mrs Hattingh lived on Mr Juta’s farm with the consent of Mr Juta. I would add that Mr Juta’s consent was for Mrs Hattingh to reside on the farm independently of anyone else’s right to reside on the farm. She was, therefore, an occupier as defined. I pause here to highlight the point that the definition of “occupier” in ESTA does not restrict occupiers to the male gender. Women, too, may be occupiers and *Hattingh* reveals that there are women occupiers even in real life under ESTA. Therefore, there is no warrant for the approach adopted in the first judgment that creates the impression that ESTA is somehow anti-women. Mrs Hattingh’s adult children, her daughter-in-law and grandchildren lived with her in a cottage on Mr Juta’s farm. Mr Juta sought to have some of Mrs Hattingh’s adult children evicted from the farm as he needed to give that part of the cottage which they occupied to his new farm manager to occupy. Mrs Hattingh’s children were not employed by Mr Juta.

[133] Mrs Hattingh’s children contended that, as an occupier, Mrs Hattingh had a right to family life as provided for in section 6(2)(d) and that that right entailed that she could live on Mr Juta’s property with members of her family. Although Mr Juta acknowledged that Mrs Hattingh’s right to family life entailed that she could live with members of her family on the farm, he contended that that did not include living with self-reliant family members. The question for determination in that case was, therefore, whether an occupier’s right to family life under ESTA entailed that the occupier could live with adult and self-reliant family members on the farm. This Court said:

“The matter raises the interpretation of section 6(2)(d) which relates to a right that is important and affects a vulnerable and yet significant section of our society, namely, people who live on other people’s land.”<sup>106</sup>

[134] In *Hattingh* the meaning and ambit of the right to family life provided for in section 6(2)(d) arose pertinently for decision. This Court interpreted the provisions of section 6(2)(d) to mean that an occupier may live on the property of another with one or more members of his or her family if to do so would not be unjust and inequitable to the property owner when the interests of the occupier and those of the property owner are balanced.<sup>107</sup> This interpretation followed upon this Court’s conclusion that the purpose of the right to family life that section 6(2)(d) confers upon an occupier is to enable the occupier to lead as normal a family life on another’s property as is possible, with due regard to the interests of both the occupier and the property owner.

[135] This Court also said in *Hattingh*:

“It would be difficult to define with any degree of certainty the occupier’s ‘right to family life in accordance with the culture of that family’ for which provision is made in section 6(2)(d). However, it seems to me that the reference to ‘family life’ in section 6(2)(d) suggests that the purpose of the conferment of this right on occupiers was to ensure that, despite living on other people’s land, persons falling within this vulnerable section of our society would be able to live a life that is as close as possible to the kind of life that they would lead if they lived on their own land. This means as normal a family life as possible, having regard to the landowner’s rights.”<sup>108</sup>

[136] Later on this Court further said:

“Living a family life may mean the occupier living with his or her spouse or partner only, or living with one or more of his or her children or with one or more members of his or her extended family, depending upon what the result is when one balances the occupier’s living with any one or more of those persons, with what the owner of

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<sup>106</sup> *Hattingh* above n 75 at para 25.

<sup>107</sup> *Id* at para 37.

<sup>108</sup> *Id* at para 35.

the land is also entitled to. If, in a particular case, the balancing produces a result that is unjust and inequitable to the owner of the land, the occupier's right to family life may be appropriately limited. If, however, the occupier were to live with his or her spouse or partner and with one, two or more of his children or other members of the extended family and this would not result in any injustice or unfairness and inequity to the owner of the land, the occupier would be entitled to live with those members of his or her family.”<sup>109</sup>

[137] It is clear from *Hattingh* that for purposes of an occupier bringing onto the property a family member or family members to reside with him or her, the consent of the property owner is not required. Only the occupier's consent is required. If the consent of the property owner were required, such a family member would become an occupier as defined upon the grant of the property owner's consent if that consent enabled that family member to reside on the farm independently of the occupier's right of residence. This would be so because, in that event, the family member would fit into the definition of “occupier”.

[138] A section 6(2)(d) resident resides on the property with the consent of the occupier as defined. The only requirements for this category of residents are that he or she must be a member of the family of the occupier, must reside with him or her on the property with his or her consent and their living on the property should not be unjust and inequitable to the property owner when the interests of the occupier and those of the property owner are balanced. Although this Court did not use the term “section 6(2)(d) resident” in *Hattingh*, Mrs Hattingh's adult family members who resided with her on Mr Juta's farm were section 6(2)(d) residents on that farm.

[139] The first judgment takes the view that our decision in *Hattingh* is distinguishable. It says that this is so because Mrs Klaase does not rely on the right to family life in section 6(2)(d) whereas Mrs Hattingh relied on that right. With respect that is not a basis to distinguish *Hattingh* because in this case the respondents rely on the existence of Mr Klaase's right to family life to say Mrs Klaase was a

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<sup>109</sup> Id at para 37.

section 6(2)(d) resident and not an occupier as defined. In the present case the main question for determination is whether or not Mrs Klaase is an occupier as defined on the first respondent's farm. She contends that she was. The respondents contend that she is not and her residence on the farm is through or under her husband who allowed her, initially, to stay with him and Mr Klaase Sr and, later, with him and their children in the cottage which he did in the exercise of his right to family life. Accordingly, the distinction relied upon by the first judgment is no distinction at all.

[140] Another category of residents would be people that an occupier may bring onto the farm to live with him or her but who are not family members. A good example would be an employee employed by an occupier such as a nanny. Such a person would not be a section 6(2)(d) resident. Nor could she or he be said to be an occupier as defined because her or his right of residence on the farm would not be independent of anybody else. His or her right of residence would be dependent on that of the occupier employing him or her. The consent of the owner or person in charge would be for that person to reside on the farm or land through or under the occupier as defined. It would be absurd to suggest that, in so far as the owner may have given consent for such a person to live with the occupier, the consent was of the type that would enable that person to continue to reside on the farm even after the occupier's right of residence has been validly, justly and fairly terminated. That is an example of a person who could reside on the farm with the owner's consent in circumstances where the consent would not mean that he or she resides on the farm or land independently of the right of residence of the occupier as defined.

[141] Coming back to the present case, therefore, the position has to be that, even if it could be said that Mrs Klaase resided on the farm with the tacit consent of the owners of the farm, that is not on its own enough to make her an occupier as defined in ESTA. It is only enough to make her a lawful occupant of the cottage or farm. In my view Mrs Klaase has failed to show that such consent to reside on the farm as she may have been given by the owners of the farm, either expressly or tacitly, was consent to reside on the farm independently of Mr Klaase Jr's right of residence. Accordingly, her right

to reside on the farm was dependent upon his and she lived on the farm through or under him. Her right could not survive beyond the termination of his right.

[142] I return to the question: is Mrs Klaase an occupier as defined in ESTA or is she a section 6(2)(d) resident? I say that she is a section 6(2)(d) resident. The features of this case which support this conclusion are:

- (a) Mr Van der Merwe's evidence that Mrs Klaase came to live on the farm as a result of her relationship with Mr Klaase Jr is undisputed;
- (b) when Mrs Klaase came to live on the farm, she already had a child with Mr Klaase Jr;
- (c) initially, Mrs Klaase lived on the farm with both Mr Klaase Sr and Mr Klaase Jr;
- (d) when Mr Van der Merwe Sr gave Mr Klaase Jr the cottage to occupy, Mrs Klaase occupied it with him and later with their children as well;
- (e) Mr and Mrs Klaase are married and have been married since about 1988;
- (f) Mr and Mrs Klaase have at all times material to this case lived together in the cottage as husband and wife and with their children as a family;
- (g) Mr Klaase Jr became an occupier as defined at the latest when Mr Van der Merwe Sr gave him the cottage;
- (h) there is no evidence that any of the successive owners of the farm or persons in charge of the farm ever spoke to Mrs Klaase about residing on the farm or giving her any consent directly to reside on the farm;
- (i) Mrs Klaase's assertion in her affidavit in the Land Claims Court that it was an essential term of her oral contract of employment that she would have housing or accommodation on the farm falls to be rejected; it is lacking in necessary details and is a benefit that Mr Van der Merwe Jr says has never been given to any seasonal worker in all the time he has lived in the area and he says he has lived in the area all his life. All his life must be decades; there is no reason why such a benefit would have been given to Mrs Klaase who was a seasonal worker; and

- (j) although Mrs Klaase has lived on the farm for about 26 years, she has never done anything to assert any right to reside on the farm independently of Mr Klaase Jr's right of residence; on the contrary, she has conducted herself all these years in a way consistent with the way a section 6(2)(d) resident would conduct herself.

[143] All these features point overwhelmingly to Mrs Klaase being a section 6(2)(d) resident. Are there features that point to her being an occupier as defined? The answer is: NO, none can be advanced. In conclusion Mrs Klaase is a section 6(2)(d) resident and not an occupier as defined.

[144] In dealing with the question whether Mrs Klaase is an occupier as defined or a section 6(2)(d) resident, I was dealing with the basis upon which Mrs Klaase claimed to have been entitled to be joined in the automatic review proceedings in the Land Claims Court. Her averments should have been assumed to be true for purposes of the Land Claims Court deciding whether she had a direct and substantial interest in the outcome of the matter between her husband and the respondents. That is the approach that is adopted in deciding whether a party has legal standing.<sup>110</sup> I think that the same approach applies to applications for joinder. However, in this case the Land Claims Court decided the joinder application on the basis of examining the validity of the contention made by Mrs Klaase that she was an occupier as defined.

[145] In this Court the matter could have been decided only on joinder on the assumption that Mrs Klaase's averments were true or correct and without pronouncing on their validity. However, the interests of justice dictated that we pronounce on whether or not the Land Claims Court was correct in its conclusion that Mrs Klaase was not an occupier as defined. The interests of justice dictated so because:

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<sup>110</sup> *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC).

- (a) the Land Claims Court had pronounced on the issue and its decision to dismiss Mrs Klaase's joinder application was based on its conclusion that she was not an occupier as defined;
- (b) the parties themselves appear to have argued the joinder application in the Land Claims Court on the basis of whether or not Mrs Klaase was an occupier as defined;
- (c) in this Court, directions were issued to the parties to the effect that the only issue on which they would be heard was whether Mrs Klaase was an occupier as defined;
- (d) this Court heard full argument on whether Mrs Klaase is an occupier as defined; and
- (e) not deciding this issue would mean that the parties are likely to return to this Court later to have the same issue decided and this would unduly delay finality on the dispute and would result in unnecessary costs.

[146] Since, for purposes of determining Mrs Klaase's application for joinder, the Land Claims Court should have assumed her averments relating to her interest in support thereof to be true, that Court should have concluded that Mrs Klaase had a direct and substantial interest in the order sought by the respondent against her husband. That the Court should have assumed Mrs Klaase's averments to be true relates to her factual averments and not the conclusions she may have sought to draw from those averments. Having assumed the factual averments to be true, the Court could then consider whether it could be said that Mrs Klaase had a direct and substantial interest in the matter. By reason of the approach it adopted to the joinder application and the conclusion it reached that Mrs Klaase was not an occupier as defined, the Land Claims Court dismissed her application for joinder.

[147] The next question that arises is what the Land Claims Court would have done if it had concluded that Mrs Klaase had a direct and substantial interest in the matter between her husband and the respondents. Mrs Klaase had a direct and substantial interest because, firstly, the eviction order that was sought was for her own eviction

and the eviction of her children. Secondly, in so far as it was an eviction order against her husband, it was an order that would deprive her of her right to live with her husband on the farm. She would have a right to continue to live on the farm with her husband if she was an occupier as defined, as she contended she was, and she would allow him to live with her as a family member in the exercise of her right to family life provided for in section 6(2)(d). The conclusion that Mrs Klaase had a direct and substantial interest in that matter means that the respondents should have cited Mrs Klaase as one of the respondents in the eviction application in the Magistrates' Court. The respondents failed to do so and those proceedings resulted in an eviction order being granted against Mr Klaase Jr and all those occupying the property through him. This included Mrs Klaase and her children. That eviction order was made without her being joined and without her being given an opportunity to be heard.

[148] What is the effect in law of the fact that the eviction order against Mr Klaase Jr and Mrs Klaase was granted in the absence of Mrs Klaase even though she had a direct and substantial interest in the outcome of the proceedings? Since the order was made without Mrs Klaase being heard, it was in breach of the *audi alteram partem* rule – a fundamental principle of our law which both courts and administrative tribunals and functionaries are generally required to observe before they may make a decision adverse to anybody. In this judgment I take the view that Mrs Klaase is a section 6(2)(d) resident and that her permission or consent to reside on the farm with Mr Klaase Jr was wholly dependent upon Mr Klaase Jr's right of residence on the farm. As such, section 10(3)(c) applies to her. Section 10(3)(c) authorises a court to grant an eviction order against her. That provision does not expressly exclude the *audi alteram partem* rule. It must, therefore, be construed to include the *audi* principle. Indeed, interpreting it in that way is interpreting it consistently with section 26(3) of the Constitution. Section 26(3) reads:

“No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

[149] The normal consequence for a decision taken by an administrative tribunal or functionary or a court adversely affecting the rights or interests of a person without compliance with the *audi alteram partem* rule is that such a decision is invalid and should be set aside. I can see no reason why there should be a departure from this general rule in the case of the eviction order of the Magistrate's Court and the decision of the Land Claims Court confirming the eviction order to be correct. Therefore, both should be set aside.

[150] The purpose of setting the eviction order aside is to rectify what was done wrong or to rectify an irregularity that occurred in the proceedings where that court issued an order in a matter without all interested parties being before it. It is also to afford Mrs Klaase an opportunity to be heard on whether the grant of the eviction order would be just and equitable in all circumstances – an opportunity she should have been granted before the eviction order could be granted against her, her husband and her children.

[151] If Mrs Klaase had been joined in the eviction proceedings in the Magistrates' Court, she could have delivered affidavits or an affidavit setting out her case as to why that Court should not grant an eviction order against her, her husband and their children. Setting aside the eviction order (as opposed to setting aside the entire eviction proceedings) will enable her to deliver her affidavits in that Court whereafter the respondent will be entitled to file a replying affidavit and the Court will then adjudicate the matter afresh.

[152] If Mrs Klaase had been joined in the eviction proceedings and had been given an opportunity to be heard, she could have argued that, if she was an occupier as defined, Mr Klaase Jr had a right of residence on the farm as a family member and the respondent was not entitled to any eviction order. She may have said that the respondent may be entitled to an order evicting Mr Klaase Jr in his capacity as an occupier but not in his capacity as a section 6(2)(d) resident. Mr Klaase Jr has only one physical body. If he had a right to reside on the farm irrespective of the source

from which that right sprang – be it from the status of being an occupier as defined or from being a section 6(2)(d) resident – that physical body would be entitled to be on the farm. The respondent would have had no right to evict it. Mr Klaase Jr does not have two physical bodies – one attached to the status of occupier and the other attached to the status of being a section 6(2)(d) resident. Therefore, if Mrs Klaase were to have been able to show that she is an occupier as defined, she could have successfully opposed the respondents’ eviction application even against her husband. However, my conclusion is that she is not an occupier as defined but is a section 6(2)(d) resident. Therefore, on my approach she will not be able to present that argument.

[153] I am, therefore, of the view that the non-joinder of Mrs Klaase in the eviction proceedings in the Magistrates Court between Mr Klaase Jr and the respondents, despite the fact that she had a direct and substantial interest, vitiated the eviction order. That order should be set aside and the matter be adjudicated afresh after Mrs Klaase has been joined and has had the opportunity of delivering affidavits in the matter. I agree with the first judgment that the application for the admission of further evidence falls to be dismissed for the reasons given in that judgment.

[154] In the premises I would make the following order:

1. Leave to appeal is granted to both applicants.
2. The application for leave for the admission for further evidence is dismissed with costs.
3. The appeals are upheld with costs, such costs to be paid by the respondents jointly and severally, the one paying the others to be absolved.
4. The orders by the Land Claims Court relating to the joinder application and to the automatic review proceedings and the eviction order issued by the Magistrate’s Court are set aside.
5. The eviction order granted by the Magistrate’s Court is replaced with the following order:

- “(a) Mrs Elsie Klaase is joined as the second respondent in these proceedings.
- (b) The second respondent (Mrs Elsie Klaase) must, if so advised, deliver to the clerk of this Court and serve on the applicant on or before the expiry of 10 court days from the date of this order such affidavits as she may wish to deliver in opposition to the applicant’s application.
- (c) The applicant must, if so advised, on or before the expiry of 10 court days after the expiry of the period in (b) above deliver a replying affidavit to the clerk of the Court and serve a copy thereof on each respondent.
- (d) Once the affidavits referred to in (b) and (c) have been delivered and served or once the period referred to in (c) has expired, the applicant shall take the necessary steps to have the matter set down for hearing.”

## JAFTA J

### *Introduction*

[155] I have had the benefit of reading the judgment of Matojane AJ (first judgment) and the judgment of Zondo J (second judgment). I agree that leave must be granted and that Mrs Klaase’s appeal must succeed. While I agree with much said in both judgments, there are aspects with which I am unable to agree.

[156] I do not agree with the conclusion in the second judgment to the effect that Mrs Klaase’s non-joinder vitiated the entire eviction order. I think the vitiation is limited to the extent that the order in question referred to Mrs Klaase who was not a party before the Magistrate, at the time the order was made. Insofar as Mr Klaase was concerned, the landowner had complied fully with the requirements of ESTA. Consequently there can be no legal basis for overturning the Magistrate’s order with

regard to Mr Klaase. Accordingly it would not have been competent for the Land Claims Court to set aside the order on review in relation to Mr Klaase because no error of law was committed by the Magistrate.

[157] The allegation that Mrs Klaase could have asserted her right or entitlement to live with her husband, had she been joined, remains just an allegation. It was not an established fact before the Magistrate. Nor was it proved before the Land Claims Court where Mrs Klaase made the application to be joined. It does not appear to me that in her papers before the Land Claims Court, she makes this allegation. In my view, it is incorrect to set aside the Magistrate's order pertaining to Mr Klaase in the present circumstances.

[158] With regard to the first judgment, once it is accepted that Mrs Klaase should have been joined, I think it is not necessary for present purposes to determine whether she was an occupier as defined in ESTA or an occupier described in section 10(3) of ESTA. This section provides:

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

[159] It seems to me that ESTA contemplates two types of occupiers. The occupiers as defined and those referred to in section 10(3) who may be evicted together with the occupier as defined, provided they live with her in the same house and their “permission to reside there was wholly dependent” on her right of residence. In addition, the granting of an eviction order in those circumstances must also be just and equitable.

[160] Therefore I accept that Mrs Klaase was an occupier but I do not find it necessary here to determine whether she was an occupier as defined or as described in

section 10(3) of ESTA. Her non-joinder justifies the setting aside of the eviction order to the extent that it referred to her.

[161] For these reasons I support the order proposed in the first judgment.

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