IN THE LAND COURT OF SOUTH AFRICA

HELD AT RANDBURG

LCC Case number : LCC 16R/2022

Magistrates' Court District Ndlambe
(held at Port Alfred)
Case number: 130/2022

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **YES** 12/9/2025

10 September 2025 .....

SIGNATURE

In the matter between:

PSST (PTY) LTD Applicant

MKHOKHELI, XOLANI First Respondent

NDLAMBE MUNICIPALITY Second Respondent

AUTOMATIC REVIEW ORDER
ito section 19(3)(b) and (c)
EXTENSION OF SECURITY OF TENURE ACT 62 of 1997

SPILG, J:

10 September 2025

IN RESPECT OF THE ABOVE MATTER which has been allocated to Judge Spilg

AND CONSIDERING THE CONTENTS OF THE COURT FILE and the order that was granted on 4 August 2022 by that court under s 19(1) of the Extension of Security of Tenure Act 62 of 1997 in terms of which:

".1 The Point in limine is dismissed.

.2 Xolani Mkhokheli and all persons holding occupation under him, are hereby ordered to vacate the property situated at Farm Southseas, Portion 32 number 230, Bathurst, Eastern Cape (hereinafter referred to as the Protea Ridge Farm) on or by 12 September 2022.

.3 Should Xolani Mkhokheli and all persons under him holding occupation refuse to vacate the Protea Farm, the Sheriff of the District or his lawful Deputy where the property is situated and upon receipt of a Warrant of Ejectment from the court, are hereby authorised to evict Xolani Mkhokheli and all persons holding occupation under him on or after 13 September 2022.

.4 The First Respondent (i.e. Xolani Mkhokheli) is ordered to pay costs of the Application."

AND FURTHER CONSIDERING the earlier order that had been made on 5 May 2022 which:

1. Confirmed the rule nisi made on 21 April 2022 which read that it;

"shall operate as an interim interdict, with immediate effect, pending the finalisation of Part A of this application"

ORDER

IT IS HEREBY ORDERED BY THIS COURT THAT:

1. *In terms of sections 19(3)(b) and (c) of the Extension of Security of Tenure Act 62 of 1997 ("ESTA") the aforesaid order granted by the learned Additional Magistrate on 4 August 2022;*

    a. *is hereby set aside in whole;*

    b. *is hereby substituted with the following order:*

        i. *Part B of the application ('the said application") brought by PSST (Pty) Ltd ("PSST") against Xolani Mkhokheli as the first respondent ("Mkhokheli") and the Ndlambe Local Municipality as second respondent is dismissed with costs;*

        ii. *The effect of this order is that;*

            1. *The application for the eviction of Mkhokheli and all persons holding title under him or occupying through him from the property known as Protea Ridge Farm (being Portion 32 of the Farm Southsea no. 230 in the division of Bathurst, Eastern Cape Province) is dismissed;*

            2. *The rule nisi granted on 21 April 2022 pending the finalisation of the said application is discharged*

2. *The matter of whether the effect of the order results in;*

    a. *any future termination of the right of residence; and*

    b. *any further proceedings being brought by the applicant for an order of eviction against the first respondent, or those occupying through him,*

being subject to the provisions of the Land Court Act 6 of 2023 and subject to the provisions of the Extension of Security of Tenure Amendment Act 2 of 2018 (both of which came into effect in April 2024) or whether they remain subject to the provisions of ESTA prior to the amendments effected by these Acts is to be decided in the terms of Rule 35A(2) of this Court's Rules (published under Government Notice R 300 of 21 February as amended by Government Notice GN 594 of 7 May 1999) in the manner set out in the following paragraph.

3. *The issue identified in the previous paragraph will be decided after the court has, in terms of Rule 35A(2)(c), heard oral argument by each of the parties, including the second respondent. To this end the presiding judge will convene a conference in terms of Rule 30 on* ***Friday 26 September 2025 at 09.30*** *by way of a remote hearing on MS-Teams for the purpose of;*

    a. *Determining the dates for the submission of heads of argument;*

    b. *Determining the venue and date for hearing (which should be no later than Friday 17 October 2025).*

4. *A copy of this order and judgment are to be delivered by Sonamzi Attorneys Inc, representing Mkhokheli, to;*

a. *the Law Society of South Africa at its local offices*

b. *The relevant Provincial Office of the Department of Rural Development and Land Reform in the Eastern Cape*

c. *The Second Respondent*

JUDGMENT

GROUNDS FOR THE LAND COURT'S ORDER

The grounds for dismissing the application are *inter alia* that PSST failed to give a valid notice under s 8 of ESTA and irrespective thereof, PSST failed to satisfy the requirement in that section that the termination of the right of residence was just and equitable and furthermore failed to satisfy the requirements of ss 9(2), 9(3) and 10(1) read with 12(6) of ESTA for the grant of an eviction order. The reasons are set out below.

REASONS FOR SETTING ASIDE THE MAGISTRATES' COURT ORDERS ON REVIEW AND DISMISSING THE MAIN APPLICATION

INTRODUCTION

1. In terms of the judgment dated 4 August 2022 of the Learned Additional Magistrate the court found that;

    a. The applicant, PSST (Pty) Ltd, had wished to assist the first respondent, Mr Mkhokheli, who had been residing on the farm when the applicant bought it in October 2021;

i. by providing Mkhokheli with another similar dwelling to the one that had been "*washed away by the floods*" and that this was evident *"by the mere fact that he agreed to uphold an agreement which he was never party to"*. This is a reference to the agreement concluded between Mkhokheli and the previous owner in terms of which the latter could occupy the farmhouse until a suitable structure was built to replace the one washed away by the floods; [1]

ii. by not terminating the consent given to occupy as soon as ownership was transferred by the previous owner to the applicant; [2]

b. the applicant had complied with the statutory provisions "*of lawfully withdrawing the consent to occupy*" in terms of a notice on 24 March 2022 by reason of "*the evidence adduced , supporting documentation and photographic evidence furnished by the applicant*". [3]

2. However the Magistrate did not identify the evidence from which these conclusions were drawn. Nonetheless it appears that the following allegations made by the applicant either in its founding affidavit or during the hearing for final relief were accepted:

a. That the applicant was not able to exercise its property rights because Mkhokheli refused to move from the farmhouse[4] to a log home with running

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[1] Judgment para 4.2

[2] Ib. It is clear from the Magistrate's judgment that she meant from the date that the applicant took occupation under the Offer to Purchase (i.e. on 1 November 2021) and not on the date when transfer was registered in the name of the applicant, which was in February 2022

[3] Judgment para 4.3

[4] The applicant also referred to the farmhouse as the farmstead, in contradistinction to the farm itself. To avoid confusion the place occupied by Mkhokheli and his family will be referred to as the farmhouse in which he had been allowed to live by the previous owner until a suitable dwelling had been provided for them

water built to the size of the structure he had lived in before it was washed away with the result that the applicant's directors and their child (for convenience they will be referred to as the "*the applicant's family*") could not move into the farmhouse despite acquiring ownership of the property in February 2022, As a result the court found that the applicant's family had to reside in what was referred to as the "*garage*";[5]

b. That the applicant had provided Mkhokheli with a housing agreement which he refused to sign but which Mr. Jolobe, the applicant's legal representative, informed the Magistrate during the course of argument;

> *" ... was also never challenged by the first respondent for being unlawful in any way ... (and) ... from that point of refusal, what then follows is a series of unlawful acts, which remain undisputed because .... (t)his application was brought in two parts, there was a Part A where it was an interdict interdicting the first respondent from certain conduct, and that part was never disputed, nor was it challenged by the first respondent, and even the relief that was in that Part A was also not opposed by the respondent."*[6]

c. That the unlawful conduct was[7];

   i. the theft of blue gum trees and harvesting proteas by Mkhokheli for his own personal gain which resulted in financial loss to the applicant.

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[5] Transcript of argument for final relief dated 21 July 2022 at pp3 to 4
[6] Ib p 4. The allegation that Mkhokheli did not oppose the relief sought in Part A which detailed his conduct was repeated at p 5
[7] Ib p 5

Although the applicant's papers alleged that Mkhokheli had enabled some unidentified operators to remove blue gum trees for which he received R1500 per truck load, the only reference to proteas was that Mkhokheli was currently (i.e. in April 2022) preventing the applicant from planting proteas during the winter months as the applicant could not yet improve the infrastructure on the farm property; [8]

ii. the refusal by him to accept the log home which the applicant had built at its expense for him and his insistence that a four bedroom brick and mortar house be built.

It was alleged that this constituted a material breach of an oral agreement that had been agreed on in early November 2021 between them in terms of which Mkhokheli would accept a log home being built by the applicant for him which would comprise three bedrooms and an outside toilet with running water;

iii. the "*assault on the applicant's son and the intimidation that came with it.*"

This suggested that Mkhokheli had himself assaulted the minor child. This is not so. The founding affidavit alleged that it was a visitor to Mkhokheli who had assaulted the child on 6 March 2022 and that when van der Walt confronted Mkhokheli he threatened to harm them. These

[8] FA para 47. However no facts were set out from which this conclusion could be drawn, bearing in mind that the applicant had only taken occupation in November 2021

incidents then formed a charge of assault and a charge of intimidation, the first of which would have been laid no earlier than 6 March 2022.[9]

Leaving aside the denials by Mkhokheli, these events therefore could not have been relied on for terminating the right to occupy or requiring Mkhokheli to vacate the farm by 30 March. This is because the Notice of termination and to vacate is dated 2 March, some four days before the alleged assault on van der Walt's minor son (whose actual age was not provided);

iv. the financial loss occasioned because the applicant is unable to farm on its own property.

Save for allegedly frustrating the ability of the applicant to plant proteas in the winter months (as mentioned earlier), the statement is not supported by any direct allegations in the papers;

v. the cattle and the pig which had caused extensive damage to the natural vegetation and the farm property. The applicant alleges in the founding affidavit that this was done intentionally by Mkhokheli;

vi. the other alleged unlawful conduct set out in the applicant's Notice to Vacate of 2 March 2022 was that Mkhokheli had;

[9] The CAS number supplied for the assault on 6 March 2022 is chronologically prior to the intimidation charge although the affidavit at a first reading suggests that the intimidation charge had been laid earlier. See FA para 46

1. laid frivolous and malicious charges against Mr. van der Walt who is one of the applicant's two directors;

2. illegally connected a generator which was unsafe.

However, in the founding affidavit the Applicant confirmed that the "*Protea Ridge Farm is not yet connected to the local municipality electric grid*"[10]);

3. allowed an unreasonable number of visitors to breach the boundary fences, thereby causing a security risk;

4. caused or materially contributed to the applicant's family fearing to live on the farm.

3. The applicant acknowledged that it was not familiar with Mkhokheli's circumstances regarding alternative accommodation but given that he "*had knowledge that the farm would be sold, he has not taken any steps to relocate, to the detriment of the applicant who continues to suffer substantial prejudice*" and that the "*hardship to the applicant, if the eviction is not granted far exceeds the likely hardship to the first respondent or any person holding title under him or occupying through him, should an order for eviction be granted and there is no other effective remedy available to the applicant to protect its rights of ownership.*"[11]

4. The judgment of the court *a quo* accepted the applicant's submissions that it had complied with all the necessary provisions of ESTA:

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[10] FA para 30 (iii)
[11] FA at paras 74 and 77

' "*regarding serving the necessary notice in terms of s 9(2)(a), which stipulated that he was terminating the right of the first applicant to occupy the property*" ... (and) ... *had complied with the provisions of s8(1)(b) as well as s 10(1)(a) and (b) in that the unlawful conduct of the occupier gave rise to the eviction order being sought by the applicant. Furthermore, that the interdict application was never opposed. In addition to that the first respondent contravened the provisions of s 6(3)(b) of the Act in that they materially and unlawfully caused damage to the owner's property.*" [12]

5. In accepting the applicant's averments the Magistrate therefore rejected Mkhokheli's allegations;

   a. contained in his point in limine that the applicant did not lawfully terminate, under s 8 of the Act, the consent he had obtained to reside on the property or that the withdrawal of such consent was just and equitable; [13]

   b. on the merits that, before he moved to the farmhouse, which Mkhokheli had been given permission to occupy by Mr Ferreira (who was the previous owner) after his wooden structure had been "*washed away by the floods*", he was entitled to have a suitable structure built on the farm as offered by not only Ferreira, but also Mr. Willright (who was Ferreira's predecessor in title. Willright was Mr and Mrs Mkhokheli's original employer), but that the applicant was intent on evicting him from the farm as soon as it had taken transfer in February 2022. [14]

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[12] Judgment paras 3.2 and 3.4
[13] Ib para 3.1
[14] Mkhokheli alleged that Willright had agreed to give him bricks to build a house if his successor in title, Mr Ferreria was not agreeable to him staying on the farm when it was sold in 2005, but that Ferreira told

c. disputing each of the applicant's averments regarding the alleged unlawful conduct it had relied on for terminating the right of residence as set out in the applicant's notice to vacate.

The manner in which the court *a quo* dealt with issues raised in the papers will now be considered.

GENERAL

6. It is evident from the presiding officer's findings set out at the commencement of these reasons that the court considered Mkhokheli's continued residence not to be through the protective provisions of ESTA, but by the good grace of the applicant once it had acquired the farm and that it owed no obligation to provide suitable alternative accommodation for him.

7. This unfortunately is a fundamental misconception of the scheme of ESTA, certainly in relation to persons in the position of Mkhokheli who have resided on the land for at least ten years and have reached the age of 60. Their life right of residence (and that of their surviving life partner or dependant to remain on the land for another year) is derived not through the kind-heartedness of subsequent landowners, but from the statutory provision to that effect contained in s 8(4). Mkhokheli was born in 1959 and had been on the farm since 1979.

8. Furthermore the life-right enjoyed by Mkhokheli could not be terminated unless he infringed the provisions of s 10(1). Even then s 12(6) provides that:

Mkhokheli that he would never be expelled and that when his wooden dwelling was swept away Ferreira, who presumably was not living on the property, allowed Mkhokheli and his family to reside in the farmhouse until he built a house for them. See AA paras 4.1.3 to 4.1.4 and 6.2 to 6.4 Compare para 3.6 of the judgment

"Notwithstanding the provisions of sections 10 and 11 the court shall not order the eviction of an occupier if it is of the opinion that one of the purposes of such intended eviction is to prevent the occupier from acquiring rights in terms of Section 8(4)"

This imposes a positive duty on a court to give effect to s 8 (6) which provides that:

"Any termination of the right of residence of an occupier to prevent the occupier from acquiring the rights in terms of this section, shall be void."

The motive for the applicant seeking to evict Mkhokheli was pertinently put in issue, yet the Magistrate failed to address s 12(6).

9. In addition, the Magistrate failed to recognise that the applicant had bound itself, when negotiating both the purchase price for the farm and the date by when occupation could be taken, to provide Mkhokheli with a "*suitable dwelling*" and that Mkhokheli had clearly accepted the benefit which he insisted be implemented. [15]

What amounted to a suitable dwelling in terms of the agreement between the applicant and Ferreira as seller was never canvassed. The applicant claims that a prefabricated log home with an outside ablution facility was adequate but never provided an affidavit from Ferreira to corroborate it. On the other hand, Mkhokheli had requested that the matter be referred to oral evidence.

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[15] Offer to Purchase, cl 4

10. It however does appear from the offer to purchase that the applicant was given almost immediate occupation after the agreement had been signed and was not required to pay any occupational interest prior to registration of transfer. This was in order "*to enable the Purchaser to provide a suitable dwelling*".

    The length of time it would still take to register transfer may well inform whether the type of dwelling contemplated was a ready to assemble wooden structure or a brick and mortar dwelling; so too would the negotiations surrounding the final agreed purchase price, which presumably would take into account the amount the applicant was expected to lay out to provide the type of dwelling contemplated by the parties.[16]

11. Due to the flawed premise on which the Magistrate proceeded to consider the matter, she accepted that the dwelling to be built was simply a replacement wooden structure for the one that had been destroyed, despite the two previous landowners considering it to be inadequate to provide Mkhokheli and his family with the necessary dignity of an adequate alternative accommodation.

    It was however not possible for the magistrate to make a determination on such a critical issue by reference to the papers alone, and certainly not to be able to decide this critical issue in dispute in the applicant's favour when, on the *Plascon-Evans* principle, a court is obliged to accept the respondent's version unless there is not a genuine dispute of fact as explained in that case.[17]

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[16] Without controverting evidence, one can reasonably assume that the provision of a dwelling for Mkhokheli and his family and their continued life right would in part have informed the purchase price of R500 000 which the applicant was prepared to pay for the 27,3835 hectare piece of land.

[17] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-I; See also *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) at para 13.

12. On these grounds alone, the Magistrates' Court decision to grant an eviction order was fundamentally flawed.

In addition, the proceedings instituted by the applicant are not salvageable for the reasons set out in the following paragraphs, which also constitute further grounds for setting aside the court *a quo's* orders.

SECTIONS 9(2)(d) AND 9(3) REQUIREMENTS NOT SATISFIED

13. Section 9(2)(d) and Regulation 6 of the Regulations promulgated prior to Proclamation 149 of 2 February 2024[18] provided that before an eviction order can be considered;

a. not less than two calendar months must have elapsed between;

i. the time the owner (or person in charge) gave written notice, via service by the Sheriff, in accordance with Form D of the Regulations to each adult occupier separately that his or her right of residence is terminated;[19]

ii. and the time the owner gave separate notices in accordance with Form E to each adult occupier [20], also via service by the Sheriff, of its intention to apply for an eviction order.

Furthermore a notice in accordance with Form F must have been served by the Sheriff also on the local Municipality and the head of

[18] The Regulations were those promulgated under Government Notice R 1632 of 18 December 1998 as amended in 2018
[19] See the first Note to Form D
[20] See the first Note to Form E

the relevant Provincial office of the Department of Rural Development and Land Reform;

or

b. if a notice to vacate was not given, then not less than two months must have elapsed from the time the eviction application was brought to court "*after the termination of the right of residence*", and the date of the commencement of the hearing, provided the application was served on each adult occupier, the Municipality and relevant Provincial Department head. [21]

14. It is clear from the wording that s 9(2)(d) contemplates either that the notice of intention to evict must be given at least two calendar months after termination of the right to residence, or that the commencement of the hearing of the application for eviction can only occur two months after it is brought to court, provided the application was preceded by a Form D notice served on each adult occupier terminating his or her right of residence.

15. In the present case, the applicant gave a notice of termination of residence to only Mr Mkhokheli. It was contained in a letter titled "*NOTICE TO VACATE*" bearing the date 2 March 2022. In the same letter the applicant listed the unlawful conduct which it alleged justified the termination of only Mr Mkhokheli's residence *and* entitled the applicant to evict him from the farm by no later than 30 March. The applicant gave notice that it would proceed with an eviction application against him if Mkhokheli did not vacate by that date.

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[21] See the proviso to s 9(2)(d).

16. It is common cause that notwithstanding the date of the letter, it was only delivered by the Sheriff on 24 March; a matter of four working days before Mkhokheli was to vacate.

17. The eviction application was launched on 13 April and served on Mkhokheli and Legal Aid South Africa ("*LASA*") the following day.

    In its terms, the application was to be heard on 21 April for the urgent interim interdictory relief in terms of part A of the application, with the return date being 5 May when the final relief set out in Part B of the application would be heard. The final relief sought was for the respondent's eviction by 31 May 2022 or such alternative date as the court determined.

18. The *rule nisi* was granted on 21 April and required Mkhokheli to remove his cattle and pigs as well as his personal belongings from all outbuildings on the farm property within one month of the order; i.e. by 21 May.

19. The rule was extended after 5 May so that Mkhokheli could deliver his answering affidavit by 12 May and for the applicant to reply by 31 May.

20. The Magistrate heard argument on 21 July and delivered judgment on 4 August.

21. In terms of the judgment, Mkhokheli was ordered to vacate by 12 September failing which the Sheriff was authorised to evict him and all persons holding occupation under him on or after 13 September.

The effect of the judgment was that Mkhokheli and his family were given less than a full calendar month from the date of the order to vacate and find other accommodation.

22. At this stage it may be observed that the notice to vacate was not served on either Mrs Mkhokheli, the Municipality or the head of the relevant Provincial office of the Department of Rural Development and Land Reform ("*the DRDLR*")

Furthermore, although the urgent application for eviction was served on the municipality as a party it was not served on either Mrs Mkhokheli or the DRDLR.

23. The reason for the statutory requirement in s 9(2)(d) that the DRDLR must be notified within two months of either the launch of the eviction application or before the commencement of the hearing of the eviction application is clear: Through inter-governmental arrangements with the Minister of Rural Development and Land Reform, the DRDLR is the tier of government responsible for giving effect to the provisions of s 4 of ESTA.

This section has provided measures to facilitate the long term security of tenure for qualifying occupiers by providing subsidies for the acquisition of land or rights in land and the development of land *"occupied or to be occupied in terms of on-site or off-site developments".*[22]

24. In the case of *Van den Bergh v Skosana* [2002] ZALCC 65 Gildenhuys AJ (at the time) held that in terms of s 9(2) (d) the notice of intention to obtain an eviction order can only be given after termination of the right of residence. In other words a notice

[22] Section 4(1)(b) and (c)

to vacate cannot be given at the same time as the notice terminating the right of residence. [23]

25. The proviso to s 9(2)(d) allows for the eviction notice to be dispensed with, provided that after the termination of the right of residence the occupier, municipality and the DLDRD have been served with the eviction application at least two months before "*the date of the commencement of the hearing of the application*".

26. It is evident that in the present case not only did the applicant deliver an impermissible rolled-up termination of residence and eviction notice, but the notice failed to afford Mkhokheli or any of the responsible arms of government an opportunity to meaningfully assist in providing him or for that matter his family with suitable alternative accommodation. If s 9(2)(d) had been complied with, it may have resulted in the Mkhokheli's being provided, through s 4 subsidies, with either on-site or off-site land rights.

27. Even if the notice that was served on 21 March is severable by excluding the portion dealing with the notice to vacate (on which this court makes no determination), the application for Mkhokheli's eviction was not served on the DLDRD and less than two months elapsed between bringing the application and the grant of the orders on 21 April. These so called interim orders included one evicting Mkhokheli from utilising any grazing areas he had been provided for his livestock by the previous landowners by requiring their removal from the farm.[24]

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[23] The judgment also referred to *Malan v Gordon and another* 1999 (3) SA 1033 (LCC) at paras 27 to 28 and *Die Landbounavorsingsraad v Klaasen* [2001] ZALCC 43

[24] See *Maredi v Andrson and another* {2022} ZALCC 15 and the subsequent case of *Moladora Trust v Mereki and others* [2022} ZALCC 32. In *Mereki and others v Moladora Trust* [2025] ZACC 16 the Constitutional Court at paras 54 to 58 and 68 recognised that, in cases of prior consent to graze, it is necessary that such right must first be lawfully terminated under section 8 before an order can be made that the occupier is to be evicted from land on which his animals grazed.

28. Earlier it was mentioned that in terms of s 9(2)(d)(i) read with Regulation 6 and the contents of Forms D and E, every adult occupier must be given a separate notice to terminate his or her residence and a separate notice that the owner intended to apply for an eviction order.[25]

Mrs Mkhokheli was not given a notice of termination of residence, was not given an eviction notice nor was she served with the eviction application. Moreover she had also worked for the previous owner and, on Mkhokheli's papers, the previous owner had been responsible for paying out her UIF[26].

It is accepted that LASA did not raise a defence that she was entitled to separate notices. However this is a matter of law and it would be a contravention of ESTA if she was evicted without the provisions of ss 8(1), 9(2) and the Regulations being complied with.

In any event, should the applicant again wish to terminate Mkhokheli's right of residence and evict her, it may wish to consider the requirements regarding notice to Mrs Mkhokheli.

29. Finally the Magistrate failed to request a probation officer's report as required (the term used is "*must*") by s 9(3) prior to granting an eviction order.

The requirement for such a report cannot be over emphasised. It allows the probation officer a latitude to inform the court on those matters identified in the section. The manner in which probation officers go about their functions would likely have included

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[25] Both Form D (notice to terminate residence) and Form E(notice of intention to apply for an eviction order) stipulate for separate service on each adult person

[26] AA para 4,1.2

enquiring about Mrs Mkhokheli's own association with the farm and its previous owners and engaging Mr Ferreira to establish what rights the Mkhokheli's enjoyed when he was owner and the dwelling which was to be provided to them before they were expected to leave the farmhouse.

30. It is for these several reasons that the provisions of ss 9(2)(d) and 9(3) read with Regulation 6 of the Regulations and the relevant Forms were not complied with. The court a quo acted *ultra vires* its powers in granting an eviction order without first obtaining a report as required in terms of s 9(3) and was incorrect in failing to find both in fact and in law that the provisions of s 9(2)(d) had not been complied with.

SECTION 8(1) READ WITH 9(2)(a), (c) and 10(1) REQUIREMENTS NOT MET

Two Stage Process and just and equitable requirement

31. In terms of s 9(2)(a) an ESTA occupier can only be evicted under s 9 (2) if the owner or person in charge had first terminated the occupier's right of residence on any lawful ground provided it was just and equitable having regard to all relevant factors with particular reference to those set out in s 8(1)(a) to (e) (and if applicable, as in this case, s 8(4))[27]. The relevant factors to be considered include.

> "*the fairness of the procedure followed in relation to giving or not giving the occupier an effective opportunity to make representations " before the decision was made to terminate the right of residence*".

32. Our highest courts have repeatedly stressed for the benefit of the courts and practitioners that ESTA envisages a two stage eviction process.[28]

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[27] See s 9(2)(a) read with s 8(1)

[28] *Snyders v De Jager* 2017 (3) SA 545 (CC) at para 75 ; *Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga and Others* [2012] ZASCA 77; *Aquarius Platinum (SA) (Pty) v Bonene and Others* [2020] ZASCA 7; 2020 (5) SA 28 (SCA) and *Maluleke N.O. v Sibanyoni and Others* [2022] ZASCA 40 at paras 9 to 11.

The first stage requires a notice terminating the occupiers right of residence and, save in the case provided for in s 8(2) (which does not apply here), a court can only progress to the next stage, which is to consider whether an eviction order should be granted, provided the termination of the right of residence was just and equitable as required by s 8(1).

33. Furthermore, the Constitutional Court has held in other land reform legislation (the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("*PIE*")) that where a statute only permits a court to grant an eviction order if it is just and equitable to do so:

> "*absent special circumstances, it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted.*"[29]

34. The principles relating to "*just and equitable*" and to "*meaningful engagement*" through discussion or mediation developed by the Constitutional Court under PIE have been applied by it to ESTA cases.[30]

35. Neither the letter giving notice of termination of residence nor the contents of the founding affidavit claim that prior to 24 March there was any attempt made by the

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[29] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7 ; 2005 (1) SA 217 (CC) ; 2004 (12) BCLR 1268 (CC) ('*PE Municipality*') at para 43. Compare *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC).

[30] *Daniels v Scribante* 2017 4 SA 341 (CC) . See also the application of *PE Municipality* in *Maluleka* at para 12 per Carelse JA (at the time)

applicant to meaningfully engage Mkhokheli in dealing with the critical issue, which is what constitutes suitable accommodation in terms of the agreement concluded between the applicant and Ferreira, let alone what, in the circumstances, constitutes suitable alternative accommodation under ESTA.[31]

Nor were the DLDRD or the Municipality approached with regard to the availability of such accommodation, whether under s 4 or otherwise.

36. Even after 21 April, when Mkhokheli was prepared to negotiate for David's erstwhile residence, which he claims was inferior to the dwelling he alleged Ferreira agreed to provide, the applicant refused to discuss that possibility and in its replying affidavit claimed, without explanation, that it is now no longer available.

This was a factor which the court a quo was obliged to take into account under s 8(1), particularly bearing in mind that the Mkhokheli's enjoyed the additional protection of a life-residence right under s 8(4) (subject to ss 10(1) and 12 (6) read with 8(6) considerations)

37. It is also evident from the papers that the impasse arose when the applicant considered that a log house would satisfy the obligation to provide suitable accommodation whereas Mkhokheli understood the obligation to require a brick and mortar house, or so they respectively alleged.

38. It should be noted that whereas the applicant argued before the Magistrate that there was no obligation to respect Ferreira's promise to Mkhokheli regarding the dwelling, in the notice to vacate it recognised that a material term of the agreement concluded

[31] The engagements which occurred are dealt with elsewhere. They did not discuss this key aspect

with Ferreira required it to provide Mkhokheli with a "*suitable dwelling on the farm property*" and that it had "*on numerous occasions attempted to comply with their obligations*" (emphasis added), albeit that it claimed that its obligation was limited to building a log home.[32]

39. There is nothing to suggest that the applicant was unable to bring Ferreira into a discussion with Mkhokheli and iron out what he in fact meant by a suitable dwelling, how it may have affected the final purchase price, and the time afforded the applicant to build a dwelling for Mkhokheli as contemplated by Ferreira and the applicant in their agreement.

40. This appears relevant bearing in mind that in terms of the agreement the applicant was given occupation free of occupational interest, not on date of transfer but six days after it had signed the agreement. The express reason for doing so, as stated in the offer to purchase, was to enable the envisaged dwelling to be provided to Mkhokheli[33]. The period envisaged to provide the dwelling, without more, does not necessarily suggest a ready to assemble log structure. The documents reveal that transfer took place on 22 February 2022 which was almost four months after the applicant put its signature to the offer to purchase.

41. A further aspect which appears to militate against the applicant being prepared to engage in meaningful discussions with Mkhokheli as required by the Constitutional Court judgments mentioned earlier, is that in early December 2021 it brought a criminal charge against Mkhokheli for allegedly harvesting blue gum trees on a large

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[32] Notice to Vacate letter delivered on 21 March, paras 3(b) and 7.

[33] Clause 4 and the signature page of the Offer to Purchase. The text of cl. 4 is set out elsewhere in this judgment.

scale for the purpose of selling wood to merchants and this had resulted in extensive damage to the property and substantial financial loss.[34]

42. The applicant relies on a statement by Mr Wilhelm to support these allegations. Wilhelm does support the applicant in respect of the extensive nature of the felling. He however adds that numerous large trucks had been travelling between the area of the blue gum trees and the boundary fence, which had been cut and replaced by a concertina type temporary gate to allow the trucks to enter a neighbouring farm. He added that the tracks had carried a great amount of traffic and that trees with the highest commercial value had been felled.

43. Wilhelm added that he and van der Walt confronted "*Shorty*" (presumably Mkhokheli) who admitted to "*enabling this event*" and received R1500 per truck load but did not answer when he had last received payment.

44. Even if the applicant's version is accepted, it is evident that Mkhokheli could not have "*enabled*" such an elaborate operation and at best was given some money by others. Of concern for present purposes is that, even if the applicant's version is accepted (as was done by the Magistrate), it does not justify refusing to engage in discussions, even if it was to find out if any local person was behind the operation or approach the owner of the farm into whose land the trucks had gone to establish when the trees had been felled, as opposed to just being removed.

45. Indeed, Mkhokheli disputed that the trees were felled after the applicant had taken occupation. He claims that the blue gum trees had all been felled *before* the applicant

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[34] FA para 36

took occupation. They had been left on the land to dry and the tracks that van der Walt and Wilhelm saw were of the trucks carrying away the felled trees.

The applicant does not pertinently dispute this in reply. It only says that Mkhokheli's affidavit was a bare denial to its allegations and that he had failed to provide any evidence to corroborate his allegations. It is difficult to appreciate what more Mkhokheli could have said.

46. A further concern in the context of whether the applicant was prepared to enter into discussions with Mkhokheli is that there is no suggestion that the applicant laid a charge against anyone who was actually responsible for the operation.[35]

47. The failure to engage in meaningful discussions in respect of the type of dwelling envisaged in the Offer to Purchase (and Mkhokheli's expectations by reference to what he alleged had been undertaken by the previous owners) may be accounted for by the applicant's statement contained in its founding affidavit that Mkhokheli was obliged to relocate at the time he acquired knowledge that the farm would be sold, but failed to do so.

48. The applicant did however allege that as a last resort it attempted to mediate through its attorney with Mkhokheli. In the founding affidavit the applicant avers that meetings were held between its attorney and Mkhokheli and that:

> *"An occupation agreement, The terms of which had been agreed to by the first respondent, was drawn up….*

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[35] For present purposes I leave aside Mkhokheli's averments that he was compelled to lay a criminal charge against van der Walt because of threats he had allegedly made at about the beginning of December to kill Mkhokheli's cattle

I am advised by the applicants attorney that even though the first respondent had initially agreed to the terms of the agreement he has since reneged. "[36]

49. This court has held that an attorney representing one party does not meet the requirement of at least neutrality and impartiality (if not also independence) required of a mediator where there is no legislative requirement. [37]

50. This is manifest from the terms of the document. As objective as an attorney for one party may wish to be in trying to negotiate a settlement, it remains a negotiation where he or she must protect the client's interests.

In the present case, the document, which would have been drawn up in January 2022, refers to constructing a log home of 30 sq. metres at the applicant's cost and that Mkhokheli could build at his own cost a brick and mortar structure alongside the log home. It also accords to both Mr and Mrs Mkhokheli the right to occupy for their lifetimes, but this is dependent on them being self-sustaining, is not transferable to their dependants and the area where they can live with their domestic animals including pigs, is to be demarcated by the applicant.

In other words, the designated area is still left to an exclusive determination by the applicant and does not include grazing for Mkhokheli's cattle (nor can he retain them on the farm). While the entitlement of Mrs Mkhokheli to remain in the log home within the demarcated area for her lifetime may not be a concession but rather an acknowledgment of a life right she separately enjoys under s 8(4), the term which precludes a dependant from remaining for any period after either Mr or Mrs Mkhokheli has passed away contravenes s 8(5) and is unlawful.

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[36] FA paras 52 and 53

[37] *Conradie N.O and Others v Van Wyk and Others* [2024] ZALCC 44 at paras 125 to 129

There are other terms in the document which restrict the Mkhokhelis unless they obtain the prior consent of the applicant, which on occasion must be in writing. For instance, the applicant's written consent must be obtained if the Mkhokheli's wish to perform cultural rituals, with the *caveat* that it may not be unreasonably withheld. Even though unfair discrimination against cultural rights, whether directly or indirectly, offends the equality provisions of s 9(3) of the Constitution it is difficult to envisage the Mkhokheli' s engaging lawyers to assert their cultural rights if consent is not given.[38]

51. The question then arises whether special circumstances existed which outweighed the factors mentioned and which could justify the applicant's failure or refusal to engage in *bona fide* discussions[39] with or without the participation of the relevant State bodies.

Alleged Unlawful Conduct and the Housing Agreement

52. The applicant relied on certain unlawful conduct allegedly perpetrated by Mkhokheli. Aside from those already dealt with, the applicant claimed that Mkhokheli had threatened the applicant's family, had laid frivolous charges against van der Walt, had claimed that the farm was his and refused to leave the farmhouse.

53. In regard to these allegations, Mkhokheli denied making threats, said that he had worked loyally for over forty years with successive owners of the farm without any issues, as demonstrated by the undisputed fact that the previous owners had respected and protected his right to live on the farm. He submitted that the allegations

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[38] Unfair discrimination against cultural rights, whether directly or indirectly, offends the equality provisions of s 9(3) of the Constitution

[39] See *PE Municipality*

made by the applicant were contrived in order to by-pass the protection s 8(4) provided.

54. Mkhokheli also alleged that it was van der Walt who removed the corrugated iron that he had used in his previous shelter (i.e., it had not been part of the farmhouse) and that it was van der Walt who removed the fence which had enclosed Mkhokheli's cattle and pigs.

    Furthermore Mkhokheli alleged that everyone used the gate after the applicant put up a notice that it must be used, even though (according to him) it constituted a security risk.

55. In his answering affidavit Mkhokheli averred that the allegations contained in the notice to vacate were untruthful, were raised by the applicant to avoid the application s 10(2) and were intended to create an unfounded case against him under s 10(1) in an attempt to circumvent the life right which he enjoyed.[40]

56. The main thrust of Mkhokheli's defence was that for the forty plus years he had been on the farm he worked for and lived in harmony with each successive owner and that this was reciprocated by each of them respecting and protecting his continued occupation with his family.

57. This, Mkhokheli submitted was also evidenced by Ferreira seeking to protect the life right he, Mkhokheli, had by making express provision for it in the offer to purchase concluded with the applicant.

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[40] See s 8(4) which precludes the termination of occupation in such circumstances unless the occupier committed one of the fundamental breaches identified in s 10(1)(a) to (c).

58. The relevant provisions of the Offer to Purchase agreement between Fereira and the applicant say as much. It provided in clauses 4 to 6 that:

> "*4. Possession of the property shall be given to the purchaser on 1 November 2021 free of occupational interest to enable the purchaser to provide a suitable dwelling for Mr.Xolani Mkokeli , identity number (which was inserted) whose dwelling was destroyed in a flooding incident.*
>
> *5. It is recorded that Mr. Xolani Mkokeli, has resided on the property for more than 10 years and the purchaser is aware that Mister Mkokeli is entitled to a life-right residence on the property hereby sold.*
>
> *6. A habitation agreement shall be entered into between the purchaser as new owner and Mr. Mkokeli as life-right holder to regulate this"*
>
> (emphasis added)

59. These were obligations that the applicant undertook to comply with and clause 8 of the agreement provided that van der Walt and Ms Handley as directors of the applicant bound themselves as sureties and co-principal debtors with the applicant in favour of Ferreira for the performance by them of all the applicants obligations in terms of the agreement.

60. Earlier it was pointed out that although payment of the purchase price would only occur on date of registration of transfer, in terms of clause 4 possession was given to the applicant for the purpose of providing "*a suitable dwelling*" for Mkhokheli and for this reason the applicant would not be obliged to pay any occupational interest.

61. van der Walt claimed that a week or so after concluding the offer to purchase agreement (which was signed on 27 October 2021) he visited the farm, found it in a state of total disrepair and concluded an oral agreement with Mkhokheli in terms of

which Mkhokheli accepted a log home consisting of three rooms and an outside toilet with running water at applicant's expense. van der Walt added that if Mkhokheli so wished, he could build onto the log home at his own expense within the space designated by the applicant and that on completion of the log home Mkhokheli would vacate the farmhouse.[41]

62. It was in the third week of November 2021 that van der Walt alleges he gave Mkhokheli a document titled "*Housing Agreement*" which he claims recorded their earlier verbal agreement but which Mkhokheli refused to sign. At the same time he avers that he informed Mkhokheli that contractors would be assembling the log home during the first weekend in December.

While accepting that the log home was not assembled[42], van der Wat alleged that this was because Mkhokheli told the contractors in isiXhosa that he " *did not want the contactors on his farm and further he would never move into the Log Home*" (emphasis added by the applicant in its founding affidavit).[43]

63. Mkhokheli in his answering affidavit replied to the allegations contained in the PART B-Eviction section of the application, not those which refer to the order for interim relief sought in part A (i.e., paras 14 to 59). Although not ideal, I am satisfied that Mkhokheli pertinently addressed the gravamen of the allegations made against him.

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[41] FA paras 28 to 30

[42] FA para 38 states: *"As a result, the log home was not assembled on 4 December 2021, even though the applicant had expended over R57 300.00 in advance to purchase it and to have it assembled."*
Furthermore FA para 42 clearly states: *"The applicant has on numerous occasions attempted to comply with the obligations to build the first respondent a log home, that the first respondent has frustrated the applicants attempts to build the log home by intimidating applicants directors and the building contractors."*
Those passages were contained in the Part A portion of the founding affidavit seeking interim relief. However in the Part B portion of that affidavit van der Walt, while still not claiming that the log home has been built contends that it is only the interior fittings that have not yet been completed as a result of Mkhokheli's alleged unlawful interference.

[43] Ib. The gravamen of paras 33 to 34 and 37 which formed part of the interim interdict application were effectively repeated in paras 63, 64(v) and 71(iii)(a)

64. In his answering affidavit Mkhokheli claimed that he always recognised the applicant's ownership of the farm, had not refused to vacate the farmhouse for the applicant, but only said he would do so if he was provided with "*alternative suitable accommodation as agreed upon.*"

He also averred that subsequently, in an attempt to mediate the matter once LASA became involved, he made a reasonable offer to take possession of a vacant house on the farm which had previously been occupied by one David even though, according to him, it was "*not that much suitable and conducive, but I was prepared to sacrifice, but the Applicant refused such offer.*"[44]

65. In its replying affidavit, and in apparent contradiction to what was said in the founding affidavit. the applicant now claimed that, save for interior fittings, it had in fact built the log home but that Mkhokheli refused to occupy it.

66. The only response the applicant furnished in regard to Mkhokheli moving into David's home as a mediated solution was the assertion that it is "*no longer an option, at the First Respondent's* (i.e. Mkhokheli's) *disposal.*"

67. Mkhokheli clearly disputes that the applicant had provided him and his family with adequate suitable alternative accommodation as undertaken by the applicant in terms of the sale agreement concluded with Ferreira which benefit Mkhokheli clearly accepted and insisted be complied with.

In this regard it is unclear if the applicant contends that Mkhokheli had prevented the log house from being constructed or that it was all but completed.[45]

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[44] AA paras 7.1 and 7.2, 8 (v), 9, 10,12 and 13, 16 to 18.
[45] See ftn 42 *supra*

68. There however remain clear disputes as to;

a. whether the applicant complied with it obligation to provide suitable accommodation for Mkhokheli as undertaken in the offer to purchase, the benefit of which had been accepted by him;

b. what constitutes suitable alternative accommodation in the circumstances;

c. whether the applicant could rely on an oral agreement with Mkhokheli, the effect of which may have prejudiced the rights which Mkhokheli, his wife and family enjoyed under ESTA

and

d. whether the applicant was attempting to circumvent the protective provisions of ESTA which accorded Mkhokheli a life-tenure right under s 8(4)

69. These issues are not necessarily unrelated because the applicant alleged in its founding affidavit that Mkhokheli only commenced engaging in his alleged unlawful conduct during the third week of November 2021 and believed that this was why their relationship "*started turning sour*".

70. Factually this coincided with the date when the applicant had presented Mkhokheli with a four page housing agreement which he refused to sign, stating (according to the applicant) that he would not vacate the farmhouse[46].

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[46] FA paras 34 and 35

It is Mkhokheli's conduct from only that time onwards on which the applicant relies for terminating the right of residence and seeking an eviction under s 10(1) and not s 10 (2) with its additional protective provisions that are set out in subsection (3).

71. It is therefore appropriate to consider the reasonableness of the terms of the housing agreement and whether it records what the applicant claims had been agreed with regard to the dwelling and Mkhokheli vacating the farmhouse.

72. A perusal of the document reveals that it is a standard form agreement applicable to all categories of ESTA occupiers. It does not in its terms recognise that as a fact the applicant enjoys a life right. It confusingly provides a commencement date of occupation as 1 December and states in clause 2 under the bold heading "*Termination of Housing Agreement*" that the provision of housing is "*related to the service agreement with the Head of the House and will thus be terminated when the service agreement is terminated*".

Critically, it fails to record the alleged terms which the applicant claims had been orally agreed. There is no provision dealing with Mkhokheli being entitled to remain in the farmhouse until a dwelling was provided or what type of dwelling would be provided. Equally worrying, the document does contain a provision that its terms could not be changed unless agreed by the parties.

Aside from these observations, there are other restrictions in the housing agreement which deviated from the rights of occupation which Mkhokheli and his wife had been enjoying under ESTA.

73. Even if the applicant's version of the earlier oral agreement was to be accepted, the written document deviated so materially from the applicant's allegations regarding

what had been discussed that it should not have come as a surprise that Mkhokheli refused to sign it and that their relationship soured from then on.

74. The extent to which the housing agreement's deviation from the terms of the alleged oral agreement, and the failure to record its essential terms, needed to be explained if the applicant was committed to having the application heard on paper. It did not, and the court was therefore obliged to implement the default position of *Plascon-Evans*.

75. The events of that day therefore become relevant in determining whether the applicant was justified in terminating the relationship by reference to s 8(1) or whether Mkhokheli was justified in seeking protection by laying a criminal complaint at the police station.

76. It is evident from the competing contentions of the parties and the extensive cross-referencing undertaken by this court in this judgment, that there exist *bona fide* disputes of fact. Mkhokheli had requested that these disputes be referred to oral evidence[47]. The applicant however persisted that there was no genuine dispute and insisted that the case be argued on the papers alone.

77. Not only did the court *a quo* fail to weigh the contents of the offer to purchase in light of the respective allegations and fail to properly consider and apply the import of *Plascon-Evans,* but it also failed to consider and decide, as it was obliged to under s 12(6) read with s 8(6), whether in its opinion one of the purposes of the intended eviction was to prevent Mkhokheli, as the occupier, from acquiring rights in terms of s 8(4), an issue which, as mentioned earlier, was pertinently raised by the defence.

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[47] AA para 10(a)

78. This court exercises inquisitorial powers. A concern which arises is that the case was presented by the applicant as an ESTA eviction and this was accepted by the defence. The concern is that in the answering affidavit Mkhokheli avers that he had been a farm worker since 1979 and that his wife had also worked there, that he used an area for his own farming of cattle and pigs, and claims that he had worked for Ferreira until he, Mkhokheli, retired and "*never received any monies due to me*"[48].

The case was argued as an ESTA eviction. This court, if it had been seized with the matter as a court of first instance, would have been obliged to enquire as to when and under what circumstances Mrs Mkhokheli had first come onto the farm, and whether she independently enjoyed a life right. It would also have had to enquire about what was meant by *"never received monies due"* and if the right to graze was in consideration for providing labour, in order to satisfy itself that the nature of the relationship was in fact under ESTA and not that Mkhokheli had been a labour tenant.

Laying Frivolous Charges

79. The court *a quo* also considered that the charges which Mkhokheli had laid against van der Walt were frivolous and malicious.

This appears to have been on an acceptance of the applicant's submission that Mkhokheli had not refuted these allegations because he filed no affidavit in response to Part A of the application. Mkhokheli however dealt with it fully in Part B of his answering affidavit which was delivered within 20 days of the launch of the application.

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[48] AA paras 4.1.1, 4.1.2, 6.2 and 9(ix)

80. In regard to the allegation that he had laid a vexatious and frivolous complaint with the police against van der Walt, Mkhokheli said in his answering affidavit that:

> "*... the applicant instructed me to clean up the place where he was going to build the house for me. I advised him that I will first go and collect my old age pension and then when I return back I will clean up. When I returned back the applicant asked me why I did not clean up as he instructed me and I advised him that I told him that I will first go and withdraw my pension, it's then he threatened to shoot and kill the cattle and subsequent to that I opened the case against him for those serious threats.*"[49]

The applicant's only response was a general assertion that Mkhokheli only proffered bare denials and failed to provide evidence to corroborate his allegations[50].

81. Mkhokheli's averments regarding the laying of a complaint against Mr van der Walt cannot be classified as a bare denial. It is also difficult to appreciate what corroboration he could provide other than to rely on the applicant's own concession that a complaint had been laid.

82. Moreover, since the applicant would have been aware of the complaint laid, the only reasonable conclusion that a court could have reached for the applicant's failure to

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[49] AA para 8(i)

[50] RA para 12. The applicant's reply to this, and the eleven other paragraphs of the answering affidavit (covering one and a half pages of single spaced print) dealing with the applicant's allegations in its founding affidavit of the grounds for terminating the right of residence, was that:

> *"Besides the bare denial of the allegations contained in paragraph 64 of the founding affidavit, the first respondent has failed to provide any evidence in corroboration to his allegations."*

deal with the response is that the complaint was consistent with Mkhokheli's averments and that none of the *Plascon- Evans* exceptions applied.

83. Accordingly, it was not competent for the court *a quo* to disregard *Plascon-Evans*, even if it could be said that laying frivolous charges amounts to a ground recognised in s10(a) to (c) for terminating a life tenancy under s 8 (4); this was an issue which should have been, but was not, considered.

The court either had to accept the respondent's version or refer the matter to evidence. What it could not do was grant an eviction order in the face of Mkhokheli's averments. Nor could it assume that in allowing an interim order to be taken, Mkhokheli was admitting to the merits of the case. It regularly occurs that interim orders are not opposed but final relief is. And there are sound reasons for a litigant not incurring unnecessary costs in preparing urgent papers or opposing interim interdictory relief which is intended to be a holding position pending the final determination of the matter.

84. Unfortunately in this case, there were orders which, although couched as interdictory relief, were in fact declaratory orders which altered the *status quo ante* , in particular the removal of grazing rights by requiring Mkhokheli to remove his cattle and pigs instead of requiring the fence to be re-erected.

Mkhokheli's occupation of the farmhouse pending the provision of a suitable dwelling

85. Mkhokheli alleged that the previous owner allowed him to reside in the farmhouse when his wooden dwelling was swept away by floods.

This was at a time when he had already started building the foundation for a replacement dwelling. The previous owner said that he should stop because it would be small and unable to accommodate Mkhokheli and his family. According to Mkhokheli, the previous owner said that he would build a house for them, to which Mkhokheli was obviously agreeable.

86. Mkhokheli denied that he ever regarded the farm as his own. He claimed that he acknowledged the applicant's right to take possession of the farmhouse provided he was given the alternative suitable accommodation as had been agreed by the previous owner.

87. He also claimed to be agreeable to move from the farmhouse to David's erstwhile dwelling on the farm, even though it was less satisfactory to the one he alleges was to be provided, but that the applicant refused such offer.[51]

88. The applicant did not dispute that Mkhokheli resided in the farmhouse until *"alternative suitable accommodation could be provided."*[52]

89. However the applicant then contended that Mkhokheli's issue was not with it but with the previous owner and that;

> *"... the applicant was never a party to any agreement concluded between the first respondent and Mr. Ferreira but he's being held ransom for what was promised."*[53]

and that;

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[51] AA paras 6, 7 and also elsewhere such as para 10 and 13
[52] FA para 62
[53] RA para 10

> *"the first respondent boldly states that he has never refused to move out of the farmhouse, as long as he is provided with alternative accommodation. This is simply untrue. The first respondent was built a log home, at applicant's expense, which he has refused to occupy. Moving into "David's house" is no longer an option, at the first respondents disposal."* [54]

90. Three features stand out.

The first is that the applicant does not dispute that the previous owner had promised to build Mkhokheli a brick and mortar structure adequate to accommodate his family.

The next is that the applicant vacillates between accepting on the one hand that it was obliged to provide Mkhokheli with a suitable dwelling as contemplated in its offer to purchase with Ferreira (the relevant passages have already been mentioned) and on the other hand contending that the promise was made by someone else which was of no concern to it.

The last is the failure to explain why it was not prepared to consider David's house as an option.

91. For reasons given earlier, on the papers, a court cannot conclude that Mkhokheli caused the relationship to sour or that on an application of *Plascon-Evans* Mkhokheli's denials of unlawful conduct could be rejected.

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[54] RA para 11 (incorrectly referring to para 9 of the AA whereas it should be a reference to para 7)

92. Accordingly the applicant was unable to bring its case within the compass of s 10(1), which by reason of s 9(2)(c) precludes a court from granting an eviction order.[55]

Even if the applicant could have overcome these difficulties, there were no special circumstances present which militated against the applicant engaging in meaningful discussions with Mkhokheli. On the papers the applicant failed to demonstrate that it had engaged in meaningful discussions. The effect is that on an application of the *ratio* of *PE Municipality* in particular, and which by reasons of the other cases mentioned earlier have been applied to ESTA evictions:

a. It was not just and equitable to terminate Mkhokheli's residence under s 8(1) and therefore an eviction order could not, for this reason too, be competent under s 10(1);

b. Even if the applicant had proceeded under s 10(2) read with 10(3) it would not have been just and equitable to grant an eviction order

CONCLUSION

93. The application cannot be resurrected. It is both procedurally and substantively flawed for the reasons given. This means that the applicant, if it wishes to evict the Mkhokhelis and their family will have to commence proceedings *de novo*.

94. It is also evident that this decision will not end the matter. In terms of the cases mentioned earlier meaningful engagement is to occur at the earliest opportunity once

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[55] Section 9(2)(c) provides that;

A court may make an order for the eviction of an occupier if-

....

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

a landowner has considered terminating the right of residence. For this reason, this decision is to be referred to the second respondent Municipality and to the relevant Provincial Department concerned with Rural Development and Land Reform.

95. It is also necessary to hear argument with regard to whether the effect of this order results in any future termination of the right of residence and any further proceedings being brought by the applicant for an order of eviction against the Mkhokhelis being subject to the provisions of the Land Court Act 6 of 2023 and subject to the provisions of the Extension of Security of Tenure Amendment Act 2 of 2018 (both of which came into effect in April 2024) or whether they remain subject to the provisions of ESTA prior to the amendments effected by these Acts. An appropriate order in terms of this court's Rules has been made to deal with this.

96. Finally the court regrets the delays which have occurred. Firstly the matter was not immediately brought on automatic review and Mkhokheli was obliged to bring an appropriate application, which incomprehensibly was opposed. Unfortunately the procedures then applicable required the record to be delivered to this court in hard copy and further administrative issues arose. These should now be ironed out with the utilization of the electronic Court OnLine digital case management system which has now become operational in the Land Court for Magistrates' Court ESTA reviews .

SPILG, J