IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

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

26/5/2020

CASE NO: LCC 257/2017

In the matter between:

GIDEON DU PLESSIS	First applicant
DAMETEX CC	Second applicant
and	
MOSES HERMANUS ROSS	First respondent
MAUREEN ROSS	Second respondent
ALL OTHER PERSONS OCCUPYING THE PROPERTY	Third respondent
THE CITY OF CAPE TOWN	Fourth respondent
HEAD: WESTERN CAPE PROVINCIAL DEPT OF RURAL DEVELOPMENT AND LAND REFORM	Fifth respondent

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JUDGMENT

COWEN AJ

1. This is an application to evict a family living on a smallholding known as Proteakop in the Western Cape.[1] The application is brought in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA). ESTA affords secure tenure to persons who reside on land that they do not own, as envisaged in section 25(6) of the Constitution.[2] It also affords occupiers '*the dignity that eluded most of them throughout the colonial and apartheid regimes.*'[3]

The parties

2. The first and second applicants are, respectively, Mr Gideon du Plessis and Dametex CC.[4] Mr du Plessis lives with his wife, Mrs du Plessis, in the main residential dwelling on the property. He is the owner of the property and the sole member of Dametex CC, which has operated a business in the carpet industry.

3. The first and second respondents are, respectively, Mr Moses Hermanus Ross and his wife, Mrs Maureen Ross. Mr and Mrs Ross live in a second residential dwelling on the property together with their two children, one of whom is still a minor. The third respondent is cited as being other persons who occupy the property through the first and second respondents. It is now common cause that only the Ross family occupy the dwelling.

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[1] Being Portion 14 (a portion of Portion 4) of the consolidated farm Saxenburg, Eerste River. It measures some 4.3 hectares in extent. I refer to it as 'the property'.

[2] *Daniels v Scribante* 2017(4) SA 341 (CC) (Daniels) at para 13. Section 25(6) 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.*'

[3] Id at para 23.

[4] Registration No CK1996/004357/23.

4. The remaining respondents are the City of Cape Town (fourth respondent) and the Head of the Western Cape Provincial Department of Rural Development and Land Reform (fifth respondent).

Litigation history and issues to be determined

5. The applicants instituted the application on 1 November 2017[5] and affidavits were exchanged.[6] The Court requested a probation officer's report, as contemplated by section 9(3) of ESTA, which was filed on 4 April 2018. The report is dated 29 March 2018 and is signed by a M Tinnie, Project Officer: Land Tenure and Administration and two intern social workers.

6. On 30 August 2018, Meer AJP made an order directing the fourth respondent to engage with all parties before 28 September 2018. On 27 September 2018, representatives of the applicants, the first and second respondents and the City of Cape Town held a meeting for this purpose. The minutes of the meeting reveal that the engagement focused on the availability of emergency housing available in a settlement known as Wolwerivier should the Court authorize the eviction and the Ross family be left homeless.

7. The application was initially set down for 2 August 2019, but was removed from the roll by agreement following a pre-trial conference held on 12 July 2019 before Ngcukaitobi AJ. During the conference, Ngcukaitobi AJ ordered that two issues be referred to oral evidence.

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[5] This is the third application instituted to authorize the Ross family's eviction. The first was instituted several years previously in the Kuilsriver Magistrates Court but was withdrawn. The second was instituted in the Land Claims Court. It too was withdrawn, on or about 22 July 2016, in light of the Constitutional Court decision in *Klaase v Van der Merwe* 2016(6) SA 131 (CC) (Klaase) and its potential impact on the legal position of the second respondent, Mrs Ross.

[6] The first and second respondents delivered their answering affidavit on 3 February 2018. Mr du Plessis deposed to a replying affidavit on 23 February 2018, and a supplementary replying affidavit on 14 March 2018.

8. The application was ultimately set down for hearing in Cape Town on 4 and 5 February 2020, when it came before me. Mr Wilkin appeared for the applicants and Mr Hathorn SC appeared for the first to third respondents. There was no appearance for the fourth or fifth respondents, although a representative from the fourth respondent was present in court.

9. At the commencement of the hearing, Mr Hathorn requested the court to reconsider the order granted by Ngcukaitobi AJ to permit oral evidence. There was no dispute that the court has the power to do so in light of the decision of *Wallach*.[7] After hearing argument, I declined to reverse the order and indicated that I would give my reasons at a later stage. I do so below. The parties then requested the court to rule on the duty to begin. After hearing the parties, I ruled that the applicants should begin because, at least in part, the issues referred were germane to the question whether the applicants have any right to terminate the rights of residence. If they don't, that is the end of the matter.

10. The matter then proceeded and Mr Du Plessis gave evidence, which was completed on 5 February 2020. Mr Ross then testified. His evidence was completed on 12 February 2020, and argument proceeded on 14 February 2020. The parties were afforded an opportunity thereafter to supplement their heads of argument in light of the oral testimony. I also requested the parties to supply the court with supplementary affidavits dealing with certain issues, including the position of the Ross children, in light of the duty on the court to have regard to all relevant circumstances when considering eviction applications[8] and the importance to be attached to children's rights under section 28(2) of the Constitution (mindful that one of the children is a minor). I received a supplementary affidavit from the Ross family dated 18 February 2020.

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[7] *Wallach v Lew Geffen Estates CC* 1993(3) SA 258 (A) at 262J to 263H..
[8] *Occupiers of Erven 87 and 88 Berea v De Wet NO and others* [2017] ZACC 18.

11. There is no dispute that ESTA applies to these proceedings. Under section 9(2), a court may only make an order for the eviction of an occupier if the conditions in section 9(2)(a) to (d) are complied with.[9] There is no dispute that the conditions in section 9(2)(b) and (d) have been complied with.

12. The following issues arise for decision in this application:

    12.1. Whether Mrs Ross is an occupier in her own right as contemplated by ESTA or whether she occupies the property by virtue of Mr Ross' right to family life.

    12.2. Whether the applicants terminated the rights of the occupiers to reside on the property in accordance with section 8 of ESTA as required by section 9(2)(a).

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[9] **Limitation on eviction**

(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.

(2) A court may make an order for the eviction of an occupier if—

(*a*) the occupier's right of residence has been terminated in terms of section 8;

(*b*) the occupier has not vacated the land within the period of notice given by the owner or person in charge;

(*c*) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and

(*d*) the owner or person in charge has, after the termination of the right of residence, given—

(i) the occupier;

(ii) the municipality in whose area of jurisdiction the land in question is situated; and

(iii) the head of the relevant provincial office of the Department of Rural Development and Land Reform, for information purposes,

not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.

12.3. Whether the conditions in section 10 or 11 have been complied with.

12.4. If an eviction is ordered:

12.4.1. What is a just and equitable date on which the occupier shall vacate the land?

12.4.2. Whether the issue of compensation arises in terms of section 13 of ESTA.

Approach to the evidence

13. Save for the two issues referred to oral evidence, the facts are to be found in the affidavits and must be determined based on the principles in *Plascon-Evans*[10] and *Wightman*[11]. Although there are multiple disputes on the papers, the core material facts are either common cause or can be determined in light of these principles. I have also had regard to the further information in the probation officer's report.

Reconsideration of the order referring matters to oral evidence

14. The two issues referred to oral evidence were:

14.1. whether the first applicant afforded the first respondent a 'life-long' right to occupation as pleaded (referred on the applicant's request), and

14.2. the financial circumstances of the applicants (referred on the first and second respondents' request should the applicant's request be acceded to)

15. In requesting the court to reconsider the referral, Mr Hathorn submitted, in short, that (a) the order should not have been granted during a telephonic pre-trial hearing when an objection had been taken to the referral, (b) the applicants should have foreseen the

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[10] *Plascon-Evans Paints v Van Riebeeck Paints* 1984(3) 623 (A) (Plascon Evans) at 634H-635C

[11] *Wightman t/a JW Construction v Headfour (Pty) Ltd and ano* 2008(3) SA 371 (SCA) (Wightman), para 13.

dispute of fact referred to in 14.1, with the result that the court should decide the matter on the principles articulated in *Plascon Evans* and (c) it is not necessary for the dispute to be resolved for the court to determine the application in light of the decision of the Constitutional Court in *Klaase*. Mr Wilkin responded to each of these submissions.

16. First, I agree with Mr Wilkin's submission that there is nothing irregular about the court making such an order in context of a telephonic pre-trial conference. Rule 30 of the Land Claims Court Rules, which regulates conferences, contemplates that they should be used to '*promote the expeditious, economic and effective disposal of the case.*' Rule 30(2) specifically authorizes a presiding judge to direct that a conference take place over the telephone. Rule 30(7)(a) provides specifically that the presiding judge may at a conference make any interlocutory order. Rule 30(9), without limiting the general powers of the presiding judge at a conference, specifically authorizes wide ranging orders to be made. Where interlocutory orders will usually be applied for by a party, the court may make them of its own accord in terms of Rule 37, and while formal applications will usually be brought by an applicant in this regard, this can be departed from in appropriate circumstances. In the present instance, the request for reconsideration of the order was made from the bar and not substantiated on affidavit and there is no substantiated suggestion that the procedure that was followed by Ngcukaitobi AJ was unfair or that the objection raised to the referral at the time was not duly or fairly considered.

17. Second, as regards the foreseeability of the dispute of fact relating to whether Mr Ross enjoyed a 'life-right' over the property, I am unable to conclude on the information before me that the dispute in its current form should have been foreseen. The dispute in its current form is based on averments made in various places in the answering affidavit to

the effect that Mr Du Plessis had agreed with Mr Ross that he could remain in occupation of the dwelling as long as Mr Du Plessis is the owner of the farm, and if he is no longer the owner of the farm, then he would provide another house for him. These allegations place in issue Mr du Plessis' highly material averment that Mr Ross' right to reside was wholly dependent on his employment. The documentary evidence before the court provides insight into what might have been foreseen, and refers to a promise to look after Mr Ross and to provide him with alternative accommodation should the 'business' be sold or closed or the farm sold. That version is not, without more, destructive of Mr du Plessis' version.[12]

18. Third, there was ultimately no serious dispute that the dispute of fact was a material one. It concerns both the nature of the right that Mr Ross may enjoy in respect of the property (or the circumstances in which it could be terminated) and (irrespective of the status of any right) it concerns considerations of justice and equity. Although Mr Hathorn submitted that the court can resolve the application without reaching these issues and based simply on the decision in *Klaase*, this would only have a necessary impact on the position of Mrs Ross. In my view, considerations of fairness and justice demanded that the dispute, at least on the first issue, be resolved with oral evidence.

19. Fourth, considerations of convenience weighed in favour of hearing the evidence. The parties were ready to proceed and the witnesses in court. An interpreter had been arranged to enable Mr Ross to give and understand evidence in Afrikaans, and the parties' representatives were confident at that stage that the evidence would only take a day, with a second day available if necessary and for argument.

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[12] To the extent that Mr Hathorn sought to rely further on information contained in documents in other proceedings, this information is not on the record before the court.

20. Accordingly, I declined to reverse the order of Ngcukaitobi AJ. Although the referred issues were narrow in scope, both parties sought to deal with the first referred issue with reference to surrounding context, features of which are traversed on the affidavits in a manner germane to other issues of potential relevance. To avoid unfairness, it is thus necessary to restrict findings on the oral evidence to the referred issues, a matter I requested the parties to be mindful of, both during their presentation of the case.

Objections to evidence

21. Both Mr Hathorn and Mr Wilkin objected at various points to questions. At times, and in order to prevent undue delay, I provisionally allowed questions whilst noting an objection. Save where indicated expressly below, I have not considered it necessary to have regard to the evidence that was subject to objection.

The credibility of Mr du Plessis and Mr Ross

22. Given the starkly divergent versions on affidavit on the first referred issue, it was at first blush unsurprising that both Mr Hathorn and Mr Wilkin sought to impugn the other's witness' credibility during cross-examination. Both counsel invited me to make adverse credibility findings. However, I am unable to do so having carefully observed the demeanour of both witnesses during their testimony and considering the way in which the testimony unfolded. On the contrary, although both witnesses' testimony was unsatisfactory in certain respects, the reason for this did not seem to me to lie in any dishonesty on their parts. The unsatisfactory features also did not destroy the cogency of other parts of each witness' testimony.

23. Where I was unable to accept the correctness of features of Mr du Plessis' evidence, this was because he manifestly had difficulties recalling some long past events and their

chronology. But he was open about any errors and sought to correct or qualify his evidence when necessary. Mr Ross had a clearer recollection of events and chronology which made sense given the nature of the testimony and level of his direct involvement in the events. Where Mr Ross' evidence was unsatisfactory, it struck me as resulting in part from challenges of translation (from English to Afrikaans) and explanation of legal language, and in one instance, a product of unrealistic expectation and hope. Unfortunately, this does not wholly explain a highly material discrepancy between Mr Ross' oral testimony and his evidence on affidavit on the first referred issue, to which I return below.

24. I was similarly unpersuaded by Mr Hathorn's attack on Mr du Plessis' credibility as regards his evidence on the second referred issue. In short, Mr du Plessis was accused of substantially and deliberately understating his wealth especially in respect of the income generated by the second applicant. In my view, Mr du Plessis was an honest witness on this issue too. In light of the nature of the financial information before the court, Mr du Plessis generally had satisfactory explanations where questions arose that warranted a response and he gave his evidence openly and frankly, again readily accepting mistakes. Where Mr du Plessis was not able to explain apparent discrepancies on the financial information, there are apparent plausible explanations.

Evaluation of the evidence

25. I explain material findings that I have made below in some detail. I have considered, but not detailed, other issues too, including related facts and lines of cross examination.

The Du Plessis family and the property

26. Mr du Plessis is 76 years old.[13] He purchased the property in 1975 for R26 000.00. He has lived there since with his wife, who is 77 years old.

27. At all material times, there have been two residential dwellings on the property, the house occupied by Mr du Plessis and his wife and the second dwelling, where employees have historically lived and where the Ross family now live. When Mr du Plessis purchased the property, the second dwelling comprised of two separate units with separate entrances, one comprising a bedroom and a kitchen (according to Mr Ross, approximately 18m2) and one comprising a smaller single room. The second dwelling has since been altered, expanded and improved.

28. At a time, the property was used to stable horses. The stables are wooden structures, with a concrete floor and low brick walling. They were built with Mr Ross' assistance. According to the probation officer's report, the property has over time also been used for other agricultural purposes.

29. At a point, Mr du Plessis became involved in the carpeting business, which was operated both from the property and from other premises, initially in Observatory and from the late 1980s, in Goodwood. Certain outbuildings on the property were converted, again with Mr Ross' assistance, to house machinery to manufacture steel and wooden materials for the carpeting business. They are now used for storage and as a transshipment area.

30. Mr du Plessis explained[14] that in about 2010, and in the face of Chinese competition and global recession, the second applicant and he 'wound down' the carpeting business, with

[13] He was born on 14 August 1944.
[14] Both on affidavit and during oral evidence on his financial position.

the manufacturing component effectively ceasing. There is a dispute about the extent to which the remaining part of business is still active and profitable.

31. Mr du Plessis is now an elderly man, and while he self-describes as a pensioner, he likes to remain active. His income is comprised of income from the carpeting business, rental income and interest from savings. He supports Mrs du Plessis who is an artist. She is not in good health. She has breast cancer, has recently been operated on and received chemotherapy. She is currently on radiotherapy and endocrine treatment. The applicants allege further that she is suffering from 'psychological issues' which she attributes to stress caused by the situation on the property, and specifically, animosity between the Ross family and the Du Plessis family. The court is informed that she is on chronic medication due to the stress. Mr Ross has sought to place this in dispute by denying the allegations and suggesting their improbability given, he says, that he has been on the property for decades and it is unlikely that his residence can suddenly be the cause of ailment. Mr Ross says the applicants must prove this but objected to evidence sought to be adduced in January 2020 in that regard.[15] On the evidence that is before the court, and in light of the principles in *Plascon-Evans* and *Wightman,* I accept that Mr and Mrs du Plessis understand that Mrs du Plessis is suffering stress arising from the current relationship between the parties, which both Mr and Mrs Du Plessis experience as hostile. This does not mean that the relationship may have been different at an earlier time. It is not necessary for me to make factual findings regarding any psychological condition and its cause and I do not do so.

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[15] The parties reached agreement with respect to this evidence which entailed that the new evidence regarding the psychological condition of Mrs du Plessis not be admitted. I accordingly do not have regard to it.

32. Mr du Plessis now wishes to expand the stables on the property and start a livery business, which he believes will generate a reasonable income to support him and his wife during their sunset years. He wants to renovate the stables to stable some 15 horses. To this end, and in view of the respective ages of Mr and Mrs du Plessis, they will need to employ a person who will live on the property and close to the stables. For this purpose, they require the use of the dwelling currently occupied by the Ross family. The prospective employee should, Mr du Plessis says, be someone who can also give instruction in horse-riding, jumping and dressage and have a working knowledge of animal husbandry and first aid. Mr du Plessis had hoped to start this project about 6 years ago but says he was and remains unable to do so because the dwelling is occupied. Mr Ross says that Mr du Plessis should employ him or that he should build a new dwelling for a new employee. Mr du Plessis does not wish to employ Mr Ross both due to their current relationship and because of the skills set he would require. He contends that he cannot afford to build a new dwelling.

33. During the course of oral testimony, the court was supplied with information about Mr du Plessis's financial position. As indicated above, Mr Hathorn submitted that, in contrast to what was suggested on affidavit, Mr du Plessis is a very wealthy man, with more than adequate funds to provide new accommodation for any new employee. Assets to which he has recourse – whether held personally or through the second applicant – include cash in an amount of more than R2.45 million (being partly an inheritance) and which generates interest income, various unbonded immovable property being a commercial property in Blackheath (currently rented to another company for R15 000 per month) and two houses in Arniston (both rented out, one on a long term tenancy for R5000 per month and one which is let out ad hoc generating some R20 000 to R25 000 a year). There was

no real dispute that Mr du Plessis' assets have a value probably well in excess of R10 million.[16] He also has his member's interest in the second respondent which continues to generate some income although this income has recently declined. Mr Hathorn sought to reveal this income as significantly higher than Mr du Plessis had portrayed. I have considered the evidence on this issue. I do not accept that Mr du Plessis has significantly understated his financial position.

34. However, I accept, as Mr Hathorn submitted, that with recourse to his cash assets, Mr du Plessis would be able to release funds to expand the second dwelling (which Mr Ross belatedly agreed to) or build new employee accommodation on the property should this be permitted by planning authorities.[17] However, I have no information upon which I can realistically estimate or determine the financial cost thereof and I accept Mr du Plessis' evidence to the effect that that the business he now wishes to pursue is not served by building new employee accommodation.

The Ross family

35. Mr Ross is currently 58 years old.[18] He has spent the bulk of his adult life living and, for much of it, working on the property. Mr Ross left school after completing standard 6 (Grade 8). Although he did not complete any formal education thereafter, he has acquired a variety of skills over time, and, significantly, in the building trade, in part from his father. He also attended (but did not complete) a building apprenticeship. Mr Ross

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[16] Under cross examination it was highlighted that the market value of the immovable property may be higher than the municipal values which were used by Mr du Plessis' book-keeper. While this may well be so, I do not accept the defendant's attempt to impugn Mr du Plessis' credibility on this basis. Mr du Plessis did not shy from the variable nature of property valuations nor its impact on his nett wealth and the financial documentation specifically stated that municipal values were used.
[17] Mr du Plessis testified that it is not permissible.
[18] He was born on 3 August 1962.

first came to live and work on the property in 1980 as a young man aged 18. In 1986, he married his first wife who came to live with him with her children from a previous relationship. They subsequently separated and she is now deceased. The children have grown up and moved out. Mr Ross married the second respondent in December 1996.

36. Until 2011, and save for a ten-month period when in prison (between 3 April 1997 and February 1998), Mr Ross worked for Mr du Plessis or the second applicant. In 2011, and after some thirty years of employment, he was retrenched. Since his retrenchment, he has worked for a neighbor. According to an application for formal housing dated 9 January 2019 (the housing application), he earned approximately R7 100 per month at that time. He has a second-hand Mercedes Benz, but it is not reliable and the costs of maintenance and running it are high.

37. Mrs Ross is currently 55 years old.[19] She explains that she went to school until Standard 7 (Grade 9). She married Mr Ross during 1996. At that stage she lived with her family in Mitchell's Plain but she then moved to the property. She worked on the farm for several years after she first moved there but no longer does.[20] According to the housing application, she earned approximately R1200 per month in 2019. She does not have a permanent job but does work from time to time for neighboring farmers.

38. Mr and Mrs Ross have two children living with them on the property, their major son,[21] who is currently 21 years old and a minor daughter,[22] who is currently 15 years old. The children share one of the two bedrooms in the dwelling.

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[19] She was born on 26 October 1965.
[20] Probation officer's report.
[21] Born on 21 February 1999.
[22] Born on 9 August 2004.

39. At the time Mr Ross deposed to the answering affidavit in 2018, his son was at Sarepta High School and his daughter was at Sarepta Primary School, which are both close to the property. The children were happy at their schools and doing well. By the time the probation officer prepared a report (April 2018), his daughter was attending De Kuilen High School. She is still there and is currently in grade 10. De Kuilen High School is also close to the property. The probation officer's report highlighted that an eviction would most likely result in both children having to change schools and thereby affect their education, but that at that stage the impact on academic performance could not be assessed. Mr Ross' son has now matriculated, but he wishes to repeat certain subjects and while doing so is assisting with sports education and mentorship at Sarepta High School.

40. The answering affidavit explains that the Ross family are all in good health. However, the probation officer pointed out that Mr Ross' daughter had recently undergone a cochlear implant to improve her hearing and it appears from the formal housing application dated 9 January 2019 that she has a hearing disability (the housing application). The housing application marks her condition as 'deaf'. However, this has since been clarified: the implant assists her hearing through a battery-operated device.

41. Mr Ross explains that his daughter is a gifted scholar. She was at the top of her primary school class and has won various subject prizes each year in high school. She did not follow her brother to Sarepta High School but, given her aptitude, went to De Kuilen High School, to get a better education and improve her prospects in life. The Ross family are particularly concerned that she does not change schools at this stage in order to ensure continuity and retain her prospects.

Mr Ross' employment and occupation of the property

42. When Mr Ross arrived at the property, he was employed by Mr Du Plessis as a farmworker and paid a salary in accordance with farmworkers salaries in the area. He was permitted to stay in one of the two rooms in the second dwelling as it then was.

43. According to Mr du Plessis, Mr Ross at all times occupied the dwelling solely as an incident of his employment. Mr Ross on the other hand, testified that even when he first arrived, he was given assurances from Mr du Plessis that he had tenure. The evidence was, however, unclear on what these were or how they differed from subsequent assurances that were said to have been made. In my view, while Mr Ross may have hoped for tenure from the start, it is unrealistic and improbable that Mr du Plessis made any such assurances at that stage.

44. Mr Ross married his first wife in 1986. He says that at that time he requested the first applicant if he could extend the dwelling he was living in as it was small for four people (him, his wife and her two children). He says that Mr Du Plessis agreed to this and provided the building materials and Mr Ross did the labour. He says he worked weekends and in the evenings after work and that it took about six months. The extension entailed an additional approximately 36m square. Mr Ross testified that at this time too, he was given assurances of tenure and Mr du Plessis' ongoing support which led him to agree to do the work himself. Mr Du Plessis testified that the work was done some ten years later. For the reasons referred to above, in paragraph 23, I accept Mr Ross' evidence on this issue.

45. Mr Ross married the second respondent during December 1996. He explains that he was then facing a situation where his maintenance obligations again increased and his new

wife did not want to live on the farm. He wanted to apply for other work to earn a higher salary and find a home in the city. So, on 25 November 1996 he resigned. However, he says that Mr du Plessis did not want him to resign and rather offered to increase his salary and provided further assurances regarding his tenure and ongoing support. Mr Ross says that although the salary was still low, he accepted the arrangement and Mrs Ross came to live with him on the property. He says that but for these assurances, he would not have done so.

46. Not long thereafter, and on 3 April 1997, Mr Ross was arrested on charges of indecent assault and was found guilty. He was incarcerated at Pollsmoor Prison for 10 months until February 1998. Mr du Plessis stored Mr Ross' furniture in another room and Mrs Ross stayed with her family. There is a dispute about the circumstances of her departure. On Mr Ross' version, which I must accept, Mr du Plessis demanded that she vacate the house, which was occupied by another employee, and Mrs Ross then returned to her sister in Mitchell's Plain. It is common cause that after his imprisonment and in February 1998, Mr Ross returned to live on the property and has lived there ever since with his wife. They initially stayed in the room where the furniture was stored, as another employee was living in the second dwelling in the interim. However, they soon moved back into the dwelling.

47. According to Mr du Plessis, Mr Ross' imprisonment had the effect of terminating both his employment and his right of occupation. When Mr Ross returned, he says, Mr Ross was again granted a right of occupation linked to his employment, from that time with the second applicant. According to Mr Ross, neither his employment nor his right of occupation terminated when he went to prison. When he returned, he says, he was employed as a foreman and machine operator but also continued to do the work he had

always done on the farm. He explains that his understanding was that he was at all times employed by Mr Du Plessis rather than the second applicant. Although his salary was higher than previously, he says he was still underpaid but he accepted his circumstances because, as before, he understood that he had tenure on the property and Mr du Plessis would take care of him.

48. Mr Ross alleged in the answering affidavit and testified that although he was paid as a farm worker, he did much more work for Mr Du Plessis than merely farm work. This initially entailed working with the horses, and thereafter work as a handyman and builder. He also worked in the carpet business, initially in Observatory and then in Goodwood, assisting with stock and materials, packing, transport and product deliveries. Mr Ross explained in his answering affidavit that he assisted initially with the conversion of the Goodwood property for business use doing building work, carpentry and plumbing and thereafter with operating machinery acquired to manufacture aluminium strips. At a point, he trained others to use the machine and then worked in the role of a foreman or supervisor. During the course of his work, Mr Ross also assisted with other improvements to the property over time, such as building the stables, car-port and building what Mr du Plessis described as a shed and Mr Ross described as factories.[23]

49. Due to its materiality to the first referred issue, the oral evidence dealt with whether Mr Ross was ever paid for the additional building and other works that he did on the property. Mr du Plessis testified that he was. He explained that whereas in earlier years Mr Ross was paid a salary on a par with other farm workers in the area, in later years he

[23] The dispute was ultimately explained by Mr Du Plessis: while the shed was at a point used as a factory, all manufacturing operations have effectively ceased and it is now used as a storage / transshipment area.

was his highest paid employee.[24] Furthermore, he says that annually, Mr Ross would be paid an agreed additional sum for any additional works that he had done that year including the building work. Mr Ross disputed this saying that he was always paid only the salary of a farmworker, the annual additional payment was the usual bonus that all employees were paid and over time. I called for documentary evidence on the additional payments and bonuses, which was then produced on affidavit. Unfortunately, I was not supplied with any documentary evidence relating to the period when Mr Ross extended the second dwelling. However, the documentary evidence that was produced supported Mr du Plessis' contentions in some measure, more specifically, the documents record payments for certain unspecified building work and odd jobs from 2000 onwards. There were, furthermore, in addition to regular bonus payments, payments for extra days and an 'extra bonus'. There is a dispute about whether the extra bonus relates to overtime (as Mr Ross contends) or the additional work (as Mr du Plessis contends). To the extent that additional work was done overtime the difference in the versions may be more apparent than real. However, on all the evidence, I accept that Mr Ross was paid as part of his salary, as adjusted annually, for the building work he did on the sheds (used for a time as factories), the commercial properties and other works from time to time such as the stables and carport. I also accept Mr du Plessis' evidence that in later years, Mr Ross was his highest paid employee.

50. However, I am unable to conclude on the evidence before me that Mr Ross was ever compensated for the work done on the second dwelling that he resides in. Importantly, the documentary information supplied on my request pertinently did not deal with any works done prior to 2000 and, on either parties' version, it is common cause that the

[24] This issue was also dealt with in a supplementary replying affidavit.

dwelling was extended before then. Furthermore, it was common cause that the deal struck was that Mr du Plessis would provide the building materials and Mr Ross the labour, which he would supply in his own time. While Mr du Plessis speculated that it was a small job, he did not do the work himself, had no clear recollection of when and how it was done nor indeed did he have a clear understanding of its extent. Mr Ross on the other hand had a very clear recollection of what was entailed, (which was a substantial amount of work), how long it took and he had taken measurements. I accordingly find that Mr Ross provided the labour to extend the employees' cottage in which he and his family lives and was at no stage compensated for this.

51. I have referred to the dispute whether Mr Ross occupied the property wholly as an incident of Mr Ross' employment (as Mr du Plessis contends) or whether there was an agreement that he had secure tenure as long as Mr du Plessis owns the farm, which he continues to do. This is the first issue referred to oral evidence.

52. Mr Ross' specific evidence on affidavit was that from the time that he arrived to work at the property in 1980, '*the consent to occupy was linked to, but not dependent on, my contract of employment*'. He continued: '*At a later stage, my right to occupy became completely independent from my contract of employment.*' The agreement that was concluded at the time that he extended the residential dwelling in about 1986 was stated to be '*that if I improved the dwelling in my own time and with my own labour after working hours then I shall be entitled to remain in the house as long as he is the owner of the farm, and if he is no longer the owner of the farm, then he shall provide another house for me.*' He alleges that this agreement remained intact and was confirmed from time to time such as when he sought to resign in 1996 and when he returned from prison.

The only difference in the terms alleged is that in 1996, the last clause is alleged to be '*then he shall provide a similar house for me.*'

53. During his oral testimony, however, the terms of the agreement reached differed materially to what was said on affidavit. Specifically, Mr Ross testified that the agreement was that '*as long as I worked for him and as long as he is the owner and as long as there 'will be' work for me, I can stay. And if there is no more work and he shuts down, he will make provision for a house.*' Later he testified that the agreement was that *'as long as I worked and he was the owner, I can stay on the farm.'* At a later stage in his evidence in chief, he explained this in these terms: '*I would work, as long as there is work and he is the owner, then I can stay there and if there is no work or he sells, then he will provide for me for a house because I have worked for the house.*' During the course of his evidence, it was made clear that this latter point, '*because I have worked for the house*' was not only a reference to the work on the dwelling but the fact that he had accepted low wages over time. While not wholly precise, what was clear from the oral evidence is that the consent to occupy was squarely linked to his working for Mr du Plessis and thus his employment. Should he no longer be working, or should there no longer be work, then the agreement was alleged to be to provide another house.

54. When Mr Wilkin asked Mr Ross to explain the difference between his oral testimony and his evidence on affidavit, Mr Ross conveyed that he understood the affidavit substantially to convey what he was saying in his oral testimony and he was emphatic that his oral testimony was in accordance with what he had told his lawyers all along. Having carefully observed Mr Ross' demeanour throughout his testimony and on this issue specifically, I accept that this is what he recalls telling his lawyers and that he believed his affidavit accorded therewith. The affidavit is in English and not drafted in his style of

communication. This means that the evidence on affidavit was not correct. I refrain from making any further findings in this regard.

55. It also means that Mr Ross' oral testimony supports Mr du Plessis' contention that Mr Ross' consent to occupy was dependent on his employment. It did not support any 'life right' or, as alleged on affidavit, any right that endured throughout Mr du Plessis' ownership irrespective of his employment.[25] What it did support, however, was an assurance of some sort from Mr du Plessis to assist with alternative accommodation if there was no work in future or if he sold the property.

56. Mr Wilkin sought (both during evidence and argument) to emphasise that the agreement Mr Ross was contending for was wholly out of kilter with what any reasonable businessman would conclude. While this was focused on the version on affidavit, Mr Wilkin also pressed this during cross examination of Mr Ross on the version given in oral testimony. Insofar as the contentions related to the version in oral testimony, I do not agree. It is clear that over a very long period of time, the relationship between Mr Ross and Mr du Plessis was symbiotic and mutually reinforcing. That is so even though I have found that Mr Ross was annually compensated for the additional (non-residential) building work that he did. It is clear from all the evidence that Mr Ross readily worked beyond the call of duty over many years. On Mr Ross' evidence, it is apparent that he has understood that Mr du Plessis would assist him should there be no work for him or the property be sold. Mr Ross has apparently also acted on that understanding when making key life choices most especially when he decided not to resign when he married Mrs Ross.

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[25] I accordingly need not consider the implications of the fact that the agreement was not in writing in light of the decision of *Janse van Rensburg and another v Koekemoer and others 2011(1) SA 118 (GSJ).*

57. As indicated, there was evidence given by Mr Ross that Mr du Plessis gave verbal assurances of this sort referred to in paragraph 55 from time to time. That may be so. I am however unable in these proceedings to make any firm findings on the contours of any assurances given or their legal status. Furthermore, it would be unfair to do so because the case that Mr du Plessis had to dispel in oral evidence, and which was dispelled through Mr Ross' own testimony, was that he gave undertakings of a sort that do not arise in this case, specifically that Mr du Plessis would provide similar or other accommodation should he sell the farm or close the business. It may have been a different matter if Mr Hathorn had agreed that Mr Ross should testify first as Mr du Plessis would then have been in a position to deal fully with the version ultimately advanced in oral evidence. But he did not testify first, and the version that was put to Mr du Plessis during his cross examination did not fully comport with Mr Ross' subsequent testimony. The version that was put in cross examination was that Mr Ross could stay in the dwelling as long as Mr Ross owned the property and that if *he closed the business* or sold the farm, he would look after him and provide him with alternative accommodation. During his testimony, however, Mr Ross linked the assurances to his *working* for Mr du Plessis, a material difference.

58. Accordingly, I find that Mr Ross and Mr du Plessis had an agreement that Mr Ross could reside in the dwelling as long as he was employed. I accept further that based on his service, Mr Ross entertained the belief over time that Mr du Plessis would seek to assist him with accommodation should there no longer be work for him, which is what occurred in 2011.

59. Mr Ross has resided in the dwelling throughout his adult life. It has not merely been a place to reside while working. It is his home in the truest sense. The same can be said

for Mrs Ross and the children.[26] Importantly however, since 2011, nearly 9 years, Mr and Mrs Ross and their children have continued to occupy the dwelling for free.

Mr Ross' retrenchment and events leading to these proceedings

60. In 2010, the second applicant's business faced economic challenges both due to worldwide recession and competition from China. In these circumstances, and in 2011, Mr Ross was retrenched. On 3 June 2011, Mr Ross was given notice of retrenchment and called upon to vacate the property by 30 July 2011, in other words after a two-month period. Mr Ross referred the matter to the CCMA but the dispute was settled by agreement with Mr Du Plessis agreeing to pay an additional amount of R33 002.65. The dispute concerned the sum of money payable in view of the length of Mr Ross' service (initially to Mr du Plessis). The lawfulness of the termination was not and is not in issue. Mr Ross did not, however, vacate the property. In November 2011, the applicants commenced formal procedures to resolve the escalating dispute about occupation.

61. There was engagement between Mr Ross and Mr du Plessis during December 2011. A letter dated 5 December 2011 from Mr Ross to Mr du Plessis records Mr Ross' stance as follows: '*Soos ons al verskeie kere bespreek het, en indien die besigheid verkoop of toegemaak word, of the plaas verkoop word, het u onderneem om na my te kyk en vir my alternatiewe huisvesting te gee. Met, onder andere, dit in gedagte, het ek ook op my koste die huis vergroot en verbeter.*' A meeting was proposed.

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[26] See *Daniels,* supra at n 2 at para 33: '*Most aspects of people's lives are often ordered around where they live.*' … And thereafter quoting Roisman: '*Security of tenure is fundamentally important because it is the basis upon which residents build their lives. It enables people to make financial, psychological and emotional investments in their homes and neighbourhoods. It provides depth and continuity for children's school attendance and for the religious, social and employment experiences of children and adults. Security of tenure enables tenants "to fully participate in social and political life.*'

62. A meeting then took place on 7 December 2011 at which Mr Ross put his proposals which were recorded in writing by Mr Du Plessis. The document records that Mr Ross was asking for R200 000 or 10 years to live there. It also records that Mr Ross referred to his previous resignation attempt and the assurances given '*to look after him*', specifically: '*He says that should I sell the farm or the business then I would have promise him a house (sic).*' Mr Ross contends that Mr du Plessis did not respond to his proposals.

63. During January 2012, the applicants' attorneys addressed further correspondence seeking to resolve the matter and tendered to assist in a process of accessing alternative accommodation and moving. Mr Ross explains he was in no position to afford another house.

64. Mr du Plessis refers in his answering affidavit to various efforts he made to assist Mr Ross after his retrenchment, including finding two full-time positions both of which had accommodation provided. Mr Ross admits that he sought to find employment but disputes that accommodation was on offer. He explains that accommodation linked to one of the options was not fit for human occupation and was a packstore for vine stumps. I accept Mr Ross' version on this issue, in light of *Plascon Evans* and *Wightman.*

65. At a point, eviction proceedings in the Magistrates Court were commenced and later withdrawn. Proceedings in this Court then ensued but were also withdrawn as a result of the *Klaase* decision.

66. On 20 October 2016, three letters were delivered by hand, respectively, to Mr Ross, Mrs Ross and any other occupiers. The letters record the applicants' stance that any right or

consent to occupy the property was terminated in 2011 or 'is terminated herewith' and the Ross family was called upon to vacate the property by 15 December 2016. The letters record the applicants' need to use the second dwelling for operations on the property. The applicants again made certain tenders to assist, again with relocation and with *accessing* (but not providing) alternative accommodation.

67. This elicited a response from the Ross family, now represented by their current attorney Mr van der Merwe.[27] On 14 February 2017, the applicants' attorneys responded. The letter details some of the circumstances and reasons for terminating the rights of occupation to which I return below. The letter then records:

> *'7. That being said, and once again in favour of a more generous interpretation of your clients' rights, before the termination of same is made final we herewith invite you to proffer reasons as to why the right of occupation should not be terminated.*
> *7.1. You are called upon to provide these reasons within 10 days, at which time the most careful consideration will be given to these by our clients and ourselves.'*

68. Mr Van der Merwe responded on 17 February 2020 *inter alia,* offering reasons why the rights should not be terminated. The applicants' attorneys responded on 22 March 2020. They noted the content of the representations, responded thereto and confirmed the decision to terminate any rights to occupy, calling on the Ross family to vacate the property by the end of April 2017. The correspondence before the court indicates that Mr van der Merwe was at that stage requesting R500 000.00 from the applicants in order to fund suitable alternative accommodation. Correspondence dated 8 March 2017 confirms that the Ross family was willing to relocate if suitable alternative accommodation could be found. Mr van der Merwe advised the applicants that the nearby area of Sarepta had suitable accommodation but that even a small two bedroomed house there would cost some R400 000.00.

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[27] The response has been removed from the court record by consent between the parties apparently on the basis that it contained 'without prejudice' content.

69. These proceedings were instituted on 1 November 2017. Since that time, there has been further engagement including with the fourth respondent regarding emergency accommodation should the Ross family be rendered homeless. Furthermore, without conceding any obligation to supply alternative housing, the applicants have repeatedly tendered, on a with prejudice basis, to contribute R300 000.00 to settle the matter and therewith to purchase or to assist to purchase a property. The applicants sought to further this process by identifying various properties or vacant plots in Kraaifontein, Blackheath, Eesterivier, Kuilsriver and Blue Downs ranging in value between R200 000.00 and R300 000.00 rands. The applicants further identified other more expensive properties that might be affordable with their contribution should the Ross family obtain a housing subsidy.

70. The Ross family rejected these proposals and made certain counter – proposals, also with prejudice. In short, these entailed the applicants contributing between R755 000.00 and R900 000.00, a portion of which would be reimbursed if the Ross family in due course obtained a housing subsidy, which they were informed could only be applied for upon transfer of ownership. In rejecting the offers, the Ross family advised that they were not willing to relocate to any RDP house, a house in a densely populated area amongst an unknown community, or in a crime-ridden area, or in a house that is not close enough to the children's schools. They maintained that they had become accustomed to living in a crime-free rural area with an abundance of physical living space and that the proposed new accommodations offered a standard of living that is significantly inferior to what they have become used to. Notably, while they considered the properties that the applicants had identified as on the market, they did not themselves take further steps to identify any other properties within or close to the price range that was on offer.

71. The Ross family at that stage also proposed that accommodation could be reached on the basis that they relinquish one of the rooms they currently occupy to a new employee, that they be permitted to build a new room and that the applicants build any new employee a new kitchen and bathroom.

The status of Mrs Ross

72. The first question is whether Mrs Ross is an occupier in her own right as contemplated by ESTA or whether she occupies the property by virtue of Mr Ross' right to family life.

73. In *Hattingh,*[28] the Constitutional Court interpreted section 6(2)(d) of ESTA which confers the right on occupiers, balanced with the rights of owners or persons in charge, the right to family life in accordance with the culture of that family. The Constitutional Court held that the purpose of the right '*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 landowners' rights.*'[29] The Constitutional Court emphasized that the right to family life '*is not restricted to the occupier being able to live with his or her spouse or partner or children only*'[30] and what this means depends on the circumstances of a particular case.[31] On the principles established in *Hattingh,* there can be no doubt in the circumstances of this case, that Mr Ross, as an occupier, is entitled to have his spouse and children reside with him as an incident of his right to a family life.

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[28] *Hattingh v Juta* 2013(3) SA 275 (CC) (Hattingh).
[29] At para 35.
[30] At para 40
[31] At para 37

74. Mr Hathorn, however, contended that on the facts of this case, Mrs Ross was not only entitled to reside on the property as an incident of her husband's family life, but was an occupier in her own right under ESTA and entitled to its protections. He relied on *Klaase* and submitted that this case falls squarely within its ratio.[32] I agree. Mrs Ross has lived openly and continuously on the property for many years with the actual knowledge of the applicants. Not only is there no evidence to rebut the presumption that she has lived there with consent but the evidence supports the conclusion that she has in fact lived there with express consent. In the result, Mrs Ross is entitled to the protections of ESTA in her own right. Indeed, during oral argument, Mr Wilkin accepted this.

Were the rights of Mr and Mrs Ross to occupy the property terminated lawfully

75. Section 9(a) requires that any right of residence must be terminated in accordance with section 8 of ESTA. Section 8 provides:

'8 Termination of right of residence.

(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to—

(a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;

(b) the conduct of the parties giving rise to the termination;

(c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;

(d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and

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[32] At para 49 to 66. *Klaase* postdates *Hattingh* and as indicated above, was the reason why the applicants withdrew the first application in this Court.

(e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.

(2) The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.

(3) Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act.

76. In *Snyders,*[33] the Constitutional Court held:

'*Section 8(1) makes it clear that the termination of residence must be just and equitable both at a substantive level as well as at a procedural level. The requirements for the substantive fairness of the termination is captured by the introductory part that requires the termination of a right of residence to be just and equitable. The requirement for procedural fairness is captured in s8(1)(e).*'

77. Importantly, interpreting section 8(1)(e), the Constitutional Court held:

'*ESTA requires the termination of the right of residence to also comply with the requirements of procedural fairness to enable this person to make representations why his or her right of residence should not be terminated. ... A failure to afford a person that right will mean that there was no compliance with this requirement of ESTA. This would render the purported termination of the right of residence unlawful and invalid. It would also mean that there is no compliance with the requirements of ESTA that the eviction must be just and equitable.*'

78. I have concluded that Mr Ross' right to reside on the property was dependent on his employment, which was terminated during 2011. The dispute referred to the CCMA concerned only the amounts payable and it was settled by agreement.

79. In order to terminate Mr and Mrs Ross' rights to occupy and those of their family, the applicants rely on the letter of 22 March 2020 and the circumstances that then prevailed.

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[33] *Snyders and others v De Jager and others* 2017(3) SA 545 (CC) (Snyders).

These were preceded by the letters of 20 October 2016 and 14 February 2017. The question is whether the termination was just and equitable in these circumstances. This must be considered *inter alia* in light of the reasons advanced by the applicants for terminating the rights in the letters of 20 October 2016 and 14 February 2017. In important measure, the reasons advanced in this correspondence overlap in respect of the Mr and Mrs Ross (and the other members of the family). The reasons include:[34]

79.1. Mr Ross' occupation was by virtue of his employment with one or both of the applicants which had terminated in 2011;

79.2. Mr du Plessis required the premises occupied by the Ross family to conduct operations on the property (i.e. the proposed livery business), which he has been precluded from doing by the Ross family's continued occupation of the premises;

79.3. The relationship has broken down due to the Ross' allowing unknown parties to reside on the property without the applicants' consent;

79.4. There has been no relationship between the parties, in effect, since 2011;

79.5. The breakdown of the relationship has been exacerbated in that the Ross family has not paid or offered consideration for their occupation of the property or services consumed on it.

79.6. The stress caused by the ongoing dispute has had a seriously deleterious effect on the health of Mr and Mrs du Plessis.

[34] I do not have regard to the reasons insofar as they are premised on Mrs Ross' rights being derived from Mr Ross' family right.

80. Mr and Mrs Ross responded to certain of these issues in correspondence of 17 February 2017. They disputed that the relationship has broken down and say that Mr du Plessis was responsible for a temporary setback when he cut off the Ross family water supply and that Mr du Plessis is responsible for any change in the relationship. They say that they have tendered consideration for the property in the form of tendering Mr Ross' services as an employee in the livery business and, on 17 February 2017, they tendered R250 per month rental which they say is a fair offer given that Mr Ross had effectively built the premises himself and they pay for their own electricity.

81. The applicants' attorneys responded on 22 March 2017. They communicated that they did not find the representations sufficiently compelling to allow the Ross family to continue to remain in occupation. They reiterated *inter alia* the fact that the relationship had become hostile with Mrs du Plessis suffering psychological harm as a result requiring medical assistance and chronic medication. They further reiterated their need for the premises to conduct the livery business. The applicants rejected the tender to work in the livery business and lease the property in light of the unfortunate relationship between the parties.

82. Mr Hathorn submitted that the termination was procedurally unfair because on a proper consideration of the correspondence the right was purportedly terminated before any representations were requested or considered. The letters of 20 October 2016 recorded that the right(s) to occupy were '*terminated at the latest on date of this letter*' and, later '*is herewith terminated*'. On the face of it, Mr Hathorn's submission is attractive. As

Corbett CJ noted in *Attorney-General Eastern Cape v Blom*[35] '*a right to be heard after the event, when a decision has been taken, is no adequate substitute for a right to be heard before the decision is taken. There is, as Van Winsen pointed out in [Davies' case] a 'natural human inclination to adhere to a decision once taken.*'

83. In administrative law, where the right to procedural fairness enjoys constitutional protection, the usual position is that a party should be heard before a decision is taken.[36] That accords with both the intrinsic and instrumental value of procedural fairness. Intrinsically, a prior hearing serves better to enhance the dignity and worth of the person whose rights and interests are being affected, and instrumentally, it improves the quality and rationality of decision-making.[37] However, this rule is not unyielding and it is recognized that, in some exceptional circumstances, a decision can be taken fairly even though representations are received after a decision has been taken.[38]

84. In my view, when applying section 8(1)(e) of ESTA, fairness demands that, in the usual course, a person whose rights to occupy may be terminated ought to be afforded an opportunity to make representations before any decision is taken. However, there will be circumstances where receiving representations after an initial decision is taken complies with the requirements of fairness. It is neither necessary nor desirable for me to seek to detail when these circumstances will arise. However, in my view, this is such a case.

85. An important factor in this case is that the *Snyders* decision was delivered on 21 December 2016, in other words after the letters of 20 October 2016 but before the

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[35] 1988(4) SA 645 (A) at 668E
[36] Hoexter, Administrative Law, 2 ed, 383 to 385. *Nortje v Minister van Korrektiewe Dienste* 2001(3) SA 472 (SCA) para 19
[37] Hoexter, supra at p363.
[38] See generally, Hoexter, supra at 384 to 385

opportunity to make representations was afforded on 14 February 2020. Upon enquiry from the court, Mr Wilkin confirmed that the letter of 14 February 2017, in which representations were requested, should be understood in this light.[39] On 14 February 2017, it was accordingly communicated that the applicants' termination decision should not be regarded as final.

86. Indeed, a notable feature of this case is that it has unfolded over several years and in the wake of land-mark Constitutional Court cases interpreting ESTA. These cases have provided clarity to legal practitioners and parties alike. They clearly had an impact on the applicants' conduct in this litigation in that the applicants specifically responded to decisions such as *Klaase* and *Snyders* to give effect to their import in context of their dispute. In doing so, the applicants demonstrated their intention to abide the law and its requirements. Furthermore, the case has a long history which included prior efforts as early as 2011 by Mr du Plessis to engage Mr Ross.

87. In the circumstances of this case, I consider whether the procedure followed was fair by asking whether the applicants duly and properly considered the representations given after their initial decision of October 2016 with a genuinely open mind. While the result was not ultimately favourable to the Ross family, the letter of 22 March 2020 shows an active and substantive engagement with the submissions made in light of the reasons advanced for the termination of the right at that stage. I am of the view that the decision to request specific representations following the *Snyders* decision was made with a genuine intention to comply with the law and consider their content before any decision was finalized. I conclude that the procedure followed was procedurally fair.

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[39] Parties may have interpreted section 8(1)(e) before then to mean that in some cases a hearing would not be necessary.

88. The next question is whether the decision to terminate Mr and Mrs Ross' rights to occupy was substantively just and equitable as required by ESTA. In my view, it was.

89. I have found that Mr Ross' right to occupy the property was dependent on his working for one or both of the applicants which he has not done for many years, since 2011. Throughout that time, he has been living on the premises with his family for free. At the relevant time, he had been so living for some 5 years. Although Mrs Ross' right to occupy was independent of Mr Ross, she came to live on the property as Mr Ross' wife and it is neither unjust nor inequitable for the applicants to seek to terminate her right in circumstances where she did not work for Mr du Plessis and Mr Ross' employment had ended, by that stage several years earlier.

90. Furthermore, the reasons the applicants sought to terminate the rights were substantively fair, being to enable them efficiently to use the second dwelling to accommodate an employee on their small holding in its new proposed use as a livery business. Mr Ross does not claim to have the full skills set that Mr du Plessis is looking for in a new employee. The business is intended as a retirement project that will generate additional income for Mr and Mrs du Plessis in their sunset years. It is not proposed to be a business on any substantial or large scale. There is no other employee accommodation on the property. Even assuming planning approvals can be obtained, I am of the view that justice and equity do not demand that funds must be obtained from other operations or by realizing other assets that are the source of the applicants' income to build a new employee's house. In these circumstances, it will seriously prejudice the efficiency of Mr du Plessis's intended operations if he is not able to use the accommodation for a new employee.

91. There is, furthermore, no real dispute on the affidavits that the relationship between the parties had soured by the time the rights were terminated. What is in dispute is the reasons for this and the depth of discord. In this case, that is not an issue that is susceptible to being resolved on only one party's version as, in the nature of things, the perspective of both parties will be relevant to understanding the breakdown.[40] Nor is it necessary to decide who was to blame. Suffice to state that it is unsurprising that the relationship had soured given how long the dispute had endured with the parties without resolution and with both parties, at least over several years, adopting uncompromising positions. It is significant, furthermore, that the Du Plessis family experiences the relationship as hostile and distressing. Mr Ross, on the other hand, contends that he has merely exercised his rights as he is entitled to do.

92. The conduct of the respective parties, in my view, ultimately does not significantly alter the balance of equities. On the one hand, both parties have sought to conduct themselves in accordance with the law and asserting their rights. On the other hand, it is difficult to understand how it came about that at the time the applicants finally terminated the rights in early 2017, the parties had escalated as it had.

93. Both parties' interests stand to be adversely affected. Mr du Plessis stands to be seriously prejudiced in the conduct of his new business and his retirement plans. Even though Mr Ross tendered R250 per month to lease the premises, the value of the premises being available for a new employee onsite would be considerably more and not solely financial. Furthermore, Mr du Plessis' and his wife's enjoyment of their home life is affected by the state of their relationship with the Ross family. However, while this

[40] I have not had regard to the applicants' contentions that the Ross family had allowed others to stay without consent. I accept the Ross family's version in that regard.

constitutes serious prejudice, in my view the Ross family ultimately stands to experience worse hardship. The Ross family stands to lose what has always been their family home. It is a dignified two bedroomed home in an attractive and quiet rural setting in an apparently safe area, close to the children's schools. The Ross family experience their home as having ample living space and the family have relied on their hope of remaining on the property for their long-term security and ultimately retirement. There is no suggestion or evidence that they any significant savings. A termination of rights will inevitably disrupt their lives, and unless accommodated, will disrupt the children's education. And the fact that the minor child has a hearing disability warrants attention.

94. Acutely mindful of the comparative hardship that will be faced, I have, however concluded that the termination of rights was ultimately just and equitable. The Ross family's rights were dependent on Mr Ross' employment. Five years passed after employment ceased but during which the Ross family enjoyed ongoing occupation free of charge. This is a not a very sizeable property, its operations are relatively intimate and there is only one employee residence. The Du Plessis family cannot in my view be forced against their will to provide accommodation to another family whether for free or at a nominal rental. They require the buildings for other legitimate purposes. Whilst Mr du Plessis may be wealthy compared to many South Africans, the wealth does not lie in this property or in any business that it has generated or that Mr du Plessis hopes to generate. The relationship between the families is no longer a good one and, indeed is experienced by the Du Plessis family as hostile.

95. In view of the above, I find that there has been compliance with sections 9(2)(a) and sections 8(1)(a) to (e) of ESTA.

Compliance with section 9(2)(c)

96. The next question is whether section 10[41] or section 11[42] of ESTA apply to this case. This depends on whether Mr and Mrs Ross were occupiers on 4 February 1997. The

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[41] Section 10. Order for eviction of person who was occupier on 4 February 1997

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

(a) The occupier has breached section 6(3) and the court is satisfied that the breach is material and that the occupier has not remedies such breach;
(b) The owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar month's notice to do so;
(c) The occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or
(d) The occupier –
(i) Is or was an employee whose right of residence arises solely from that employment; and
(ii) Has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act.

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

(3) If –
(a) Suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;
(b) The owner or person in charge provided the dwelling occupied by the occupier; and
(c) The efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,

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

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

[42] Section 11: Order for eviction of person who becomes occupier after 4 February 1997

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

difficulty arises because of Mr Ross' imprisonment and Mrs Ross' attendant departure from the property during April 1997. They returned in February 1998. I assume, without deciding, that the more stringent provisions of section 10 apply. I do so because I am satisfied that I would come to the same conclusion on the facts of this case even if section 11 were to govern the eviction.

97. I am not satisfied that the requirements of section 10(1) can have any application. To trigger these provisions, Mr Wilkin relied on the fact that the Ross family had allowing others to stay on the property without consent. However, without considering whether or not this can constitute conduct of the sort contemplated by section 10(1), I cannot draw these conclusions on the evidence on the tests of *Plascon Evans* and *Wightman.*

98. Accordingly, I turn to consider the application of sections 10(2) and 10(3). Section 10(2) permits a court to grant an order for eviction if none of the circumstances in subsection (1) apply if suitable alternative accommodation is available.[43] Section 10(3) permits an eviction even if it is not, but only in narrowly circumscribed circumstances.

(a) The period that the occupier has resided on the land in question;
(b) The fairness of the terms of any agreement between the parties;
(c) Whether suitable alternative accommodation is available to the occupier;
(d) The reason for the proposed eviction; and
(e) The balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land.

[43] '*Suitable alternative accommodation*' is defined in section 1 of ESTA to mean:

'Alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to –

(a) The reasonable needs and requirements of all the occupiers in the household in question for residential accommodation, land for agricultural use and services;
(b) Their joint earning abilities;

The need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active.'

99. The accommodation available to the Ross family is that on offer from the fourth respondent as set out in the minutes of the engagement of 28 September 2018. This is emergency housing in an area called Wolwerivier, about 30 km outside of Cape Town near Atlantis. The units are two-roomed units made of pre-fabricated light-gauge steel with corrugated cladding of approximately 26.5 m2 and the units are serviced. The fourth respondent has at no stage withdrawn its advice that the housing will made available subject to specific timing.

100. Mr Wilkin drew my attention to the fact that the Constitutional Court found that this specific accommodation was regarded as suitable alternative accommodation in the *Baron v Claytile* matter.[44] That is so. However, the definition of 'suitable alternative accommodation' requires a consideration of each case on its own facts. In this case, the Ross family currently occupy a relatively large and spacious family home and live close to their children's schools and where they have found work. Moreover, the full details of the prior accommodation in *Baron v Claytile* are difficult to discern.

101. In my view, notwithstanding any comparison between the Ross family's current accommodation and the Wolweriver accommodation and its resultant consequences for whether the requirements of section 10(2) are met, the requirements of section 10(3) for an eviction are substantially complied with.

102. These circumstances are circumscribed, firstly, by the provisions of section 10(3)(a)(b) and (c) quoted in fn 41 above. These circumstances are present assuming suitable alternative accommodation is not available to the occupier within a period of nine

[44] *Baron v Claytile* 2017(5) SA 329 (CC)

months after the date of termination of an occupier's right of residence as the owner, Mr du Plessis, provided the dwelling occupied by the occupiers and, as I have concluded, the efficient carrying on of the proposed livery operation will be seriously prejudiced unless the dwelling is available for occupation by another person to be employed by the owner.

103. Even if these circumstances are present the court may only grant an order for eviction of any occupier whose permission to reside was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to:

103.1. 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

103.2. 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.

104. I am satisfied that in the circumstances of this case it is just and equitable that an eviction be ordered. I have already conducted the balancing exercise weighing the justice and equity of some of the relevant considerations when considering whether it was just and equitable to terminate the rights of residence at all. I concluded that it was just and equitable. There are additional considerations relevant to the justice and equity of the eviction. In this regard I have specifically considered the length of the Ross family's tenure and the fairness of the agreement that I have concluded was in place

between them. I have also considered that the Ross family has continued to reside in the dwelling for a further lengthy period for free. I have considered the history of the relationship between the parties and the fact that it has further deteriorated. Furthermore, these proceedings have not only been conducted unapologetically over several years on a materially incorrect factual premise advanced on behalf of the Ross family and have been conducted in a manner in which both parties have chosen (whether on advice or on their own accord) to accuse each other of dishonesty.

105. Importantly, I must also consider the efforts to which the owner or person in charge and the occupier have respectively made to secure suitable alternative accommodation for the occupier. I have referred above in the section headed 'Mr Ross' retrenchment and events leading to these proceedings' to the parties' respective efforts. In my view, and having regard to the detail provided regarding the accommodations sought, the applicants went to fair lengths to secure suitable alternative accommodation, which would have resulted in the Ross family owning a property outright in their own name at the cost of the applicants. While the Ross did consider these options, they apparently did not make the effort to look for alternatives that they might prefer in or close to the price range on offer and (where applicable) closer to the children's schools. In doing so, they adopted the view that any RDP home was unsuitable, they did not wish to live in any densely populated area and resisted any area they perceived to be 'crime ridden' however safe a particular home may be. In my view, the wholesale rejection of the full range of offers coupled with their failure actively to partake in the process of finding something more acceptable to them, were, in my view, unreasonable. Furthermore, this ensued in circumstances where the Ross family has now been living for free on the property for some nine years.

106. Mr Wilkin contended that the court must approach the matter on the basis that there is no duty resting on a private land-owner to provide suitable alternative accommodation. I am unable to reconcile this submission with the findings of the Constitutional Court in *Baron v Claytile,*[45] *Daniels*[46] and *Blue Moonlight.*[47] However, on the facts of this case, although the case was argued and 'with prejudice' tenders made on the basis that no duty arose, I am of the view that Mr du Plessis has factually honoured any duties that may reside with him by *inter alia* tendering to purchase a new property to a value of R300 000 and identifying various properties in the price range (which were rejected) *and* in any event, by providing the family with accommodation free of charge for what is now 9 years. Furthermore, the order I propose to make will place a further temporary restriction on the owner's property rights to secure the interests of the Ross family. Notably, Mr Ross himself regarded ten years of occupation from 2011 to be a fair resolution. In effect, this is what he has obtained. In these circumstances, it is not necessary for me to decide whether this is a case where positive duties reside with a private landowner as foreshadowed in *Baron v Clayton* arise whether they be to assist with finding alternative accommodation or providing it themselves.

107. The fourth respondent remains under a duty to protect the Ross family from homelessness. I accordingly make provision therefore in my order. This does not of course preclude the parties amicably from finding another solution in the interim, which I would encourage.

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[45] Id at para 35 and 36.
[46] Supra, n 2 at para 49.
[47] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2012(2) SA 104 (CC) at para 100.

A just and equitable date for eviction

108. In my view, the circumstances of the case are such that justice and equity demand that the Ross family be afforded a generous period for departure from the property. This will in my view give proper effect to the balance of interests in the property between owner and occupier as contemplated by ESTA in circumstances of this case. This flows from various factors, including the length and nature of the relationship between the parties, my conclusions regarding the agreement between the parties and Mr Ross' understanding that he would be assisted should there be no work for him, the conduct of the parties and their respective interests including the comparative hardship on the Ross family that moving will entail. Importantly, the minor child's interests warrant special protection as her education and prospects stand to be seriously compromised if she is not accommodated. Adequate time will permit the flexibility needed to make appropriate decisions.

109. There are further considerations that weigh in favour of a generous period.

109.1. As appears below, I am making an order in terms of section 13 for the payment of compensation for improvements made by Mr Ross through his labour to the residential dwelling in which his family resides.[48]

109.2. While the fourth respondent has assumed its duty to make alternative accommodation available, and has not retracted the advice it gave in 2018, availability is subject to specific timing and time has since lapsed. Accordingly,

[48] Section 13(3) provides: No order for eviction made in terms of section 10 or 11 may be executed before the owner or person in charge has paid the compensation which is due in terms of subsection (1): Provided that a court may grant leave for eviction subject to satisfactory guarantees for such payment.

the fourth respondent may require time to ensure that it can provide emergency accommodation should this be necessary.

110. I am mindful that a generous period for departure will further delay the Du Plessis' ability to commence their business and that this will require the Du Plessis and Ross families to find a way to live together in the coming period. However, the parties may be able to find a solution where they can part ways more quickly than the time I have provided for.

111. In all of these circumstances, I am making an order that the Ross family is ordered to vacate the property by no later than end June 2021.

Compensation

112. Under section 13, a court ordering eviction '*shall order the owner or person in charge to pay compensation for structures erected and improvements made by the occupier ...., to the extent that it is just and equitable with due regard to all relevant factors, including whether (i) the improvements were made ... with the consent of the owner or person in charge; (ii) the improvements were necessary or useful to the occupier; and (iii) a written agreement between the occupier and the owner or person in charge, entered into prior to the making of improvements, provides that the occupier shall not be entitled to compensation for improvements identified in that agreement.*'

113. This entitlement was expressly pleaded, and in light of my findings above, Mr Ross is entitled to compensation for the improvements he made to the dwelling in which he resides. Justice and equity demand that Mr Ross is compensated for the fair value of

these improvements. At the least this would include the cost of the skilled labour provided by Mr Ross adjusted appropriately given the lapse of time.

Impact of Covid-19

114. This judgment is being delivered during the Covid-19 pandemic. The national disaster was, however, only declared after the matter was argued. The regulations and directions made under the Disaster Management Act 57 of 2002 have an impact on the executability of eviction orders. At the present time, there is no certainty as to what the legal or practical position will be in that regard over the coming months and I have not heard argument on the issue. In the result, the parties' attention is specifically drawn to the provisions of section 12(5) of ESTA in terms of which a court may, on good cause shown, vary any term or condition of an order for eviction it makes.

Costs

115. The usual position in this court is that each party carries its costs. There is in my view no reason to depart from this position.

Order

116. I make the following order:

1. The first to third respondents are to vacate the property by 30 June 2021.
2. Should the respondent not vacate as aforesaid, the Sheriff for the area is authorized to secure their eviction on 2 July 2021.
3. The fourth respondent shall provide the first to third respondents with emergency accommodation upon their eviction should this be necessary, and shall liaise with

the first to third respondents in that regard to facilitate their decision-making relating to schooling.

4. In terms of section 13 of ESTA the first applicant shall, within six months of the date of this order, compensate the first respondent for the fair value of improvements effected by him to the dwelling his family currently occupies.
5. Should a dispute arise in respect of paragraph 4, either party may approach the court on the same papers supplemented where necessary for a timeous determination by the court.
6. Each party shall pay its own costs.

S J COWEN
Acting Judge, Land Claims Court

DATE OF JUDGMENT: 26 MAY 2020

Appearances:

For the Applicants
Adv L Wilkin *instructed by* Marais Muller Hendricks

For the first to third respondents
Adv P Hathorn SC *instructed by* J D van der Merwe Attorneys

Fourth and fifth respondents
No appearance