IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

APPEAL CASE NO: LCC63/18

Before: **the Honourable Madam Acting Judge President Meer and Judge Canca**
Heard On: **8 June 2018 and at Cape Town**
Delivered: **27 June 2018**

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

27/06/2018 .....

DATE SIGNATURE

In the matter between:

ANDRIES JOHANNES ERWEE NO **First Appellant**
In his capacity as Trustee of
MONTEITH TRUST (IT2470/94)

CHRISTINA LOUISA ERWEE NO **Second Appellant**
In her capacity as Trustee of
MONTEITH TRUST (IT 2470/94)

JACOBUS CORNELIUS BADENHORST NO **Third Appellant**

In his capacity as Trustee of
MONTEITH TRUST (IT 2470/94)

JOHANNES HAMMAN GROENEWALD NO **Fourth Appellant**
In his capacity as Trustee of
WAPADSKLOOF TRUST (IT 3627/2000)

DANIEL BRAND GROENEWALD NO **Fifth Appellant**
In his capacity as Trustee of
WAPADSKLOOF TRUST (IT 3627/2000)

and

FRANKLIN DAVIDS **First Respondent**

PATRIC WILLIAMS **Second Respondent**

JACO DAVIDS **Third Respondent**

MAINA ADAMS **Fourth Respondent**

FRANS PIENAAR **Fifth Respondent**

THEEWATERSKLOOF MUNICIPALITY **Sixth Respondent**

JUDGMENT

MEER AJP

[1] This is an appeal against a judgment of the Caledon Magistrates Court, dated 15 December 2017. The Appellants before me unsuccessfully sought the eviction of the Respondents, in terms of the Extension of Security of Tenure Act 62 of 1997 ("ESTA"), from the farm Krabbe Fonteyn in the District of

Caledon ("the farm"). In dismissing the application, the court a quo did not deal with the merits of the application, but found for the Respondents, by upholding their point *in limine* that there was an irregularity pertaining to the commissioning of the founding affidavit of the First Appellant, (First Applicant in the application a quo), namely the absence of an indication of the date when, and place where, the affidavit had been commissioned.

[2] On appeal the Respondents contend that it will be in the interests of all the parties, in the event of the appeal being upheld on the point *in limine*, for this Court to determine the application on its merits, instead of referring the matter back to the court a quo for adjudication.

[3] It is so that the Respondents are, without having lodged a cross appeal, entitled to seek to convince the Court of Appeal to uphold the judgment on other or additional grounds in respect of which no definite order has been made against the Respondents. See S v Boesak 2000 (3) SA 381 (SCA) at paragraph 30. That is precisely the case here, and, as is contended by Ms. Cronje on behalf of the First to Fifth Respondents, this Court is in as good a position as the court *a quo* to determine the application on its merits. I shall accordingly deal with the appeal in respect of the point *in limine* firstly, and

should that appeal be upheld I shall proceed to deal with the application on its merits.

The upholding of the Point *in limine*.

[4] The Respondents, as aforementioned, raised a point *in limine* on the basis that the founding affidavit of Andries Johannes Erwee did not comply with Regulation 4(1) of Government Notice R1258 of 21 July 1972 ("Regulations Governing the Administering of an Oath or Affirmation"), in that the date and place was not inserted beneath his signature on his affidavit.

[5] It is trite that Regulation 4 (1), relied upon by the Respondents with respect to the point *in limine,* is directory and not peremptory. See Standard Bank of South Africa Limited v Dlamini and Another (42232/2015) [2016] ZAGPPHC 26 (22 January 2016) at paragraph 16. See also Erasmus Superior Courts Practice, Revision Service 45 E2-2A

[6] The Magistrate clearly did not appreciate the directory nature of the Regulation, and the discretion accorded to her to admit the affidavit notwithstanding the omission of the date and place where it was attested to.

[7] The founding affidavit of Erwee was supported by an affidavit attested to by one Groenewald, the Fourth Applicant. Both affidavits were commissioned by the same Commissioner of Oaths. Whereas the date, 19 May 2016, and name of place, Grabouw, appears on the affidavit of Groenewald, it was not inserted on the affidavit of Erwee. The stamp of the Commissioner of Oaths indicates her address as being in Grabouw. The inference can therefore be drawn, submitted Mr. Cronje on behalf of the Appellants, that both affidavits which formed part of the founding papers were commissioned in Grabouw on 19 May 2016. This is a reasonable assumption, which I am hard pressed to understand why the Magistrate did not make. The absence of a date and place on the founding affidavit is, in the circumstances, of no great import or irregularity and certainly caused no prejudice.

[8] This being so, the court *a quo* ought not to have upheld the point *in limine,* clearly erred in failing to appreciate its discretion and erred moreover in avoiding the merits of the application. The appeal against the decision of the court *a quo* to uphold the Respondents' second point *in limine*, accordingly succeeds.

Merits of the Application.

[9] The Applicants brought an application in the Caledon Magistrates Court, on 9 May 2016, for the eviction from the farm of the First to Fifth Respondents, and all those occupying through them.

[10] The farm is owned by the Wapadskloof Trust and leased by the Monteith Trust. The First to Third Appellants are trustees of the latter trust and the Fourth and Fifth Appellants are trustees of the former. The Respondents reside in a two bedroom dwelling on the farm and are all members of the same family. It is undisputed that their residence on the farm dates back to July 2011, when the First Respondent, currently aged 28, commenced employment for Monteith Trust. As part of his contract of employment he was given housing on the farm. The other Respondents, as his family members, came to reside with him. The elder of the family is the Fifth Respondent, a pensioner, aged 70. He is the father of the First, Second and Third Respondents. It is common cause that he is a long term occupier who is protected from eviction in terms of section 8(4) of ESTA. Whilst prayer 1 of the notice of motion seeks also the eviction of the Fifth Respondent, the founding affidavit states that his residence is not sought to be ended. The Trust is instead offering him a one bedroom unit to relocate to, and is prepared to help him move.

[11] The details of the other family members are as follows: the Second Respondent, the brother of the First Respondent, is employed on the farm and was, according to the First Respondent, brought there to look after the Fifth Respondent. He lives, together with his partner the Fourth Respondent, their three minor children and a grandchild, in the family dwelling. The Third Respondent, another brother of the First Respondent, has never worked on the farm, but lives there with the rest of his family.

[12] The First Respondent's contract of employment was terminated on 11 December 2015 after a disciplinary enquiry was held. He was given 30 days' notice to leave the farm, but did not do so. It is common cause that there is currently no dispute pending before the CCMA in respect of the First Respondent.

The status of the Second to Fourth Respondents.

[13] Mr. Cronje, for the Appellants, could not deny that the Second to Fourth Respondents had been residing on the farm since 2011, when the First Respondent came to work there. Nor could he deny that between 2011 and 2015 they would have continuously and openly resided on the farm. This being so, they are presumed to have had consent so to reside, in terms of

section 3(4) of ESTA (unless the contrary is proved, which is not the case), and are deemed to have resided with the knowledge of the owner or person in charge in terms of Section 3 (5) In the circumstances their right to reside flows from consent in terms of section 3(4) and 3(5) of ESTA and does not flow from the right of residence of the First Respondent.

[14] The Constitutional Court judgement of *Klaase and Another v Van der Merwe NO and Others 2016 (6) SA 131 (CC)* recognised that the rights of residence of persons like the Second to Fourth Respondents derived from consent, flowing from the combined operation of subsections (4) and (5) of section 3 of ESTA. Discussing the subsection at paragraph 59, the Court acknowledged:

> "...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 and (b) three years shall be deemed to have done so with the knowledge of the owner or person in charge." (Footnotes omitted.)

[15] Post *Klaase,* the Second to Fourth Respondents can no longer be regarded as mere residents who occupied under the rights of the First Respondent. They are occupiers in terms of sections 3(4) and 3(5) of ESTA, whose rights of

residence stemmed from consent. See also the unreported judgment of DJ Wium and Others LCC218/2016 delivered on 27 November 2017.

[16] As the Second to Fourth Respondents' right of residence flowed from consent, the termination thereof had to occur in terms of section 8(1) of ESTA, the section applicable to persons whose right of residence flowed from consent. The section states:

> "**8. Termination of right of residence.**-(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to-
>
> (a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
>
> (b) the conduct of the parties giving rise to the termination;
>
> (c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
>
> (d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and
>
> (e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence."

[17] The factors set out in section 8(1) were simply not considered in relation to the termination of the rights of residence of the Second to Fourth Respondents, and accordingly their eviction would be contrary to section 8 of ESTA and cannot be granted. Nor were any of the other mandatory requirements as specified at Section 9 (2) of ESTA complied with in relation to them. For this reason too, their eviction cannot be granted.

The right to family life of the Fifth Respondent

[18] Another factor which stands in the way of the eviction order sought by the Appellants, pertains to the right to family life of the Fifth Respondent, which has not at all been contemplated by the Appellants in their quest to evict all the Respondents, and move their 70 year old ageing parent to a one bedroom unit without family support. As an occupier whose eviction is not being sought, and who lives with his family, the Fifth Respondent is entitled, in terms of section 6 (2) (d), to the right to family life. The section states, *inter alia,* that an occupier shall have, balanced with the rights of the owner or person in charge, the right to family life in accordance with the culture of a family.

[19] In *Hatting and Others v Juta 2013 (3) SA 275 (CC)* the Constitutional Court, at paragraph 35, gave content to this right. There it was stated that the purpose of the conferment of the right, was to ensure that despite living on the land of others, vulnerable persons would be able to live a life as close as possible to the life they would lead if they lived on their own land, having regard to the land owner's rights. At paragraph 37 the Court said that if the occupier were to live with one or more of their children, or other members of the extended family, and this would not result in any injustice, unfairness and inequity to the owner of the land, the occupier would be entitled to live with those members of his or her family.

[20] There is no evidence that the First to Fourth Respondents' continued residence with the Fifth Respondents would result in any injustice, unfairness and inequity to the Appellants. It is common cause that the Fifth Respondent, a 70 year old pensioner, cannot live alone and needs to be looked after and supported in his old age. Given that he requires a family member/members to live with him, there is clearly no way that he and his family can be accommodated in a one bedroom unit which the Appellants plan to move him to.

[21] Ms. Cronje, for the Respondents, submitted that the lack of information on the papers about the household of the Fifth Respondent and precisely which family members are required to live with him, must be attributed to the Appellants. The Respondents, she submits, were simply not put on their defence by the Appellants to show how many, or which, family members the Fifth Respondent needed to live with him. This was not the case the Respondents were asked to meet.

[22] As Ms. Cronje correctly submitted, on the papers one cannot decide who must go and who must stay. Even in respect of the First Respondent, it is not clear how essential his presence is to the exercise of the right to family life of the Fifth Respondent. At the very least, she contended, the family should meet and consider this. I am inclined to agree.

[23] After all is said and considered, the Appellants have failed to show that permitting the First to Fourth Respondents to occupy the two bedroom unit the Fifth Respondent currently occupies, will be unjust and inequitable to the owner of the land. This being so, in view of the Fifth Respondent's right to family life, the eviction of the First to Fourth Respondents cannot be granted.

I accordingly order as follows:

1. The appeal against the decision of the Magistrate, Caledon, to uphold the Respondents' second point *in limine* succeeds.
2. The application for the eviction of the First to Fifth Respondents from the farm Krabbe Fonteyn, District of Caledon, is dismissed.

Y. S Meer

ACTING JUDGE PRESIDENT

LAND CLAIMS COURT

I agree.

M. Canca

ACTING JUDGE

LAND CLAIMS COURT

Appearances

For the Appellants :	Mr FH Cronje
	Cronjes Incorporated Attorneys, Cape Town
For the Respondents:	Ms. H Cronje
Instructed by:	Chennells Albertyn Attorneys and Conveyancers, Cape Town