

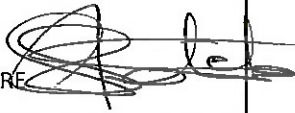


**IN THE LAND COURT OF SOUTH AFRICA  
HELD AT RANDBURG**

**CASE NO: LCC 08R2025  
MAGISTRATE CASE NO: 64/2020**

**Before the Honourable Flatela J**

**Delivered on: 10 March 2026**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED: NO	
DATE 10 MARCH 2026	SIGNATURE 

In the matter between:

<b>HANS LINDE DU PLESSIS N.O.</b>	First Applicant
<b>PETRUS JOHANNES ERASMUS N.O.</b>	Second Applicant
<b>CHRISTIAAN LOURENS DU PLESSIS N.O.</b>	Third Applicant
<b>FREDERIK JACOBUS DU PLESSIS N.O.</b>	Fourth Applicant
and	
<b>SESHA TSHABALALA</b>	First Respondent
<b>SESHA TSHABALALA N.O.</b>	Second Respondent
<b>PUSELETSO TSHABALALA</b>	Third Respondent

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**ORDER**

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1. The order of the Magistrate, Fouriesburg, is set aside in whole and is replaced by the following order:
  - a. The matter is referred to mediation in terms of section 11(2)(b) of the Extension of Security of Tenure Act 62 of 1997.
  - b. The mediation shall be concluded within six months of this order, unless the mediator extends that period for good cause shown.
  - c. The Dihlabeng Local Municipality (Fourth Respondent) and the Provincial Director of the Department of Land Reform and Rural Development (Fifth Respondent) are ordered to participate meaningfully in the mediation. They shall provide information regarding:
    - i. Housing assistance available to the First to Third Respondents.
    - ii. Availability of Suitable Accommodation
2. At the conclusion of mediation, the mediator shall prepare a report for filing with the Magistrates' Fouriesburg Court, indicating:
  - a. Whether the parties reached an agreement, and the terms of that agreement.
  - b. If the mediation does not lead to an agreement, the applicants may file an application at the Fouriesburg Magistrates' Court. Such an application shall be heard by a different Magistrate who has not presided over the initial hearing and who has never overseen a criminal case. The application must be accompanied by:
    - i. The mediator's report.
    - ii. Updated reports from the municipality and the Provincial Director of the Department of Land Reform and Rural Development regarding housing alternatives.
    - iii. The Probation officers' report

3. Pending the outcome of mediation and any subsequent court proceedings, the First to Third Respondents shall be entitled to remain in occupation of the dwelling on Farm La France.
4. There is no order as to costs.

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## JUDGMENT

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**FLATELA J**

### **Introduction**

[1] This is an automatic review of the eviction order issued by the Magistrate in Fouriesburg, Free State Province, pursuant to section 19(3) of the Extension of Security of Tenure Act 62 of 1997 (ESTA). The Magistrate granted an eviction order against the First to the Third Respondents from the dwelling situated on FARM LA FRANCE, described as the remaining extent of Farm La France No.378, District Fouriesburg, Free State Province (the farm). The First Respondent and the Third Respondent are a married couple who married on 28 February 2013 and have been living together as husband and wife since then. The First and Third Respondents will be referred to as Mr and Mrs Tshabalala.

[2] The Magistrate granted an eviction order against Mr and Mrs Tshabalala after finding that Mr Tshabalala contravened the provisions of section 6(3) of ESTA, following a criminal court conviction for stealing beans from the Applicant's farm. The Magistrate concluded that Mr Tshabalala committed such a fundamental breach of the relationship between him and the persons in charge of the Farm, as outlined in sections 10(1)(a) to (c) of the Act, that it is practically irremediable and cannot be restored in trust in any form or manner.

### **Issues for determination**

[3] Central to this review is whether the termination of the Respondents' right of residence was in accordance with section 8 of ESTA, and whether an order of eviction would be just and equitable under section 8, read together with the provisions of section 10 of ESTA.

### **The Parties**

[4] The First Applicant is Hans Linde Du Plessis N.O. The Second Applicant is Petrus Johannes Erasmus N.O. The Third Applicant is Christiaan Lourens Du Plessis N.O., and the Fourth Applicant is Frederick Jacobus Du Plessis N.O. They are Trustees of the Brandwater Trust. The Brandwater Trust is the registered owner of the Farms La France Nos. 378 and 379, since 1 August 2001. The Fourth Applicant, Frederik Jacobus Du Plessis, the deponent of the Founding Affidavit, is a person in charge of all farming activities and is authorised to make the application on behalf of the Applicants.

[5] The First Respondent is Sesha Tshabalala, an adult male residing on the farm. The Second Respondent is Sesha Tshabalala N.O, cited in his representative capacity as father and guardian of their minor children, and the Third Respondent is Puseletso Tshabalala, an adult female and the wife of Mr Tshabalala, residing on the farm. The First to the Third Respondents will be referred to as the Respondents.

[6] The Fourth and Fifth Respondents, respectively, are the local municipality, Dihlabeng Local Municipality, and the Department of Land Reform and Rural Development, cited in accordance with section 9(2)(d) of ESTA. The Fourth Respondent has a constitutional duty to provide alternative accommodation in the event of the eviction of the First to Mrs Tshabalalas, whilst the Fifth Respondent is responsible for ensuring the right of the First to Fifth Respondents to security of tenure. ESTA mandates them to undertake both on-site and off-site developments to realise this right. The Fourth and Fifth Respondents will be referred to as the State Respondents.

## **Factual Background**

[7] The facts are largely uncontested. Mr Tshabalala arrived on the farm with his late parents in 1995 when he was two years old. His late parents worked on the farm and were allocated the house where he and his siblings grew up. In 2013, he started working on the farm as a gardener and was allocated a house. The terms of employment were agreed verbally between the parties. He married Mrs Tshabalala in the same year and has been living with her since then. They share their home with their two minor children, aged 12 and 7.

[8] On 20 October 2016, the employment terms were formalised in writing. An employment agreement was signed between Brandwater Boerdery, as the employer, and Mr Tshabalala. The contract stated that he began working on 1 January 2014 as a general worker earning a salary of R2,780. Regarding accommodation, it was recorded that his tenure rights are directly linked to his service agreement, meaning that if the employment ends, his tenure rights will also end. The agreement also recorded that Mr Tshabalala's dependants' tenure rights are directly linked to the main contract's service agreement.

[9] On 14 April 2018, Mr Tshabalala was summarily dismissed from employment for misconduct, specifically theft of 10 bags of beans (valued at R7,500.00), in breach of section 6(3)(b) of ESTA. Mr Tshabalala referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

[10] On 3 August 2018, Brandwater Boerdery (Pty) Ltd and Mr Tshabalala reached a settlement agreement under which the employer agreed to reinstate Mr Tshabalala on the same terms and conditions that governed the employment relationship prior to the dismissal on 14 April 2018. Mr Tshabalala was to report for duty on 6 August 2018.

[11] On 6 August 2018, the date of his reinstatement, Mr Tshabalala was served with a notice of suspension, which he refused to sign. Following a disciplinary enquiry held in his absence on 8 August 2018, Mr Tshabalala was found guilty of two charges:

dishonesty for stealing 10 bags of beans (valued at R7,500.00) on 14 April 2018, and absence from work without permission from 15 April 2018 to 8 August 2018. He was dismissed. Notably, his employer summarily dismissed Mr Tshabalala from 14 April 2018 to 6 August 2018, yet he was charged and found guilty of absence from work during that period. Mr Tshabalala did not refer the issue of his second dismissal to the CCMA.

[12] The Applicants launched the eviction proceedings against the Respondents. The Applicants asserted that Mr Tshabalala was dismissed from his employment for fundamental breach of the relationship under section 10(1)(c) of ESTA due to misconduct (stealing 10 bags of beans), which Mr Tshabalala denied.

[13] I will first address the legislative framework, followed by a summary of the evidence, analysis, and conclusion.

### ***Legislative framework***

[14] The Constitution is the starting point in all eviction cases. Section 25(6) of the Constitution states that '(a) A person or community whose tenure of land is legally insecure due to past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to legally secure tenure or to comparable redress'. ESTA was enacted in terms of section 26(9)

[15] ESTA affords secure tenure, as envisaged in section 25(6), to persons who reside on land they do not own.<sup>1</sup> The mischief of ESTA is not only about securing tenure of ESTA occupiers, but "*It is also about affording occupiers the dignity that eluded most of them throughout colonial and apartheid regimes*"<sup>2</sup>.

### **The Structure of ESTA**

[16] The purpose of ESTA is to:

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<sup>1</sup> *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) (*Daniels*) para 13.

<sup>2</sup> *Daniels* supra n2 para 23.

- a. provide for measures with State Assistance to facilitate the long-term security of the land tenure;
- b. regulate the conditions of residence on certain land;
- c. regulate the conditions and circumstances under which the right of persons to reside in the land may be terminated;
- d. regulate the conditions and circumstances under which persons whose right of residence has been terminated may be evicted from the land and to provide for matters connected therewith.<sup>3</sup>

[17] ESTA recognises that 'many South Africans do not have secure tenure of their homes and the land which they use and are therefore vulnerable to unfair eviction', and the unfair eviction leads to great hardships, conflict and social instability.

[18] Chapter II of ESTA addresses measures to facilitate the long-term security of tenure for occupiers. It provides that:

#### **'4. Tenure grants**

- (1) The Minister shall, from the monies appropriated by Parliament for that purpose and subject to the conditions of the Minister, may prescribe in general or determine, in a particular case, provide tenure grants-
  - (a) To facilitate the planning and implementation of on-site and off-site developments,
  - (b) To enable occupiers, former occupiers and other persons who need long-term security of tenure to acquire land or rights in land;
  - (c) For the development of land occupied or to be occupied in terms of on-site or off-site developments;
  - (d) To enable occupiers and former occupiers to acquire suitable alternative accommodations and;
  - (e) To compensate owners or persons in charge for the provisions of accommodation and services to occupiers and their families.<sup>4</sup>

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<sup>3</sup> See the preamble and the individual chapter headings to Chapters II, III and IV.

<sup>4</sup> Chapter II, Section 4 of the Extension of Security of Tenure Act 62 of 1997.

[19] Section 8 of ESTA provides that the right to residence may be terminated on any lawful grounds, provided that such termination is just and equitable, having regard to all relevant factors. The provisions read as follows:

“(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 adequate opportunity to make representations before the decision was made to terminate the right of residence.

- (2) ..
- (3) ..
- (4) .....

[20] Section 9 of ESTA deals with the limitations on evictions

**“9. Limitation on eviction**

(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 Land Affairs, for information purposes,

not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: 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 Land Affairs 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."

[21] I now consider the parties' evidence. In motion proceedings, the affidavits filed in the application constitute evidence.

### **The Applicants' evidence**

#### **FREDERICK JACOBUS DU PLESSIS**

[22] Mr Frederick Jacobus Du Plessis was the Applicant's only witness. He stated in his founding affidavit that he was in charge of all farming activities on the farm and that he was aware of the history of the occupiers and the Respondents.

[23] He testified that Mr Tshabalala was employed as a general worker on or about 20 October 2016. As part of his employment contract, the Third Applicant provided Mr Tshabalala with a house, and his right to reside was directly linked to his employment; he could only stay on the farm as long as he remained employed there. The contract was translated into Sesotho, Mr Tshabalala's mother tongue.

[24] According to Mr Du Plessis, Mr Tshabalala, NO, and Mrs Tshabalala are not occupiers in their own right. Her right of residence is "coupled to that of the 1st Respondent".

[25] He stated that on or about 14 April 2018, Mr Tshabalala stole 10 bags of beans without the necessary permission and therefore contravened the provisions of section 6(3) of the ESTA, as Mr Tshabalala stole property from the Applicants, which is a serious breach of the Act.

[26] Mr Du Plessis averred that, after learning that Mr Tshabalala had stolen the beans, he immediately took disciplinary action against him. He stated that Mr Tshabalala was served with a copy of the disciplinary inquiry on 3 August 2018, confirming that the disciplinary inquiry and hearing would take place on 8 August 2018. However, Mr Tshabalala refused to sign the notice of disciplinary hearing. The disciplinary hearing was held on 8 August 2018, and Mr Tshabalala was dismissed from employment due to his misconduct.

[27] Mr Du Plessis averred that after the dismissal, Mr Tshabalala reported the labour disputes to the CCMA. According to the Third Applicant, the matter has been finalised, and there is no outstanding labour dispute between the parties; the provisions of section 8(3) of ESTA are not applicable.

### **Just and Equitable Eviction and Alternative Accommodation**

[28] Mr Du Plessis argued that the eviction is just and equitable because Mr Tshabalala's right of residence, and thus the Second and Mrs Tshabalalas' derivative rights, were lawfully terminated due to misconduct and the resulting breakdown of the relationship.

[29] He stated that Mr Tshabalala is currently employed on a neighbouring farm, Mr Viljoen's Farm, where suitable alternative accommodation is available, indicating they will not be left homeless if evicted. The Applicants argue that they are incurring unnecessary expenses by transporting new employees because the Respondents still occupy the house built for employees, and the Applicants require the accommodation.

[30] Furthermore, the Third Applicant asserted that the "duty to supply alternative accommodation to the First and Mrs Tshabalala vests with the Fourth and Fifth Respondents [the Municipality and Department of Rural Development] and there is no duty on the Applicants".

[31] The Third Applicant stated that the relationship between the Applicants and the Respondents has deteriorated to such an extent that it cannot be restored at all or in a practically feasible manner due to the actions of Mr Tshabalala.

### **Compliance with ESTA**

[32] The Applicants stated that they served a Notice in terms of section 8(1)(e) and section 9(2)(a)(b) of ESTA on the Respondents on 18 November 2019, requesting written representations as to why their right of residence should not be terminated. Despite the notice being translated into Sesotho and served by the sheriff, no response or written representations were received from the Respondents within the 15 days. A subsequent notice in terms of section 9(2)(d)(i) of ESTA, signed on 11 February 2020, informing the Respondents of the termination, was served on 9 March 2020, but the Respondents still refused to vacate the farm.

[33] The Notices were served on Dihlabeng Local Municipality (the Fourth Respondent) and the Department of Rural Development & Land Reform (the Fifth Respondent) in compliance with sections 9(2)(d)(ii) & (iii), and the Applicants confirm that they were served via registered mail.

[34] A report by a Probation Officer, as contemplated under section 9(3) of ESTA, was obtained.

## The Respondents' evidence

[35] Mr Tshabalala opposed the application on the basis that the termination of their right to residence was not just and equitable in terms of section 9(2)(a)<sup>5</sup>, read with section 8(1)<sup>6</sup> of ESTA. Secondly, Mr Tshabalala contended that the requirements of sections 9(2) and 10 of ESTA have not been met. Therefore, the application ought to be dismissed.

[36] Mr Tshabalala avers that he was only two years old when his family moved to the farm. He lived with his parents until he was 19, when he began working on the farm for the property's previous owner as a seasonal worker. He was employed as a gardener on 27 November 2013 through an oral agreement. In 2016, the oral agreement was converted into a written contract.

[37] He states that Mrs Tshabalala is an occupier under ESTA. He contends that Mrs Tshabalala's right of residence came into effect in 2013 through the express or tacit consent of the Applicants before Mr Tshabalala's employment contract commenced.

[38] Mr Tshabalala denied stealing the beans as alleged. He says he was instructed by the farm manager, Boeta, to assist his co-worker, Phakiso, in loading 10 bags of 50kg of beans. Phakiso was the driver of the van where these items were to be loaded.

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### <sup>5</sup> Limitation on eviction

9. (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;

### <sup>6</sup> 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.

He claims it appeared to be a trap set by Mr Boeta and Mr Du Plessis. Mr Tshabalala and Phakiso were arrested on 14 April 2018 and released on bail of R300. He was summarily dismissed from work on the day of his arrest. He referred the unfair dismissal to CCMA, and the matter was set down for hearing on 3 August 2018. He testified that the Applicant tried to coerce him into withdrawing the dispute, but he refused.

[39] The Applicants and Mr Tshabalala then reached a settlement agreement for his reinstatement on 6 August 2018, which never materialised. He claims that on 6 August 2018, he reported for work in accordance with the settlement agreement but was served with a notice of suspension pending a hearing in contravention of the settlement agreement. According to Mr Tshabalala, he was never served with any notice of suspension before the CCMA on 3 August 2018.

[40] Mr Tshabalala further denied that his employment was lawfully terminated; he claims that the Applicants failed to adhere to the settlement agreement.

[41] Regarding the availability of the alternative accommodation, Mr Tshabalala contended that he is employed part-time by a neighbouring farmer at one of that farmer's farms in Clarens, which has no infrastructure. During the week, he stays in a caravan with his co-workers. He states that he regards Farm La France as his home.

### **Factual disputes**

[42] The following issues were several disputed facts, and the disputed facts were referred to trial. The following issues were referred to trial.

- i. Whether sections 10 and 11 of the ESTA are applicable in this application.
- ii. Whether Mr Tshabalala had contravened the provisions of section 6 (3) of ESTA;

- iii. Whether Mrs Tshabalala is occupying the property in her own right or whether her right of residence is coupled to that of Mr Tshabalala;
- iv. Whether Mr Tshabalala made representations in terms of the provisions of section 8(1) (e) of ESTA;
- v. Whether the Applicants need the house that the First to Mrs Tshabalalas are currently residing in to accommodate workers employed by the Applicants.
- vi. Whether Mr Tshabalala is permanently employed on a neighbouring farm;
- vii. Whether it would be just and equitable if the court grants the order for eviction;
- viii. Whether a suitable alternative accommodation is available where the First to Mrs Tshabalalas can reside;
- ix. Whether there is a duty on the Applicants to provide suitable accommodation for the First to Mrs Tshabalalas.

**Whether sections 10 and 11 of the ESTA are applicable in this application.**

[43] The Magistrate found that section 10 is applicable to this eviction. Section 10 reads as follows

**"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 remedied 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 months' notice in writing 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 if 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.”

**Whether Mr Tshabalala had contravened the provisions of section 6 (3) of ESTA, and whether the relationship between Mr Tshabalala and the Applicants totally deteriorated**

**The Fourth Applicant’s evidence (Hendrik Jacobus Du Plessis)**

[44] The Fourth Applicant, Hendrik Jacobus Du Plessis, was the Applicant’s sole witness. The Third Applicant testified that he and his brother received information that

Mr Tshabalala and his co-worker were about to remove the beans from the shed. They caught them when they had finished loading the beans.

[45] He stated that on 3 August 2018, the Applicants and Mr Tshabalala reached a settlement agreement stipulating that he would be reinstated on 6 August 2018. On 6 August 2018, Mr Tshabalala was served with a suspension letter, and on 8 August 2018, he was dismissed after being found guilty. Mr Du Plessis explained that they require the house for their employees, as they are now using their van to fetch their workers from townships. He further testified that there is no trusting relationship between them. He testified that Mr Viljoen employed Mr Tshabalala on a neighbouring farm and has alternative accommodation for Mr Tshabalala's family.

[46] During cross-examination, Mr Du Plessis explained that he and his brother instructed their former farm manager, Boeta, to direct Mr Tshabalala and his colleague to load wire from the storeroom for transport to another farm. Boeta gave Phakiso, the driver, the key to the storeroom. Mr Du Plessis and his brother Christiaan received information that Mr Tshabalala and his colleague were planning to steal beans from the shed and load them onto the wire. Mr Du Plessis and his brother decided to hide in the shed and watch as Mr Tshabalala loaded wire and ten 50-kilogram bags of beans. When they were about to finish loading the beans, Mr Du Plessis and his brother appeared, and when confronted, Mr Tshabalala and his colleagues apologised in Sesotho.

[47] Mr Du Plessis reported the theft to the police, and Mr Tshabalala was charged with theft, found guilty, and sentenced to twelve months, suspended for four years.

#### **Mr Tshabalala's evidence**

[48] Mr Tshabalala testified that on Saturday, 14 April 2018, the Farm Manager, Mr Boeta, approached him while he was working in the garden and asked him to assist his co-worker, Mr Phakiso Mphuti, with loading beans, wire, and poison, then deliver these to another farm. He agreed. Tshabalala and Phakiso drove together to the shed and began loading the beans first, then the wire, while searching for the poison, Mr Chris Du. Plessis emerged from the shed where he had hidden and asked what they

were doing. They explained that they had been sent by Mr Boeta to load beans, wire, and poison and to offload them to another farm. He then accused them, as blacks, of stealing from him and threatened to call other white farmers to come and beat them a little. He locked them in the storeroom and left. Later, he returned with Silent Night Security officers and, after a while, the CID. They were taken to the police station by CID, arrested, and subsequently released on bail. He referred his unfair dismissal case to the CCMA. Mediation at the CCMA took place, and on 3 August 2018, the employer tried to coerce him to withdraw the case upon payment of R1000 (One Thousand Rands), an offer he refused. He and his employer reached a settlement agreement under which he would be reinstated. When he reported to work, Mr Du Plessis wanted him to sign documents without reading them. This document was a notice of suspension. He refused to sign it, but he took it to someone who assisted him with his CCMA referral. (The notice of suspension informed him that he was suspended from duty, with full pay, effective from the date of the notice, due to the serious allegations of misconduct pending against him; secondly, that he will soon receive a notice of his disciplinary hearing, and he must leave the premises as discussed during the CCMA procedure.)

[49] That person advised him that the document he was given to sign stated that Mr Tshabalala had agreed during the CCMA proceedings to vacate the premises; he denied ever agreeing to vacate the farm during the CCMA proceedings.

[50] Mr Tshabalala testified that on 6 August 2018, when he resumed work pursuant to the CCMA settlement agreement, he was given notice of suspension.

[51] He then received a phone call from an official at the department in Bethlehem, who instructed him to deliver the document to their offices, which he did. He stated that the department's official told him he would assist him in the eviction from the farm.

[52] Regarding the alternative accommodation offered, Mr Tshabalala also objected to both houses provided by his current employer. The first house was a one-room dwelling that leaked and had no toilets. The second house was unsafe because it was isolated from farm workers, located in the bush, surrounded by trees, and far from the community. He also stated that moving would negatively impact his children's schooling due to transport and distance issues, which could require them to change

schools. During cross-examination, Mr Niemand, for the Applicant, highlighted that the alternative accommodation was close to transport and facilities. However, Mr Tshabalala denied knowing about transport availability and argued that the locations were unsafe and isolated. He stated that the offered accommodation was unsuitable because it was unsafe, as it was detached from the farm community and villages, and surrounded by trees. During the week, he works in Clarens, leaving his family on the farm, where he resides with his coworkers in a caravan. He has three children born in 2023, 2018 and 2024. His wife was unemployed, having previously worked for the Applicant as a seasonal worker.

[53] That was the end of the evidence; each party closed its case.

#### **The Probation Officer's report**

[54] A Probation Officer's Report (Report) was provided to the Magistrate, upon request, in terms of section 9(3) of ESTA. The report paid regard to the following:

- a. The availability and suitability of alternative accommodation to the respondents.
- b. Indication on how the constitutional rights of the respondents be affected by an eviction order, including the right to education of the child.
- c. Undue hardship which an eviction order would cause the respondents.
- d. Recommendations.

[55] The Probation Officers' report made the following findings based on the information provided by the respondents.

- a. Mr Tshabalala came to stay and work on the farm with his parents, now deceased, at the age of 2 and has lived on the farm since then. He was allocated a house when he started working on the farm in 2014.
- b. The house where Mr Tshabalala resided with his family prior to his employment is currently occupied by his siblings.
- c. The main conflict between Mr Tshabalala and Mr Chris Du Plessis arose from allegations of theft of items from the farm's storeroom.

- d. Mr Tshabalala was dismissed from his employment following a guilty verdict for misconduct.

[56] With regard to the availability of alternative accommodation, the report recorded that the Respondents have no alternative accommodation, and that the Department of Land Reform and Rural Development and Dihlabeng Local Municipality have no suitable alternative accommodation as there are no available sites.

[57] The probation officer recommended that the eviction not be granted. She suggested that the Respondents be allocated a portion of the farm, which would help ease the conflict between the applicants and the Respondents; however, if the court deemed it necessary to evict the Respondents, reasonable terms must be put in place to provide them with suitable accommodation.

[58] The Municipality did not file any report.

### **The Magistrate's Judgment**

[59] The Magistrate began his judgment by outlining the evidence presented by the Applicants and the Respondents. From there, the Magistrate, without properly assessing the evidence, proceeded to address other issues referred to trial. The evidence before him clearly demonstrated two mutually contradictory versions concerning the incident of 14 April 2018, the events of 3 August 2018 before the CCMA, and the conditions of alternative accommodation. The Magistrate ignored the evident dispute of facts in these events. It is possible to resolve the factual dispute by considering the probabilities of both versions, evaluating whether they are plausible, reasonable, and consistent, using the appropriate technique, as neatly summarised by Nienaber JA in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at paragraph 5.

'The technique generally employed by court in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses;

(b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b), and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[60] The Magistrate neglected to use the appropriate methodology to reconcile the conflicting evidence presented. He failed to conduct a thorough evaluation of the evidence from both parties; he just relied on the guilty verdict in the related criminal case, stating that the Criminal Court, in its discretion, had determined that Mr Tshabalala was guilty and that there had been a breach of the provisions set out in 6(3) of ESTA, thus violating Mr Tshabalala's right a fair hearing guaranteed in section 34 of the Constitution. This raises a pertinent question: why did the Magistrate refer certain disputed facts for trial if he intended to base his conclusion primarily on the verdict from the criminal proceedings? This is irregularity.

[61] Dealing with proper consideration of evidence, Madlanga ADCJ writing for the unanimous court in *Vodacom (Pty) Ltd v Makate and Another*<sup>7</sup> expressed himself as follows:

[45] The duty of proper consideration is an integral component of the fair hearing right. The founding constitutional value of the rule of law and section 34 of the Bill of Rights require, in my view, that a court should have regard to all material evidence and all material submissions bearing on the issues it must decide. And the court must bring its reasoning to bear on those material issues and reach a conclusion on them. The evaluation of the evidence and reasoning may – as I say – be erroneous, but there cannot be a fair hearing in compliance with the rule of law and section 34 if proper consideration of the matter before the court has not occurred.

[46] The close bond between the fair hearing right and the rule of law was highlighted by this Court in *De Beer N.O.* where it was held:

“This section 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair.”<sup>8</sup>

[62] Dealing with the provisions of section 10(1)(c) of ESTA, Schippers JA, writing for the majority in *Nimble Investments (Pty) Ltd v Malan*,<sup>9</sup> said the following:

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<sup>7</sup> [2025] ZACC 13

<sup>8</sup> *De Beer N.O. v North-Central Local Council and South-Central Local Council* [2001] ZACC 9; 2001 (11) BCLR 1109 (CC); 2002 (1) SA 429 (CC) at para 11.

<sup>9</sup> [2021] ZASCA 129; [2021] 4 All SA 672 (SCA); 2022 (4) SA 554 (SCA)

Para 46-47.

"In determining whether an occupier has committed a fundamental breach of the relationship envisaged in s 10(1)(c) of ESTA, it seems to me that the following factors must be considered. The history of the relationship between the parties prior to the conduct giving rise to the breach. The seriousness of the occupier's conduct and its effect on the relationship. The present attitude of the parties to the relationship as shown by the evidence."<sup>10</sup>

[63] The judgment does not deal with these factors. He relied on the verdict of the criminal court. The Magistrate failed to resolve the glaring factual dispute, which defeated the purpose of referring the issues to trial. On this point alone, the Respondents' eviction cannot be confirmed.

**Whether Mrs Tshabalala is an occupier in her own right or whether her right is tied to that of Mr Tshabalala**

[64] In terms of ESTA, Consent means the express or tacit consent of the owner or person in charge of the land in question, and, in relation to a proposed termination of the right of residence or eviction by a holder of mineral rights, includes the expressed or tacit consent of such holder. An Occupier means a person residing on land which belongs to another person, and who, on or after February 1997 or thereafter, had consent or another right in law to do so, ...

[65] Consent to reside on land is dealt with in Section 3 of ESTA. Subsection

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

(2) ..

(3) ..

(4) For the purposes of civil proceedings in terms of this act, a person who has continuously or and openly resided on the land for a period of one year shall be presumed to have consent unless the contrary is proved.

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<sup>10</sup> Id at para 47.

(5) For the purposes of civil proceedings in terms of this act, a person who has continuously and openly resided on land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge.

[66] The Applicants testified that Mrs Tshabalala is not an occupier in her own right, but her right of residence is linked to that of her husband, Mr Tshabalala. The Probation Officer also shared the Applicants' sentiments.

[67] In his supplementary opposing affidavit, Mr Tshabalala stated that Ms Tshabalala is his wife, to whom he has been married since 28 February 2013. He further argued that Mrs Tshabalala has been living with him since they got married. She is an occupier under ESTA; she has consent to reside on the farm since then. During his oral testimony, Mr Tshabalala testified that the Applicant previously employed Mrs Tshabalala as a seasonal worker.

[68] In their reply, the Applicants admitted that Ms Mrs Tshabalala has been residing with Mr Tshabalala in the property but denied that she had consent to do so.

[69] Relying on the Applicant's argument, the Magistrate concluded that Mrs Tshabalala's right of residence was secondary to that of Mr Tshabalala. The Magistrate found that the Applicant's evidence was uncontested. This finding is untenable in light of the Constitutional Court judgment in *Klaase and Another v van der Merwe N.O. and Others*.<sup>11</sup> In this case, Mrs Klaase appealed this court's decision confirming the eviction order against her. This order was granted after Mr Klaase's right of residence was terminated following a disciplinary inquiry.

[70] The Constitutional Court addressed inter-alia the definition of an occupier under ESTA and the presumption of consent under sections 3(4) and 3(5) of ESTA. Matojane J writing for the majority held as follows:

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<sup>11</sup> 2016 (6) SA 131 (CC).

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

[58] Section 8 falls under Chapter IV of ESTA that deals with "termination of right of residence and eviction". It provides that an occupier's right of residence may be terminated on any lawful ground, provided that the termination is just and equitable, having regard to certain relevant factors. These factors include: the fairness of any agreement or provision of law on which the owner or person in charge relies; the conduct of the parties giving rise to the termination; the interest of the parties, including the comparative hardship to the owner or occupier concerned and the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representation before the decision was made to terminate the right of residence.

[59] Section 3(3) focuses on the substance rather than the form of consent, providing that consent shall be effective regardless of whether the occupier is required to obtain any other official authorisation required by law for the occupier's residence. Additionally, ESTA provides that for the purpose of civil proceedings in terms of ESTA, a person who has continuously and openly resided on land for a period of (a) one year shall be presumed to have consent to do so unless the contrary is proved<sup>12</sup> and (b) three years

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<sup>12</sup> Section 3(4).

shall be deemed to have done so with the knowledge of the owner or person in charge.<sup>13</sup>

[71] At paragraph 66, the Constitutional Court held:

‘The Land Claims Court’s finding that Mrs. Klaase occupied the premises “under her husband” subordinates her rights to those of Mr. Klaase. The phrase is demeaning and is not what is contemplated by section 10(3) of ESTA. It demeans Mrs. Klaase’s rights of equality and human dignity to describe her occupation in those terms. She is an occupier entitled to the protection of ESTA. The construction by the Land Claims Court would perpetuate the indignity suffered by many women similarly placed, whose rights as occupiers ought to be secured’<sup>14</sup>

[72] Given that Mrs Tshabalala has been residing openly on the farm since 2013, with the Applicants' knowledge, she is an occupier under ESTA. She is entitled to the protections afforded by ESTA.

#### **Termination of Mr Tshabalala’s right of residence**

[73] On 18 November 2019, the Applicants served on the First and Mrs Tshabalala via the Sheriff a “Notice in terms of sections 8(1)(e) and 9(2)(a) and (b)” to provide reasons as to why their right to residence on the Farm should not be terminated. They were given 15 (Fifteen) days’ Notice to make representations, failing which, their right of residence will be terminated.

[74] Tshabalala testified that he delivered the notices to someone who helped him with the CCMA case, and that person assisted him in responding to the notices. Even though the notices were translated into Sesotho, based on those responses, it appears that the person who assisted him may not have had legal qualifications; the responses are off the mark and don't make sense.

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<sup>13</sup> Section 3(5).

<sup>14</sup> Ibid para 66.

[75] Section 8(1)(e) mandates procedural fairness, ensuring the occupier has a genuine opportunity to make representations before any decision to terminate their right to reside. The Constitutional Court in *Snyders and Others v De Jager and Others*<sup>15</sup> held that:

‘Section 8(1) makes it clear that the termination of a right of residence must be just and equitable both at a substantive level as well as at a procedural level. The requirement 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 section 8(1)(e).’<sup>16</sup>

[76] In the following paragraphs, the learned Judge held that:

‘If a person has a right of residence on someone else’s land under ESTA, that person may not be evicted from that land before that right has been terminated. In other words, the owner of the land must terminate the person’s right of residence before he or she can seek an order to evict that person. However, it must be borne in mind that the termination of a right of residence is required to be just and equitable in terms of s 8(1) of ESTA.’<sup>17</sup>

[77] Notably, the resolution to evict the Respondents was unanimously adopted on 15 July 2019 to initiate eviction proceedings against them and to authorise the Third Applicant to sign all relevant documentation required to effect the Eviction in the notice of suspension given to Mr Tshabalala. He was told to leave the farm. If it is not already obvious, inviting the Respondents to make written or oral submissions as to why their right to reside should not be terminated on the farm, once a resolution is reached, appears to be merely a formality to comply with ESTA provisions.

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<sup>15</sup> 2017 (3) SA 545 (CC) (*Snyders*).

<sup>16</sup> *Ibid* para 56.

<sup>17</sup> *Snyders* supra n16 para 67.

[78] Dealing with the hybrid approach of combining the Notices in terms of sections 8(1) (e) and 9(2), Barnes AJ in *Cosmopolitan Projects Johannesburg (Pty) Ltd v Leoa & Others*,<sup>18</sup> Barnes AJ expressed herself as follows.

'What is immediately apparent is that this is a Notice in terms of section 9(2)(d) of ESTA, which purports also to terminate the first to fiftieth respondents' rights of residence in terms of section 8 of ESTA. As Mr Botha, who appeared for the thirty-fifth to fiftieth respondents, correctly submitted, this sort of hybrid approach is impermissible. A section 9(2)(d) Notice is correctly and appropriately issued only after an ESTA occupier's right of residence has been validly and fairly terminated in terms of section 8.'<sup>19</sup>

[79] The jurisprudential authority from these cases is that ESTA supports a two-stage eviction process, rather than a hybrid approach. A notice of termination of residence must be issued first, followed by the eviction notice under section 9(2) of ESTA.

#### **Whether it will be just and equitable for the court to grant the eviction**

[79] Section 10(3) provides that 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

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<sup>18</sup>[2019] ZALCC 1.

<sup>19</sup> Ibid para 34.

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.

[80] Applicants argued that they needed the house the Respondents are occupying to accommodate their employees; they say they now transport the employees from the township to work when the Respondents occupy the dwelling.

[81] The Magistrate stated that, due to his earlier finding that there was a breach of trust between the parties, he was of the view that it would be unjust for the court to refuse or dismiss the application.

[82] In *Kanhym (Pty) Ltd v Simon Botha Mashiloane*,<sup>20</sup> Dodson J held that the applicant must show a causal connection between the unavailability of that particular dwelling and the serious prejudice which the owner's operation or operations will suffer. The applicants initially contended that they needed the dwelling to house their other employees and then changed their position to say they needed it to expand their farming operations. The Magistrate accepted this without an enquiry into how the respondents' occupation of the farm hampered the applicants' farming operations.

[83] Dodson J in paragraph 12 continued and stated that, *'I do not agree that a mere averment that the house is needed for another employee justifies the inference that the efficient carrying on of any operation of the applicant would be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the applicant. It was necessary that the applicant set out details of the serious prejudice which one or more of its operations would suffer and to identify*

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<sup>20</sup> 1999 (2) SA 55 (LCC).

*those operations. The enquiry is specific to that particular occupier (the respondent in this instance) and the particular house which he or she occupies. A causal connection must be shown between the unavailability of that particular dwelling and the serious prejudice which the owner's operation or operations will suffer. No such proof was offered by the applicant.'*

### **Availability of suitable alternative accommodation**

[84] Mr Tshabalala testified that the alternative accommodation offered by Mr Viljoen is unsafe and isolated from other farm workers, relying on *Rouxlandia 2 Ltd*<sup>21</sup> the Magistrate held that despite cracks observed by the court on the wall of the house, it cannot be expected that the condition of that house would be identical to the current house. The Magistrate said that in *Rouxlandia 2*, the Supreme Court of Appeal held that ESTA was not enacted to provide security to an occupier in the house of their choice.

[85] In *Rouxlandia 2 Ltd*,<sup>22</sup> The matter concerned the relocation of the occupiers from one house to another on the same land owned by the same person. In that case, the occupier argued that the house to which they were relocated was smaller than the house the appellant was occupying. Therefore, the relocation would impair his dignity. Nichols J, writing for the Court, said:

'However, what of the situation where a relocation does not impact on the human dignity of the occupier? The Constitutional Court has acknowledged that the right of residence conferred by s 8 of ESTA is not necessarily tied to a specific house. The protection afforded by those parts of ss 5 and 6 of ESTA, on which the appellants rely, is to ensure that an occupier will not be subjected to inhumane conditions violating human dignity. To this extent, an occupier's right to resist relocation is protected. But these sections do not amount to a blanket prohibition on relocation under any circumstances. If indeed the relocation were to impair an occupier's human dignity, then the provisions of s 5 and s 6 would apply, and the occupiers could invoke their

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<sup>21</sup> *Orange and Others v Rouxlandia Investments (Pty) Ltd* 2019 (3) SA 108 (SCA) (*Rouxlandia 2*).

<sup>22</sup> *Orange and Others v Rouxlandia Investments (Pty) Ltd* 2019 (3) SA 108 (SCA) (*Rouxlandia 2*).

constitutional rights. This does not mean that all relocations necessarily suffer the same fate.”<sup>23</sup> (footnotes omitted)

“Suitable alternative accommodation is defined in s 1 of ESTA as 'alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation.' Rouxlandia has offered alternative accommodation. It is not a manager's house but a smaller 5-roomed house. It has been newly painted and has running water, a flush toilet, and an inside bathroom. The roof is corrugated iron and is leak-free. The criteria for suitability have, in my view, been fulfilled. In any event, Mr. Orange does not object to the alternative accommodation on the basis that it is unsuitable. He complains that it does not befit the status of a manager. He wants a 'bigger and better' house.’<sup>24</sup> (footnotes omitted)

[86] The learned Judge continued in the following paragraph and stated:

'ESTA was not enacted to provide security of tenure to an occupier in the house of his or her choice. The primary purpose of ESTA, as set out in the preamble, is: 'To provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and the circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from the land; and to provide for matters connected therewith.’<sup>25</sup>

[87] *Rouxlandia* is distinguishable. In this case, Mr Tshabalala has rejected the alternative accommodation because it does not feel safe, given the crack in the wall, and because it is surrounded by trees and isolated from the farm community.

[88] “Suitable alternative accommodation” is defined in section 1 of ESTA as '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-

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<sup>23</sup> *Oranje and Others v Rouxlandia Investments (Pty) 2019 (3) SA 108 para 18.*

<sup>24</sup> *Rouxlandia 2 supra n21 para 20.*

<sup>25</sup> *Ibid para 21.*

- (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 ending abilities; and
- (c) the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active

[89] The Magistrate failed to consider the underlying justifications for the resistance and instead wrongly applied an incorrect legal principle to the circumstances. He did not consider the reasonable needs of the Respondents as outlined in a, b, and c of the definition of a suitable alternative accommodation. The occupier retains the right to reject alternative accommodation that they consider unsafe and that undermines their dignity.

[90] Dealing with the matter of alternative suitable accommodation, Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) held that:

'Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat. As the United Nations Housing Rights Programme report points out:

"To live in a place, and to have established one's own personal habitat with peace, security and dignity, should be considered neither a luxury, a privilege, nor purely the good fortune of those who can afford a decent home. Rather, the requisite imperative of housing for personal security, privacy, health, safety, protection from the elements and many other attributes of a shared humanity, has led the international community to recognise adequate housing as a basic and fundamental human right."<sup>26</sup>

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<sup>26</sup> *PE Municipality* supra n27 Ibid para 17.

## Probation officers report

[91] In his judgment, the Magistrate notes that the concerns expressed by the Probation Officer have been addressed by the Applicant, who maintained that Mr Vijoen offered the alternative accommodation. It does not avail the Magistrate to cherry-pick the Probation Officers' report. The Magistrate did not engage with other issues raised in the Probation officer's report at all.

[92] Dealing with the purpose of the reports, Ngcukaitobi AJ said in *Drakenstein Municipality v CJ Cillie en Seun (Pty) Ltd.*<sup>27</sup>

'There is a clear reason why the consideration of these reports is entrenched in statute: the reports must (a) indicate the availability of alternative land in the event of an eviction; (b) the impact of the eviction on the affected occupiers, including their children; and (c) any undue hardship which will be caused by the eviction. It can be seen from the provisions of section 9(3) that the purpose of the statute is to protect occupiers from unlawful evictions and where evictions are inevitable to ameliorate their adverse impact'.<sup>28</sup>

## Absence of the Municipality Report

[93] It is trite that the Municipality has a constitutional duty to provide suitable alternative accommodation. However, the Municipality did not file its report concerning the availability of suitable alternative accommodation. The Magistrate did not call on the Municipality to file such a report.

[94] Both the Constitutional Court and the Supreme Court of Appeal are of the view that a municipality's obligations extend, at the very least, to providing a Court with all of the information necessary to establish when an eviction would be just and equitable. However, according to *Drakenstein Municipality v Hendricks and Others [2009] ZAWCHC 228*, there does not seem to be a general duty on municipalities to report in

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<sup>27</sup> [2016] ZALCC 9.

<sup>28</sup> *Ibid* para 15.

all cases. The Court reasoned that relevance is an important consideration in this exercise, and it is, of course, ultimately for the court to decide what is relevant or not.

[95] The court can always call upon the municipality to provide relevant information when necessary for a proper decision in a particular case. In this particular case, the court failed to call the municipality's report.

### **Meaningful engagement**

[96] ESTA enjoins the parties to the eviction to engage meaningfully. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others 2010 (3) SA 454 (CC)* at paragraph 338 it was held that:

'The Constitutional Court introduced the concept of "meaningful engagement" between the occupiers and the City as a major pre-condition for determining whether an eviction order would be just and equitable. In this way the conundrum of how to balance competing claims is partly resolved by getting the parties themselves to find functional solutions according to their respective needs and interests, with the court establishing the parameters of what is just and equitable'.

[97] In *Joe Slovo*, the Constitutional Court at paragraph 244 held that:

'The goal of meaningful engagement is to find a mutually acceptable solution to the difficult issues confronting the government and the residents in the quest to provide adequate housing'.

[98] While emphasising the need for meaningful engagement in the realisation of socio-economic rights, the Constitutional Court has also developed it as a remedy in cases where socioeconomic rights have been infringed or are threatened<sup>29</sup>.

[99] In *Diedericks*<sup>30</sup>, this Court at paragraph 10 affirmed that the requirement of meaningful engagement applies to all eviction applications, whether they are in terms

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<sup>29</sup> Chenwi, L. (2011). "Meaningful engagement" in the realisation of socio-economic rights: the South African experience". *Southern African Public Law*, 26(1) p131.

<sup>30</sup> *Diedericks v Univeg Operations South Africa (Pty) Ltd v/a Heldervue Estates* (LCC18/2011) [2011] ZALCC.

of PIE or ESTA, and whether they are in respect of state-owned or privately-owned land. It held that:

'All decisions in these matters dealing with evictions – whether they be evictions carried out in terms of PIE (PE Municipality, Joe Slovo) or whether they be in terms of the National Building Regulations and Building Standards Act (Olivia Road) or ESTA (Lebombo) or whether they be on private property (Olivia Road, PE Municipality, Lebombo) or on state land (Joe Slovo), point to a requirement that there must be engagement by the parties. The engagement is clearly directed at informing the parties concerned and the local authority (even if not a party) in a manner so as to limit homelessness – accordingly, in most cases, an eviction order would not be competent in the absence of some form of engagement.'

[100] It is settled that in the determination of the Application for eviction in terms of ESTA, the Court must engage in a consecutive two-stage enquiry. In *Aquarius Platinum (SA) (Pty) Ltd v Bonene and Others (Aquarius)*<sup>31</sup> the Supreme Court of Appeal held as follows:

'... (the need to protect the rights of residence of vulnerable persons) indicate a two-stage procedure. Section 8 provides for the termination of the right of residence of an occupier, which must be on lawful ground and just and equitable, taking into account, inter alia, the fairness of the procedure followed before the decision was made to terminate the right of residence. Section 8 at least requires that a decision to terminate the right of residence must be communicated to the occupier. Section 9(2) then provides for the power to order eviction if, inter alia, the occupier's right of residence has been terminated in terms of s 8, the occupier nevertheless did not vacate the land and the owner or person in charge has, after the termination of the right of residence, given two months' written notice of the intention to obtain an eviction order.<sup>32</sup> Section

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<sup>31</sup>*Aquarius Platinum (SA) (Pty) Ltd v Bonene and Others* [2020] ZASCA 7; 2020 (5) SA 28 (SCA) para 13.

<sup>32</sup> **Limitations on Evictions**

**Section 9(2):**

(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 Land Affairs, for information purposes, not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based:

Provided that if a notice of application to a court has, after the termination of the right of residence, been

8(2) must of course be read with s 8(1) and provides for a specific instance of what may constitute a just and equitable ground for the termination of a right of residence.’

[101] The court in this case did not conduct the two-stage enquiry; it simply relied on the criminal court verdict, and courts are not permitted to apply ESTA passively — they must conduct this enquiry. Given the circumstances of this matter, I believe the eviction order was not just and equitable; therefore, the Magistrate's order in Fouriesburg should be set aside.

[102] ESTA was amended by the ESTA Amendment Act 06 of 2023, which came into force on 1 April 2024. The Act introduced section 11(2)(b), stating that a court considering an eviction may consider whether the parties attempted mediation.

[103] Dealing with the requirement of mediation introduced in the ESTA Amendment Act, the full Bench of this court in *Marais NO v Daniels*<sup>33</sup> held as follows:

“The benefits of mediation are compelling. By encouraging amicable settlements, it relieves the burden on overextended courts, offers a more cost-effective alternative to prolonged litigation and enables swift resolution of disputes. Mediation encourages constructive dialogue and mutual understanding, often preserving long-standing relationships between parties.

Since 1994, it has always been Parliament’s intention that mediation play an important role in the resolution of land disputes. In all three primary statutes which fell under the jurisdiction of the erstwhile Land Claims Court, the Restitution Act, ESTA and the Labour Tenants Act, provision was made for mediation even prior to the adjudicative process.<sup>34</sup> Under ESTA, s 21 has always provided for mediation on request to the Director-General of DLRRD

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given to the occupier, the municipality and the head of the relevant provincial office of the Department of Land Affairs 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.

<sup>33</sup> *Marais NO v Daniels* [2025] ZALCC 38.

<sup>34</sup> Section 21 of ESTA, section 13 of the Restitution Act and section 18(3) of the Labour Tenants Act

whether prior to or during litigation. Section 21, which lies at the heart of the mediation requirements introduced by the ESTA amendments, provides:

21. Mediation

(1) A party may request the Director-General to appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act.

(2) The Director-General may, on the conditions that he or she may determine, appoint a person referred to in subsection (1): Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the Director-General may determine.

(3) A person appointed in terms of subsection (1) who is not in the full-time service of the State may, from moneys appropriated by Parliament for that purpose, be paid such remuneration and allowances as may be determined by the Minister in consultation with the Minister of Finance for services performed by him or her.

(3A) The Director-General may refer the disputes contemplated in this section to the Board for mediation or arbitration as contemplated in section 15C(1)(d).

(4) All discussions, disclosures and submissions which take place or are made during the mediation process shall be privileged, unless the parties agree to the contrary.'

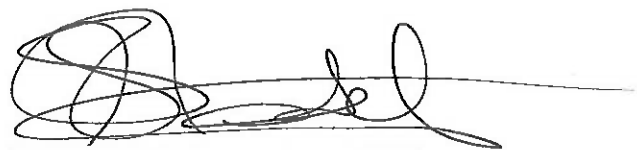
[104] It is true that, prior to the amendment to ESTA, the parties were not required to attempt mediation before initiating eviction proceedings. However, there is nothing in the ESTA Act that indicates it would be inappropriate for the court to refer the matter to mediation, considering the benefits of mediation.

[105] Given the lack of meaningful engagement between the stakeholders and the absence of a municipal report, I believe the parties' challenges can be effectively addressed through mediation rather than through a lengthy litigation process. This approach would facilitate direct communication among the parties, especially involving the state respondents. Additionally, the municipality and the Provincial Director of the Department of Land Reform and Rural Development should be required to clarify the support and resources they can offer to resolve these issues.

[106] In the circumstances, the following order is made:

1. The order of the Magistrate, Fouriesburg, is set aside in whole and is replaced by the following order:

- a. The matter is referred to mediation in terms of section 11(2)(b) of the Extension of Security of Tenure Act 62 of 1997.
  - b. The mediation shall be concluded within six months of this order, unless the mediator extends that period for good cause shown.
  - c. The Dihlabeng Local Municipality (Fourth Respondent) and the Provincial Director of the Department of Land Reform and Rural Development (Fifth Respondent) are ordered to participate meaningfully in the mediation. They shall provide information regarding:
    - i. Housing assistance available to the First to Third Respondents.
    - ii. Availability of Suitable Accommodation
2. At the conclusion of mediation, the mediator shall prepare a report for filing with the Magistrates' Fouriesburg Court, indicating:
- a. Whether the parties reached an agreement, and the terms of that agreement.
  - b. If the mediation does not lead to an agreement, the applicants may file an application at the Fouriesburg Magistrates' Court. Such an application shall be heard by a different Magistrate who has not presided over the initial hearing and who has never overseen a criminal case. The application must be accompanied by:
    - i. The mediator's report.
    - ii. Updated reports from the municipality and the Provincial Director, Department of Land Reform and Rural Development regarding housing alternatives.
    - iii. The Probation officers' report
3. Pending the outcome of mediation and any subsequent court proceedings, the First to Third Respondents shall be entitled to remain in occupation of the dwelling on Farm La France.
4. There is no order as to costs.



**Flatela L**  
**Judge of the Land Court**