

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION (MAIN SEAT)

Case Number: 1025/2020

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|----|---|
| 1. | REPORTABLE: YES/ <u>NO</u> |
| 2. | OF INTEREST TO OTHER JUDGES: YES/ <u>NO</u> |
| 3. | REVISED. |

22 June 2021

[SIGNED]

DATE

SIGNATURE

In the matter between:

HOTAZEL DEVELOPMENTS (PTY) LTD

Applicant

and

VARIOUS OCCUPIERS OF THE REMAINING

First Respondent

EXTENT OF PORTION 4 AND/OR THE REMANING

EXTENT OF THE FARM BARCLAYS VALE J288

REGISTRAITION DIVISION JT, PROVINCE

MPUMALANGA, AS PER ANNEXURE "FA2"

AND TEN OTHER RESPONDENTS

This judgment was handed down electronically by circulation to the parties' legal representatives by email and will be released to SAFLII. The date and time for hand-down is deemed to be 11h30 on 22 June 2021.

JUDGMENT

Roelofse AJ:

[1] The is an application for the eviction of persons in occupation of a number of houses situated on agricultural land. The houses are situated on two farms¹(“*the property*”). The farms are situated near Mbombela in the Mpumalanga Province.

[2] The application reached this court after the applicant has applied and was authorised and directed to serve the notice of motion and founding papers in this application together with the section 4(2) notice in terms of the provisions of the Prevention of Illegal Evictions and Unlawful Occupation of Land Act² (“*PIE*”) upon the occupiers of the houses.

[3] Service was effected upon the first respondents in terms of and in compliance with the order of Her Ladyship Ms. Justice Greyling-Coetzer AJ dated 16 April 2021. The returns of service upon the evictees reflect that service of the notice of motion, court order as well as the section 4(2) notice was effected by the Sheriff on 9 July 2021. The Sheriff appears to have attended to 154 houses on the property in order to effect service. Of the 154 houses he attended, the documents were served personally on 4 persons found at the houses.³ In all other instances, the documents were placed “....*to the Outer door*....” of

¹ Described in the Notice of Motion as: the Remaining Extent of Portion 4 and/or the Remaining Extent of the Farm Barclays Vale, 288 Registration Division JT, Province Mpumalanga.

² 19 of 1998.

³ Philip Nxumalo (house A16), Albert Mathonsi (house B9), Rose Mkhonto (house C2) and Mr. Mkhathswa (house C7).

150 houses.⁴ The documents were also affixed to three notice boards at the three main entrances to the property. In addition to service by the Sheriff, further notices were set up at prominent places at the property and the applicant endeavoured to deliver letters to each of the first respondents personally in the form of a notice.

[4] The second to fifth, eighth and ninth respondents were served with the application by the Sheriff. The sixth and eleventh respondents were served by email by agreement upon their attorneys. The seventh respondent was served by placing copies of the papers on notice boards. The tenth respondent was served by affixing copies of the papers to buildings as none of its members were willing to accept service.⁵

[5] In addition, the notice of set down of the application was also served upon the respondents.

The relief the applicant is seeking

[6] The applicant seeks orders that:

- a. The first respondent's occupation of the property be confirmed as constituting unlawful occupation as meant in the Prevention of Illegal Eviction and Unlawful Occupation of Land Act⁶ ("*PIE*");⁷
- b. All persons listed as the first respondent as referred to in annexure "FA2" and all other unlawful occupiers identified by the Sheriff, and all persons occupying through them ("*the evictees*") be evicted from the property;⁸

⁴ As the houses were locked.

⁵ The fifth respondent is the Regional Land Claims Commissioner, Mpumalanga. The sixth respondent is the Mawulu Communal Property Association. The seventh respondent is the Mawulu Community Property Association. The eighth respondent is the Mbombela Local Municipality. The ninth respondent is the Chief Land Claims Commissioner. The tenth respondent is the Mawulu Concerned Group. The eleventh respondent is the members of the Mawulu Communal Property Association.

⁶ Act 19 of 1998.

⁷ Prayer 1 of the notice of motion.

⁸ Prayer 2 of the notice of motion.

- c. The evictees be ordered to vacate the property within 30 days after the date upon which the court grants the order;⁹
- d. Should the evictees fail to comply with the eviction order in paragraphs (c) and (d) above, the second to fourth respondents¹⁰ together with the Sheriff of this court be authorised and mandated to evict the evictees;¹¹ and
- e. The evictees any other person, entity or respondent who opposes the application be ordered to pay the costs of the application jointly and severally.¹²

[7] In paragraph 6 of the founding affidavit, the applicant describes the first respondent as “....various occupiers of [the property] whose full and further particulars are unknown to the applicant despite various and its best efforts possible to obtain the same.”

[8] In paragraphs 21 and 22 of the founding affidavit, the applicant describes the purpose of the application:

“The main purpose of this application is to obtain an eviction order against the first respondent including all persons comprising the first respondent, their family members and/or any other persons who might possibly reside through them in the houses on the property, as well as all other unlawful occupiers of the property....”

“Thus, an order will be sought from the above Honorable Court to the extent that the first respondent is evicted from “the houses” situated on “the property”, together with all their family members and/or any other persons, as well as all other unlawful occupiers after property who may reside through them, together with all

⁹ Prayer 3 of the notice of motion.

¹⁰ The Minister of the South African Police Services, National Government (second respondent); the Commissioner of the South African Police Services, National Government (third respondent); and The Station Commander of the Nelspruit South African Police Services / Station (fourth respondent).

¹¹ Prayer 4 of the notice of motion.

¹² Prayer 5 of the notice of motion.

the movable assets, including but not limited to any possible livestock they may own.”

[9] Annexure “FA2” to the founding affidavit comprises of the names of 90 persons. Against each person’s name appears a house number which is purportedly occupied by that person. Initially, the applicant sought the eviction of all the persons on the list.

[10] On 12 April 2021, the applicant withdrew the application against 33 persons that were included in annexure “FA2”. There is therefore no need to concern myself with those persons as the applicant no longer seeks their eviction. The remaining 57 persons included in annexure “FA2” therefore constitute the persons against whom the applicant is specifically proceeding including all persons occupying through them as well as all other occupiers identified by the Sheriff. I shall refer to annexure “FA2” (after the names of the persons listed therein against whom the applicant has withdrawn have been deleted), as “*the list*”.

[11] It is immediately clear that the applicant does not only seek the eviction of the persons on the list. The applicant also seeks the eviction of all persons who occupy the property through the persons mentioned on the list as well as other unlawful occupiers identified by the Sheriff, and all persons occupying through them. The persons noted by the applicants as occupiers “through them” is clearly meant to be persons who occupy through the persons on the list and through all other unlawful occupiers, as identified by the Sheriff. The applicant therefore also seeks the eviction of persons not included on the list and those persons who occupy the property “through” them.

[12] In their answering affidavit, the first respondents identify certain persons who are not included on the list. The applicant, in its replying affidavit and in a supplementary replying affidavit responds to the evidence regarding the persons so identified by the first respondents. To these affidavits and the issues raised therein I shall return later in this judgment.

[13] In paragraph 77 of the applicant's supplementary replying affidavit, the applicant sets out as follows:

“The applicant will seek an eviction order as per the notice of motion and which will include the additional occupiers, not included in the list of names annexed to the founding papers, and who were identified by the respondents in their answering papers. This will include the persons dealt with in the supplementary replying affidavit above, which will however exclude any persons contained in the notice of withdrawal filed on 12 April 2021.”

[14] The relief the applicant is ultimately seeking therefore forces the court to differentiate between different classes of occupiers as appears from the papers before me. To my mind there are three categories of first respondents:

- a. The first category - all persons mentioned on the list together with those persons who occupy the property through them;
- b. The second category - all persons identified and mentioned by the first respondent in the answering affidavit and who do not appear on the list together with those persons who occupy through them.¹³
- c. The third class - all other unlawful occupiers of the property and all persons who occupy the property through them not identified by either the applicant or the first respondents.

[15] In respect of the first and second category of first respondents, the applicant wants the Sheriff to identify the persons and seeks an order that the Sheriff execute the eviction if the first respondents do not obey the eviction order should same be granted. The persons who occupy the property through the first- and second category of first respondents may

¹³ The first respondent opposes the application and delivered an answering affidavit which will be dealt with more fully below.

be easy to determine. It simply means that all persons living together with any of the first- or second category of first respondents in the same home is to be evicted.

[16] I have a difficulty with the third category of first respondents against whom an eviction is also sought. This matter differs from a matter where a person or group of persons have unlawfully taken occupation of a property where there has never before been any nexus between them and the property. I think of the typical “land grab” situations that are so prevalent nowadays. In this application, even upon a superficial evaluation of the evidence, there is or has been at least some form of nexus between some of the occupiers of the property. In this matter each and every occupier’s situation must be analyzed in order to determine whether the occupation is lawful or not.

[17] I am not going to grant an order to the effect that the Sheriff is required to identify unlawful occupiers of the property who has not specifically been identified by the applicant or the first respondents and then allow the Sheriff to evict them. The court is the final arbiter over the lawfulness of unlawfulness of occupation and whether an eviction should be granted. What the applicant wants is that the Sheriff be both the judge and the executioner. That neither I nor any other court can allow. I therefore proceed to only deal with the first and second category of first respondents. The third category of first respondents is therefore excluded from the first respondents henceforth.

The applicant’s cause of action

[18] The applicant’s cause of action is squarely founded upon the provisions of PIE. The applicant specifically states that the provisions of the Extension of Security of Tenure Act¹⁴ (“*ESTA*”) does not apply in this application.

[19] The applicant alleges that it is the owner of the property and that the first respondents are in occupation of various dwellings and structures on the property. The applicant alleges that the first respondents are in occupation of the property without its

¹⁴ Act 62 of 1997.

consent and to the extent that the first respondents may be in occupation of the property on consent they believe they have or may have had, such ostensible consent was revoked. The applicant alleges that despite its demand that the first respondent vacate the property, they have failed to do so. The applicant alleges that the continued occupation by the first respondents of the property has already caused it serious harm and prejudice that will only further perpetuate and increase if the first respondents are not evicted.

The first respondents' defence

[20] Only the first respondents oppose the application and only they filed and delivered an answering affidavit. The answering affidavit was deposed to by Ms. Nomcebo Bianca Maphanga (*"Ms. Maphanga"*), who was allegedly authorised by the first respondents by virtue of confirmatory affidavits deposed to by the other first respondents.

[21] The first respondents oppose the application on the basis that:

- a. The applicant has no standing in the application as it is neither the owner of the property nor is it in charge thereof;
- b. The majority of the first respondents are occupiers for purposes of ESTA; and [my underlining]
- c. The minority of the first respondents have an existing land claim over the property in terms of the Restitution of Land Rights Act¹⁵ (*"the Restitution Act"*) and therefore, in terms of the provisions of the Restitution Act, none of these first respondents may be evicted without the consent of the fifth respondent.[my underlining]

¹⁵ Act 22 of 1994.

[22] Before I deal with the facts of the application, the legislation that regulates security of tenure, evictions, unlawful occupation of property and land restitution need to be restated to the extent necessary in order to decide this application.

[23] Three pieces of legislation, being PIE, ESTA and the Restitution Act have a bearing in this matter. In addition, the Constitution of the Republic of South Africa, 1996, to which PIE, ESTA and the Restitution Act owes its existence, has particular relevance. I proceed to deal with the Constitution, ESTA, PIE and the Restitution Act in turn.

The Constitution

[24] Section 10 of the Constitution provides:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

[25] Section 25(6) of the Constitution provides:

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

[26] Section 25(9) provides:

“Parliament must enact the legislation referred to in subsection (6).”

[27] Section 26 of the Constitution provides:

“Housing

- 1. Everyone has the right to have access to adequate housing.*
- 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*

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

ESTA

[28] ESTA was enacted as the legislation contemplated under subsection 25(9) of the Constitution. The relationship between section 10 and section 25(6) of the Constitution and thus the right to security of tenure was most aptly described by Madlanga J in Daniels v Scribante and Another (at paras 2 and 3):

“[2] This takes us to the nub of this matter: the right to security of tenure. An indispensable pivot to that right is the right to human dignity. There can be no true security of tenure under conditions devoid of human dignity. Though said in relation to the right to life, the words of O’Regan J are apt: “without dignity, human life is substantially diminished”. Addressing herself directly to human dignity, she said:

“The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights].

[3] Here the right to security of tenure and the right to human dignity are implicated in the context of a person who is an occupier of farmland under the Extension of Security of Tenure Act (ESTA). That her occupation is in terms of this Act is common cause.” (References omitted)

[29] ESTA was enacted to:

- a. Provide for measures with State assistance to facilitate long-term security of land tenure;
- b. Regulate the conditions of residence on certain land;
- c. Regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to
- d. Regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land.

[30] The application and implementation of ESTA, insofar as it is relevant to the land in issue in this application, is set out in section 2:

“(1) Subject to the provisions of section 4¹⁶, this Act shall apply to all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships, but including—

(a); and

(b)

(2) Land in issue in any civil proceedings in terms of this Act shall be presumed to fall within the scope of the Act unless the contrary is proved...”

[31] The following definitions in ESTA is important for purposes of deciding this application:

- a. *“consent” means 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*

¹⁶ Which deals with subsidies granted by the Minister of Rural Development and Land Reform for certain purposes and under certain circumstances.

or eviction by a holder of mineral rights, includes the express or tacit consent of such holder;

- b. “court” means a competent court having jurisdiction in terms of this Act, including a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996);*
- c. “employee” means an employee in terms of the Labour Relations Act;*
- d. “evict” means to deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of this Act, and “eviction” has a corresponding meaning;*
- e. “occupier” means a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding—*
 - a person using or intending to use the land in question mainly for or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and*
 - a person who has an income in excess of the prescribed amount;*
- f. “owner” means the owner of the land at the time of the relevant act, omission or conduct, and includes, in relation to the proposed termination of a right of residence by a holder of mineral rights, such holder in so far as such holder is by law entitled to grant or terminate a right of residence or any associated rights in respect of such land, or to evict a person occupying such land;*
- g. “terminate” includes to withdraw consent to a person to occupy or use land;”*

[32] Section 3 of ESTA deals with consent. The section provides:

“3. Consent to reside on land

- (1) *Consent to an occupier to reside on or use land shall only be terminated in accordance with the provisions of section 8.*
- (2) *If a person who resided on or used land on 4 February 1997 previously did so with consent, and such consent was lawfully withdrawn prior to that date—*
 - a. that person shall be deemed to be an occupier, provided that he or she has resided continuously on that land since consent was withdrawn; and*
 - b. the withdrawal of consent shall be deemed to be a valid termination of the right of residence in terms of section 8, provided that it was just and equitable, having regard to the provisions of section 8.*
- (3) *For the purposes of this Act, consent to a person to reside on land shall be effective regardless of whether the occupier, owner or person in charge has to obtain some other official authority required by law for such residence.*
- (4) *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 one year shall be presumed to have consent unless the contrary is proved.*
- (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.*
- (6) *.....”*

[33] Section 9(1) of ESTA provides that an occupier may be evicted only in terms of an order of court issued under ESTA. Section 9(2) provides for the circumstances under which an occupier may be evicted. Section 10 applies to person who was occupier on 4 February 1997. Section 11 applies to an occupier person who was occupier after 4 February 1997. To each of the categories of occupiers in sections 10 and 11, different circumstances for an eviction apply. The former is more onerous than the latter.

[34] Section 17 of ESTA provides for the choice of court. The high court only has jurisdiction if all parties to the proceedings consent thereto.

PIE

[35] PIE was enacted to give effect to the fundamental right in section 26(3) of the Bill of Rights.

[36] PIE provides for the prohibition of unlawful eviction and provides for procedures for the eviction of unlawful occupiers while still recognising the right of landowners to apply to a court for an eviction order in appropriate circumstances.

[37] PIE applies to all land throughout the Republic.¹⁷

[38] Under sub-section (xi) of section 1 of PIE, an unlawful occupier is defined as:

“a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996).”

[39] It is immediately clear from the aforesaid definition that:

- a. PIE expressly excludes occupiers as defined in ESTA;
- b. PIE pertains to occupation without the owner or person in charge of land's consent or any other right in law to occupy. It matters not if the occupation has at any time prior been consensual - what matters is that the present occupation is without consent or without or any other right in law to occupy.

¹⁷ Section 2 of PIE.

[40] Consent is defined as:¹⁸

“the express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question”

[41] Evict is defined as:

“to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and ‘eviction’ has a corresponding meaning”

[42] Sections 4(1) to 4(5) set out the procedure for an eviction.¹⁹ Sections 4(6) to 4(9) provide for the circumstances under which an eviction may be ordered and executed. Sections 4(10) and 4(11) provides for the execution of an eviction order. Section 4(12) grants a power to the court to vary any condition for an eviction order.

[43] The provisions of PIE have been the subject of many decisions in or courts. It is not necessary to repeat all the principles that have emerged, and which are trite by now. For

¹⁸ Section 1(ii) of PIE.

¹⁹*“4(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.*

(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

(3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.

(4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.

(5) The notice of proceedings contemplated in subsection (2) must— (a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier; (b) indicate on what date and at what time the court will hear the proceedings; (c) set out the grounds for the proposed eviction; and (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.”

purposes of this judgment, I place emphasis on what was said in Machele and Others v Mailula and Others²⁰, at para. 14:

“In Port Elizabeth Municipality v Various Occupiers this Court said the following:

‘The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was adopted with the manifest objective of . . . ensuring that evictions, in future, took place in a manner consistent with the values of the new constitutional dispensation. Its provisions have to be interpreted against this background.’

The application of PIE is not discretionary. Courts must consider PIE in eviction cases. PIE was enacted by Parliament to ensure fairness in and legitimacy of eviction proceedings and to set out factors to be taken into account by a court when considering the grant of an eviction order. Given that evictions naturally entail conflicting constitutional rights, these factors are of great assistance to courts in reaching constitutionally appropriate decisions.”

The Restitution Act

[44] The Restitution Act provides for the restitution of rights in land in respect of which persons or communities were dispossessed under or for the purpose of furthering the objects of any racially based discriminatory law; to establish a Commission on Restitution of Land Rights and a Land Claims Court; and to provide for matters connected therewith.

[45] The following definitions in the Restitution Act is relevant for purposes of this application:

- a. "claim" means any application lodged with the Commission in terms of this Act.

²⁰ 2010 (2) SA 257 (CC).

- b. "claimant" includes a community.
- c. "community" means any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group.

[46] Sub-section 11(7) of the Restitution is raised in the papers. Sub-section 11(7) provides:

“Once a notice has been published²¹ in respect of any land and a temporary note has been made in the records as contemplated in subsection (6)(b)-

- a. no person may in an improper manner obstruct the passage of the claim;*
- b. no claimant who was resident on the land in question at the date of commencement of this Act may be evicted from the said land without the written authority of the Chief Land Claims Commissioner;*
- c. no person shall in any manner whatsoever remove or cause to be removed, destroy or cause to be destroyed or damage or cause to be damaged, any improvements upon the land without the written authority of the Chief Land Claims Commissioner;*
- d. no claimant or other person may enter upon and occupy the land without the permission of the owner or lawful occupier.”*

[47] From the legislative provisions set out above, the basis of the occupier’s occupation is the first issue to be determined because the requirements that must be met before an eviction order may be granted differ in respect of different kinds of occupiers. This court cannot entertain an eviction application in terms of ESTA unless the parties agreed to its jurisdiction. In terms of the Restitution Act, the Commissioner’s permission is required before an eviction may be carried into effect in respect of a claimant who has been in

²¹ The notice of the land claim the commissioner shall cause to be published in the Gazette and shall take steps to make it known in the district in which the land in question is situated – section 11(1)(b).

occupation of the land that is claimed at the commencement of the Restitution Act, being 25 November 1994. The basis for an eviction under PIE is that the occupier's occupation is without the consent of the owner or person in charge of the land in question. ESTA presupposes consent to occupy whether express or tacit. In respect of the land from which the eviction is sought, ETSA generally only applies to agricultural land whereas PIE applies to all land (including agricultural land). ESTA provides for presumptions in respect of the nature of the land whereas PIE does not provide for any presumptions in respect of the land.

[48] What type of occupier, i.e an occupier in terms of PIE or ESTA or the Restitution Act must be determined as the class of occupier will determine the court's jurisdiction, the process of the eviction, the factors to be taken into account for an eviction and the involvement and obligations of the state institutions in the process prior to an after an eviction. The inquiry into the type of occupier in respect which the eviction is sought is to be determined upon the facts of the matter. I therefore commence to determine the first question – are some or all of the first respondents ESTA occupiers or are some of all of them PIE occupiers and whether the Restitution Act is applicable to any one or all the first respondents.

The preliminary issues

[49] Before I consider the facts and apply the law thereto in this application, I must decide two preliminary issues that are raised in this application.

[50] The first respondents launched an application in terms of the provisions of Rule 6(15) to strike-out certain portions of the applicant's replying affidavit (*"the Rule 6(15) application"*).

[51] The applicant applies for leave to file and serve a supplementary replying affidavit (*"the Rule 6(5)(e) application"*). In terms of Rule 6(5)(e), the court may in its discretion

permit the filing of further affidavits. The supplementary replying affidavit constitutes such a further affidavit. Both these applications are opposed.

[52] The outcome of these applications will ultimately determine the ambit of the evidence I have to consider in this application.

The Rule 6(15) application

[53] Rule 6(15) provides:

“The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted.”

[54] It is immediately clear from the provisions of Rule 6(15) that even if the matter in an affidavit is scandalous, vexatious or irrelevant, prejudice must be established for the matter to be struck out from the affidavit.

[55] Nowhere in the first respondents’ affidavits in the Rule 6(15) application do they aver that the alleged offending paragraphs in the applicant’s replying affidavit are scandalous, vexatious or irrelevant. The first respondents claim prejudice because of the offending paragraphs. The point is this, prejudice must be alleged and established in an application in terms of Rule 6(15) in addition to establishing that the offending material is either scandalous and/or vexatious and/or irrelevant.²² This the first respondents have not established. Even if I am wrong in this regard, due to the nature of applications for eviction

²² Beinash v Wixley y 1997 (3) SA 721 (SCA) at 733A-B.

“What is clear from this Rule is that two requirements must be satisfied before an application to strike out matter from any affidavit can succeed. First, the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant. In the second place the Court must be satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced.”

and the court's duties in such applications, more information upon which a decision can be taken is better. The Rule 6(15) application must fail.

The Rule 6(5)(e) application

[56] Rule 6(5)(e) provides:

“Within 10 days of the service upon him of the affidavit and documents referred to in sub-paragraph (ii) of paragraph (d) of subrule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits.” [my underlining]

[57] The court, in exercising its discretion under Rule 6(5)(e), involves fairness to both parties. Normally the circumstances should be exceptional for an additional affidavit to be allowed.²³

[58] In the supplementary replying affidavit, the applicant sets out the need to file the supplementary replying affidavit and the purpose thereof. The need to file the supplementary replying affidavit, so the applicant alleges, arises from the duty of the applicant to place all relevant matter before the court.²⁴ The purpose of the supplementary replying affidavit is set out in paragraph 4 thereof as follows:

“Therefore, the purpose of this supplementary replying affidavit, is to more fully respond to the answering affidavit, by including and dealing with facts that should have been revealed by the [first] respondents in their answering affidavit.”

²³ See: BANGTOO BROS AND OTHERS v NATIONAL TRANSPORT COMMISSION AND OTHERS 1973 (4) SA 667 (N) at 680.

“Whether such permission should be granted in a given case is basically a question of fairness to both sides. See, for example, Milne, N.O. v Fabric House (Pty.) Ltd., 1957 (3) SA 63 (N). See also B Marshall v Marshall (Pty.) Ltd. and Others, 1954 (3) SA 571 (N) at p. 576C, and Ismail and Another v Durban City Council, 1973 (2) SA 362 (N) at p. 380E. Normally the circumstances should be exceptional. Ebrahim (Pty.) Ltd v Mahomed and Others, 1962 (1) SA 90 (D).”

²⁴ Paragraph 3 of the supplementary replying affidavit.

[59] The main feature of the supplementary replying affidavit, the particulars of which will be dealt with later in this judgment, constitutes the outcome an investigation the applicant conducted whereby additional information concerning the first respondents and other persons mentioned in the first respondents' answering affidavit were obtained. The supplementary replying affidavit sets out specific information regarding the occupation and circumstances of the persons mentioned in the supplementary replying affidavit. The applicant cannot disclose the identities of the persons who have disclosed the information to the applicant for they fear for their safety.²⁵ The information therefore constitutes hearsay.

[60] Instead of rebutting the allegations in the supplementary replying affidavit head on through an affidavit in response to the supplementary replying affidavit, the admission into evidence would most likely have been granted because in eviction applications adequate information is better than inadequate information (more is better than less in eviction applications), the first respondents oppose the Rule 6(5)(e) application in an affidavit deposed to their attorney on the grounds that the evidence in the supplementary replying affidavit is irrelevant and repetitive and constitutes hearsay.

[61] Ms. Maphanga gave detailed information in respect of the persons mentioned in that affidavit. I see no reason why the first respondents were unable to assist the court in countering the information in the supplementary replying affidavit. The only inference the court can make for not doing so is because the first respondents have no evidence to counter the evidence in the supplementary replying affidavit.

[62] In my view, the information may be repetitive, but it is not irrelevant in this application. A court is empowered to accept hearsay evidence. The evidential weight to be given to such evidence is for the court to decide. Having regard to the background to this application, including the alleged unlawful conduct of the first respondents, the applicant's

²⁵ Paragraph 5 of the supplementary replying affidavit.

reason for not disclosing the identities of the persons who gave the information is plausible. I say again, in this eviction application, more is better than less.

[63] Without pre-empting the outcome of this application, the way the first respondents have dealt with the opposition to the supplementary replying affidavit is a recurring theme throughout the proceedings. The first respondents (or most of them), when attempts were made to make them aware of the proceedings and despite an invitation to reveal the rights upon which they rely for their occupation of the property through a notice prepared by the applicant, have rather been obstructive throughout.

[64] The notice, amongst other things, namely: explained the applicant's ownership of the properties; informed the first respondents that they are in unlawful occupation of the properties; that proceedings would be instituted for their eviction; invited the first respondents to disclose their personal circumstances as well as the circumstances of their occupation; and upon what right they may be relying for their continued occupation. The applicant also confirmed that it had not given the first respondents any right to occupations and if such right existed, same was terminated. Attempts were made to deliver these notices to the first respondents personally. Only in few instances, an individual first respondent took delivery of the notice.

[65] In almost all instances, the first respondents (or the majority of them) were undoubtedly aware of the proceedings. Instead of disclosing to the court their perceived right of occupation and their circumstances in affidavits deposed to by themselves, they rely on a single answering affidavit wherein an attempt is made to disclose some of the first respondents' circumstances, in most instances, disclosing information which the deponent to the first respondent's answering affidavit could never have known by herself. The information must have been given to her by someone, most likely the individual first respondents. If it was indeed the individual first respondents who gave the deponent to the answering affidavit the information, why not depose to affidavits themselves. I say it now and I say it upfront - this conduct may adversely affect the weight of the evidence in the

answering affidavit. I have raised this issue with counsel for the first respondent during the hearing of the application. His explanation was unpersuasive.

[66] In weighing up the fairness to the applicant and the first respondents against the overall obligation of parties in eviction proceedings to give full disclosure of all information pertaining to the matter, I find that the possible prejudice to the first respondent by allowing the supplementary replying affidavit does not outweigh the prejudice to the applicant if the supplementary replying affidavit is not allowed. The very nature of an eviction application constitutes sufficient exceptional circumstances to rather err to the side of too much information than too little.

[67] Finally, on the issues of the Rule 6(15) application and the Rule 6(5)(e) application, I was guided with what was said in Port Elizabeth Municipality v Various Occupiers²⁶:

[32] The obligation on the court is to 'have regard to' the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The court cannot fulfil its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully apprised of the circumstances before it can have regard to them. It follows that although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus of proof should not play an unduly significant role in its enquiry. The court is not resolving a civil dispute as to who has rights under land law; the existence of unlawfulness is the foundation for the enquiry, not its subject matter. What the court is called upon to do is to decide whether, bearing in mind the values of the Constitution, in upholding and enforcing land rights it is appropriate to issue an order which has the effect of depriving people of their homes.

[31] Of equal concern, it is determining the conditions under which, if it is just and equitable to grant such an order, the eviction should take place.[32] Both the

²⁶ 2005 (1) SA 217 (CC).

language of the section and the purpose of the statute require the court to ensure that it is fully informed before undertaking the onerous and delicate task entrusted to it. In securing the necessary information, the court would therefore be entitled to go beyond the facts established in the papers before it. Indeed when the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of establishing the true state of affairs, so as to enable it properly to ‘have regard’ to relevant circumstances.”

[68] The supplementary replying affidavit is allowed.

[69] With all the preliminary issues out of the way, I proceed to decide the application on all the evidence before me. I first deal with the nature of the property for this is important to determine whether ESTA applies. Then I proceed to set out what is alleged in respect of each of the first respondents specifically mentioned in this application for, depending on each of their individual circumstances, ESTA or PIE may apply. If ESTA applies, this court does not have jurisdiction to grant an eviction order. Conversely, if PIE applies, this court has jurisdiction to grant an eviction order if the conditions for such an order are met.

The property

[70] It is common cause that the property is agricultural land. It is also common cause that the applicant is conducting farming activities on the property.²⁷

²⁷ Mr. Smuts alleges as follows:

“The purpose of the applications were mainly to put the applicant in a position to continue with its farming operations as he was entitled to do....”

“The relief that was sought was for purposes of protecting the applicant, its employees, shareholders and representatives and allowing the applicant to continue with its farming operations,....” (paragraph 51 of the founding affidavit)

These allegations are merely “noted” by the first respondents (paragraph 162 of the answering affidavit).

[71] The applicant became the owner of the Remaining Extent of Portion 4 of the farm and the Remaining Extent of the farm Barclays Vale on 27 June 2017.²⁸

[72] Ms. Maphanga, sets out some of the history of the “Barclay Vale Farm” (as the property is referred to by the first respondents) in the answering affidavit²⁹ Apparently, Mr. Ben Greathead took ownership of the property³⁰ in 1951 and commenced with farming operations. Mr. Greahead constructed brick houses on the property in 1960. Between 1951 to 1978, the property was owned by a succession of entities all of which were controlled by Mr. Greathead. Apparently, the entities traded as “Emvest”. In or about 1978, Mr. Greathed left the property and sold it to Emvest. Thereafter South African Dried Fruit (“SADF”) commenced with farming activities on the farm. On or about 1993, SADF stopped farming on the property. Pioneer Foods (Pty) Ltd farmed the property and ran food processing activities on the farm while Emvest was still the owner. In 2010, Emvest commenced farming on the property but ceased its farming operations in 2015.

[73] The aforesaid narrative is challenged by the applicant. It alleges that the property Ms. Maphanga refers to appears to be a reference to the property presently owned by another entity QCK Lezman 4915 (Pty) Ltd (“Lezman”). Lezman became the owner of the Remaining Extent of the farm Barclays Vale 288 after that portion was excised by a subdivision from the former Remaining Extent of the farm Barclays Vale 288. The applicant also challenges Mr. Greathead’s alleged involvement in the property.

[74] The applicant further takes issue with Ms. Maphanga’s description of the property when it alleges as follows:³¹

“The content hereof is admitted, except to state that the property from which the eviction of the first respondent is sought is not “the Barclays Vale Farm” but is specifically, and as stated in paragraph 4 of the founding affidavit, the houses is on

²⁸ Annexures “RA1” and “RA2” to the replying affidavit.

²⁹ Paragraph 5 of the answering affidavit.

³⁰ Described by the first respondents as “the Barclay Vale Farm” – paragraph 5 of the answering affidavit.

³¹ Paragraph 19 of the replying affidavit.

the Remaining Extent of Portion 4 and the new farm Kranskop as referred to above. The farm Kranskop previously fell under the property that used to be the Remaining Extent of the farm Barclays Vale, which has now been incorporated into the Kranskop property.”

[75] The applicant explains, in the replying affidavit, after its ownership of the properties was challenged by the first respondents, that the description of the properties has changed subsequent to a consolidation and subdivision the result of which was that the application is still the owner of the Remaining Extent of Portion 4 of the Farm Barclays Vale and the owner of the farm Kranskop 1041, Registration Division JT, Mpumalanga Province. These are the properties in respect of which the applicant now seeks the eviction orders.³² What is important, the properties’ descriptions have changed in the Deeds Registry. The houses from which the applicant seeks the eviction did not move. I accept that the applicant is the owner of the properties as presently described and seeks an eviction from the houses on these properties.

The first category of respondents: persons on the list

[76] In considering whether an eviction should be granted against any remaining person mentioned on the list, I approach the issue as follows:

- a. Firstly, I consider those persons who remain on the list where only the applicant has put forward a version;
- b. Secondly, I consider those persons who remained on the list and who has presented a version and the applicant’s response thereto;
- c. Thirdly, I consider I consider the persons who are referred to in the answering affidavit and the applicant’s response thereto.

³² Paragraph 8.2 to 8.4.6 of the replying affidavit.

Remaining persons in respect of which only the applicant put forward a version

[77] This group of persons are listed under numbers: 1 to 4, 7, 10, 11, 15 to 18, 21 to 26, 28 to 37, 39 to 46, 48, 50, 52 to 55, 57, 59, 61, 63, 65, 66, 78 and 89 on the list. Only the applicant's version is before court in respect of these persons.

Remaining persons on the list on whose behalf a version is given

[78] This group of persons are listed under numbers: 8, 19, 27, 49, 60, 69, 85 and 88 on the list.

[79] Before I deal with each individual person in this category, I set out what the applicant alleges in its replying affidavit in respect of these persons because in each instance, the applicant's challenge to the allegations in the answering affidavit amounts to the same thing. The applicant alleges that: the occupiers' right of residence has terminated and has been challenged. The applicant denies that these persons have a valid right to reside on the properties. Furthermore, the applicant denies the persons' standing to oppose the application because they do not set out where they reside. In addition, the applicant alleges that, because the persons do not state on which farm they reside, it must be accepted that they reside on Lezmin's property.

[80] However, in the supplementary replying affidavit, the applicant sets out in which house each of the persons mentioned in the supplementary replying affidavit resides. They reside in houses on the property. The applicant's challenge to the persons' standing is gainsaid by its own evidence in the supplementary replying affidavit. The challenge in reply concerning the persons' standing therefore, upon the applicant's own version in the supplementary replying affidavit has no merit. In the context of the supplementary replying affidavit, the replying affidavit, due to the generality thereof in respect of each person mentioned therein, I still have considered but I found it to be of little value in determining each person's circumstances.

[81] I proceed to deal with the persons on the list in respect of whom a version is given in the answering affidavit also having regard to the evidence regarding each such person in the supplementary replying affidavit

No. 8 on the list: MR. ASARIA MANDLABE

[82] According to Ms. Maphanga, Mr. Mandlabe occupied a house on the property since 2013 and was employed by the former owner of the properties and has paid rent in the amount of R 130 per month from 2010 to 2014 . Presently he is employed as a farm labourer. Ms. Maphanga does not say where Mr. Mandlabe is employed.³³

[83] In the supplementary replying affidavit, the applicant alleges that Mr. Mabdlabe is a Mozambican citizen who is unlawfully in the country and that he employed somewhere else in the vicinity, namely at Alkmaar.

No. 19 on the list: MS. IVE TSHILA

[84] According to Ms. Maphanga, Ms. Ive Tsila came to live on “the farm” in 2006 when she and her cousin were employed by Pioneer Foods (an entity who conducted farming operations on the properties). She has paid rent from 2010 to 2014. Mr. Tsila is a farm labourer. It is not disclosed where she is presently employed.

[85] In the supplementary replying affidavit, the applicant alleges that Ms. Tsila was a seasonal worker for Emvest and that she moved onto the property when Emvest vacated same.

No. 27 on the list: MR. RODRIQUES GASTAO

[86] According to Ms. Maphanga, Mr. Gastau worked for Emvest in 2015. No mention is made whether he occupied the property with the permission of Emvest or that he had a right to occupy in terms of his employment with Emvest.

³³ Paragraph 82 of the answering affidavit.

[87] In the supplementary replying affidavit, the applicant alleges that Mr. Gastao moved onto the property after Emvest vacated same.

No. 49 on the list: MS. ESTER SIBUYANE

[88] According to Ms. Maphanga, Ms. Ester Sibuyane has been living on the property since 1987 with the consent of SADF (another entity who conducted farming operations on the properties).

[89] In the supplementary replying affidavit, the applicant alleges that Ms. Sibuyane unlawfully occupies a house on the property, that she does not pay rental and that she has no lease agreement with the applicant.

No. 60 on the list: MS. MAPHANGA

[90] Ms. Maphanga alleges that she was born on the property on 24 April 1984 and that her family has always lived on the property. She alleges that she is a member of the Mawuwu Communal Property Association. Ms. Maphanga does not say upon what she relies to be in occupation of the house on the property. What she does say is that the Mawuwu Communal Property Association has “registered” a land claim over the property.

[91] In the replying affidavit, the applicant meets the allegations made by Ms. Maphanga by raising the same issues as in the case of the previous persons on the list. In addition, the applicant avers that it is impossible to verify from the papers before court whether Ms. Maphanga is indeed a land claimant in respect of the property.

[92] In its supplementary replying affidavit, the applicant alleges that Ms. Maphanga’s family left the property of their own accord many years ago and that she has only returned to the property after Envest has left and before the applicant was able to effectively control the influx of unlawful occupiers onto the property.

No. 69 on the list: MR. SALMON MNGUNI NGOBENI

[93] According to Ms. Maphanga, Mr. Ngobeni previously worked as a fruit picker and that he had moved onto the property with the permission of SADF in 1986. He has also allegedly paid rent to Emvest.

[94] In its supplementary replying affidavit, the applicant alleges that Mr. Ngobeni has moved from the property voluntarily.

No. 85 on the list: Ms. PRETTY SITHOLE

[95] According to Ms. Maphanga, Ms. Sithole was born on the farm on 30 September 1978. Ms. Sithole's father and grandfather had worked on the property for SADF and Emvest. She alleges that Ms. Sithole had worked for SADF but not for the owners after that.

[96] In the supplementary replying affidavit, the applicant alleges that Ms. Sithole's father was employed on the farm and that he had left the farm when his employment was terminated. Mr. Sithole stayed on the farm without permission when her father had left.

No. 88 on the list: Ms. HARRIET MNISI

[97] Ms. Mnisi's situation has already been decided in case number: 1024/2020. An eviction order was granted against her. There is no need for me to consider her position as I have already spoken in case number 1024/2020.

Persons not on the list but in respect of whom a version was given in the answering affidavit

[98] I proceed to deal with the persons not on the list but in respect of whom a version is given in Ms. Maphanga's affidavit. I follow the same process as the process in the previous category of persons.

MS. GRACE THOLIWE MATSABE (paragraph 43 of the answering affidavit)

[99] Ms. Maphanga alleges that Ms. Matsabe came to the farm in 1979 and was employed by SADF and Pioneer foods. She has retired from Pioneer foods. Her right to live on the farm was never challenged.

[100] In its supplementary replying affidavit, the applicant alleges that Ms. Matsabe has sub-let the property and has left same.

MS. PETUNIA NOKHUTHULA MKHARI (paragraph 49 of the answering affidavit)

[101] Ms. Maphanga alleges that Ms. Mkhari's parents were employed on the farm. She was born on the farm in 1962. Her right to live on the farm was never challenged.

[102] In the supplementary replying affidavit, the applicant alleges that Ms. Mkhari does not live on the farm.

MS. LAHLIWE MQULU (paragraph 51 of the answering affidavit)

[103] Ms. Maphanga alleges that Ms. Mqulu commenced living on the property in 1990 and that her right to live on the farm was never challenged.

[104] In the supplementary replying affidavit, the applicant alleges that Ms. Mqulu lives on the farm and that she stayed on when her temporary employment was terminated.

MR. GEORGE SITHELOE (paragraph 62 of the answering affidavit)

[105] Ms. Maphanga alleges that Mr. Sitheloe was born of the property in 1966. His parents were employed by Mr. Greathead. Mr. Sithole's right to live on the farm was never challenged.

[106] In the supplementary replying affidavit, the applicant alleges that Mr. Sitheloe resides on the farm.

MS. LULU SEGODI (paragraph 67 of the answering affidavit)

[107] Ms. Maphanga alleges that Ms. Segodi commenced living on the farm in 2006 when she was employed by SADF. After SADF sold the farm, Ms. Segodi stayed on.

[108] In the supplementary replying affidavit, the applicant alleges that Ms. Segodi was a temporary employee on the farm and simply remained after her employment ended. In addition, the applicant states that Ms. Segodi is presently employed at Sudwala.

MR. GODFREY FUNDI MATHE (paragraph 86 of the answering affidavit)

[109] Ms. Maphanga alleges that Mr. Mathe's father and grandfather had been employed on the farm. Mr. Mathe moved to the property in 2016 and right to live on the farm was never challenged.

[110] In the supplementary replying affidavit, the applicant alleges that Mr. Mathe resides on the property where he remained after Emvest had left.

MR. CIAN SHONGWE (paragraph 88 of the answering affidavit)

[111] Ms. Maphanga alleges that Mr. Shongwe moved to the farm in 2013 and took up residence with Emvest's permission.

[112] In the supplementary replying affidavit, the applicant alleges that Mr. Shongwe resides on the farm. He has stayed on the farm after Emvest has left.

EVYLIN NOSIPHO MAKAKULA (paragraph 91 of the answering affidavit)

[113] Ms. Maphanga alleges that Ms. Makakula was employed by all the previous owners of the farm. She was allegedly born on the farm on 4 May 1970.

[114] In the supplementary replying affidavit, the applicant confirms that no order is sought against Ms. Makakula.

MS. AGNES MESIAH (paragraph 95 of the answering affidavit)

[115] Ms. Maphanga alleges that Ms. Mesiah was born on the farm on 12 May 1964. Her family were already in occupation of the farm when Mr. Greathead arrived there. The family paid Emvest a monthly rental. Her alleged right of occupation was never challenged before.

[116] In the supplementary replying affidavit, the applicant alleges that Ms. Mesiah resides on the property.

MS. HLOLA MARGARET MHLANGA (paragraph 96 of the answering affidavit)

[117] Ms. Maphanga alleges that Ms. Mhlanga was born on the farm on 23 March 1963. She has not worked for any of the owners or operators of the farm. Her great grandparents and grandparents were buried in the farm. Her right to live on the farm has never before been challenged.

[118] In the supplementary replying affidavit, the applicant alleges that Ms. Mhlanga does not reside on the property.

MS. MELICENT MAKUKULE (paragraph 100 of the answering affidavit)

[119] Ms. Maphanga alleges that Ms. Makukule lives on the farm with her husband. She was born on the farm on 14 February 1988. Ms. Mamukule worked for Pioneer between 2008 and 2009.

[120] In the supplementary replying affidavit, the applicant confirms that no order is sought against Ms. Makakula.

MR. MDUDUSI NDLOVU (paragraph 103 of the answering affidavit)

[121] Ms. Maphanga alleges that Mr. Mduduzi was born on the farm on 14 March 1973. His parents worked for Mr. Greathead and he has lived on the farm since his birth. Furthermore, Ms. Maphanga alleges that Mr. Mduduzi is a member of the eleventh

respondent and “*one of the people who has registered a land claim over the property*”. His alleged right of occupation was never challenged before.

[122] In the supplementary replying affidavit, the applicant alleges that Mr. Ndlovu chased Mr. Sydney Ncube from the house with force after Emvest have left. He has no right to reside on the property.

MS. NOMVULA NKOSI (paragraph 105 of the answering affidavit)

[123] Ms. Maphanga alleges that Ms. Nkosi’s family was given permission by Mr. Greathead to reside on the farm. She was born on the farm on 10 January 1958. She worked for Mr. Greathead during school holidays. Her family was given permission to work and live on the farm by Mr. Greathead.

[124] In the supplementary replying affidavit, the applicant confirms that no order is sought against Ms. Nkosi.

MR. ANDREW MARWE (paragraph 106 of the answering affidavit)

[125] In the answering affidavit, Ms. Maphanga alleges that Mr. Marwe was born on the farm on 11 April 1966.

[126] In the supplementary replying affidavit, the applicant alleges that Mr. Marwe does not reside on the property.

MS. NOSIWE AGNES MASANGO (paragraph 107 of the answering affidavit)

[127] In the answering affidavit, Ms. Maphanga alleges that Ms. Masango lives with her son and daughter-in-law on the farm.

[128] In the supplementary replying affidavit, the applicant alleges that Ms. Masango no longer resides on the property.

MR. EUGEN BANGO (paragraph 11 of the answering affidavit)

[129] In the answering affidavit, Ms. Maphanga alleges that Mr. Bango moved to the farm in 2010 when he started working for Emvest. His right to reside on the farm has never before been challenged.

[130] In the supplementary replying affidavit, the applicant alleges that Mr. Bango worked for Emvest and also for the applicant. When his employment with the applicant was terminated, he refused to vacate the property.

MR. FABIO NGOBE (paragraph 118 of the answering affidavit)

[131] In the answering affidavit, Ms. Maphanga alleges that Mr. Ngobe moved to the farm in 2010 when he started working for Emvest. His right to reside on the farm has never before been challenged.

[132] In the supplementary replying affidavit, the applicant alleges that Mr. Ngobe is a Mozambican citizen who has no right to be on the property.

Discussion

[133] With the aforesaid evidence before me, I must apply the facts to the law and determine whether: The applicant is entitled to an order evicting the first respondents who has presented a version pertaining to their occupation; the first respondent's ESTA defence is valid. Lastly, and if I order an eviction, on what conditions the eviction order may be executed.

[134] The applicant applies for a final order in motion proceedings. To the extent that there are factual disputes to be resolved in this application, the principle is trite: “....*where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order.... It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the*

*applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.”*³⁴

The disputes of fact

[135] By applying the principles in Plascon-Evans and considering the evidence, I am of the view that I am able to decide the application on the papers before me.

[136] The applicant alleges that it is the owner of the property. This the first respondent denies. As already set out above, there is no merit in this denial. I accept the applicant's version.

[137] The applicant alleges that the respondents occupy the property without the applicants' consent. This the first respondents do not deny. They avoid the consent issue by alleging that either they themselves or their parents or grandparents or forefathers had the consent of the applicant's predecessors in title to occupy the property. These allegations, some to a limited extent, the applicant denies in its replying affidavit.

[138] During argument, the applicant specifically referred to the “STATEMENT: CONFIRMATION OF FACTUAL EVENTS WITH REGARDS TO THE LIVING AND OCCUPATION OF THE REMAINING EXTENT AND PORTION 4 OF THE FARM BARCLAYS VALE 288 JT” (“*the statement*”)³⁵, compiled by of the sixth respondent (the Mawuwu CPA).

[139] In this regard, in paragraph 53 of the founding affidavit, the applicant says:

“It is the applicant's submission that all the unlawful occupiers or most of them, which are part of the first respondent in this matter, are responsible for the damage caused to the applicant's property as a result of their unlawful acts. They have total disregard to the applicant's rights, as land over, and to the law. They are in

³⁴ Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd. 1984 (3) SA 623.

³⁵ Annexure “FA6”.

contravention of the court orders on a regular basis and an unlawful occupying the houses on the property without any permission or consent whatsoever. Most of them, if not at all, only invited the property after they were informed and became aware that off that the applicant has purchased the property. This was an attempt from them to prevent the applicant from taking occupation of the property and farming same. A copy off a report prepared by the CPA in that regard is attached hereto as annexure “FA6”.

[140] In paragraph 2 of the statement, it is alleged:

“Before Emvest abandoned their operations on the property none of the persons who were employed on the property and/or occupied dwellings on the property were allowed to have their own life stock on the property and/or graze the property.”

[141] In paragraph 4 of the statement, it is alleged as follows:

“After Emvest withdrew the operations on the property and before the property was bought by Hotazel Developments No.1 (Pty) Ltd, a period of 12 - 15 months passed.. During this period [un]lawfulness and chaos was the order of the day on the property. It was during this that numerous unlawful actions were committed by various occupiers”

[142] The first respondents’ response to this paragraph is:

“Mr. Smuts does not tie any of the first respondents to the allegedly unlawful conduct. Mr. Smuts blames the first respondents (whom he says he does not know) four acts committed by individuals he does not identify.”

[143] The first respondents do not deny the factual statements in the statement. They avoid the factual averments in the statement by challenging Mr. Du Toit’s lack of particularity over the identity of the perpetrators.

[144] In my view, the factual position as set out in the statement must be accepted as correct. The statement, properly evaluated against the purpose for which it was presented and the response thereto, the following is evident:

- a. Prior to the applicant becoming owner of the property some of the first respondents were allowed to occupy the houses and to keep livestock on the property; and
- b. Some of the first respondents invaded the property only after Emvest ceased its operations.

[145] With regards to the identity of the perpetrators, much is learnt from affidavits before me, in particular the answering affidavit and the supplementary replying affidavit for therein names are mentioned together with the persons' situation (in the case of the answering affidavit and names are connected to specific houses (in the supplementary replying affidavit).

[146] The applicant's affidavits establish the occupation of the houses and the identity of the first respondents that are in occupation thereof. It does not establish the identity of those persons who occupy through the first respondents. The answering affidavit gives information regarding the history of occupation of the property by some of the first respondents. In most part, this history is not properly met by the applicant in the sense that, and to the extent that the applicant bore a reverse onus brought about by the deeming provisions in sections 3(2)(a), 4 and 5 of ESTA, the applicant has not discharged same.

[147] Despite the criticism I have already expressed with the manner in which the first respondents have decided to meet the applicant's case, I nevertheless determine the application in accordance with the Plascon Evans principle. I consider the first respondents' version in respect of each person mentioned by them in the answering affidavit as correct except where the supplementary replying affidavit has swayed my view. The result is that where the first respondents have established that the persons mentioned in the answering

affidavit or their immediate relatives may have had consent to occupy the property before the applicant became the owner, I consider those persons to be occupiers in terms of ESTA. In those instances where the applicant has established that an occupier has moved onto the property after Emvest has left, and in respect of those occupiers where only the applicant gave a version, I shall confirm that those persons are occupiers as contemplated in PIE. The end result is set out in annexure “A” to this judgment and order.

[148] In respect of the ESTA occupiers, this court has no jurisdiction to grant an eviction order. In respect of the PIE occupiers, this court can grant an eviction order and will do so after considering the next stage of the mandatory enquiry provided for in subsections 4(6) to 4(9) of PIE. I proceed to deal with this issue.

[149] The first respondents that fall under PIE have been in occupation of the property for more than six months at the time the proceedings were initiated. This application was preceded by the application on terms of section 4(2) of PIE which was launched on 20 March 2020. According to the statement³⁶ 12 to 15 months passed subsequent to Emvest abandoning their operations and before the applicant became the owner of the property. The applicant became the owner of the property on 27 June 2017.

[150] Section 4(7) of PIE therefore finds application. It provides as follows:

“(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, ... whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.”

³⁶ Ibid para139

[151] Before an eviction of the respondents who fall under PIE may be granted, the eviction must be just and equitable after considering all the relevant circumstances, such circumstances including whether land has been made available by the municipality or organ of state or another landowner for the relocation of the first respondents including the rights of the elderly, children, disabled persons and households headed by women.

[152] As in City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC), “[T]he crucial question before this Court is therefore whether it is just and equitable to evict the Occupiers, considering all the circumstances, including the availability of other land, as well as the date on which the eviction must take place.” This court must consider same.

[153] Circumstances that are particularly relevant in my view is the conduct that is displayed by the first respondents. The applicant sets out a multitude of applications that have been brought and in terms of which orders were granted which were simply not obeyed by some of the first respondents. The applicant had to institute numerous criminal charges as a result of criminal conduct that were committed against it by some of the first respondents. The first respondents have displayed a total disregard for the opportunity given to them by the applicant to demonstrate each of the first respondent’s circumstances. This invitation was met by disdain and threats. This conduct displays a clear adversity by the first respondents to work with the applicant to find a solution. The first respondents have given no reason whatsoever for their reluctance to engage the applicant. The only conclusion is that the first respondents have absolutely no desire to work with the applicant. Rather they work against the applicant and it appears that they wish to drive the applicant from the property by their unlawful conduct. This is not how disputes and differences ought to be solved in our society.

[154] In addition, section 25 of the Constitution protects the applicant’s rights to and in the property. However, the applicant must have been aware of the first respondents’ occupation. As a matter of fact, the applicant has withdrawn the application against several

occupiers. The applicant cannot be expected to provide free accommodation to the first respondents forever. This the more considering the conduct demonstrated by the first respondents (or some of them). The applicant has been patient and has attempted to enforce its right to use the property in numerous applications mentioned by it in these papers. The applicant has been the owner of the property for four years and has already invested substantial amounts of money in the development of the property. The first respondents' conduct is severely prejudicial to the applicant. I am guided by what was said in City of Johannesburg³⁷, at para. 40:

“It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted, as Blue Moonlight’s situation in this case has already illustrated. An owner’s right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE.”

[155] With regards to the interests of the vulnerable class of persons mentioned in subsection 4(7) of PIE, the first respondents were given an opportunity to come forward and present their circumstances. Firstly they were invited by the applicant to do so³⁸ and yet again in this application. They chose not to do so. I have no other choice to accept that the first respondents would have brought their plight and the plight of the vulnerable class of persons in section 4(7) to the court’s attention if there were indeed such circumstances the court had to consider. Moreover, the first respondents were represented by legal counsel. They must have been aware that the court would be better suited to make the necessary enquiry if the relevant circumstances were brought to the court’s attention. The

³⁷ Para. 69 *ibid.*

³⁸ Letter annexure “FA6”.

circumstances that were brought to the court's attention were only in respect of a small portion of the first respondents.

[156] With regards to the alternative land issue, there is no evidence that land has been made available by another organ of state or another landowner. The mere fact that the sixth respondent has substantial land holdings does not mean that its land has been made available or even will be made available for relocation. The City of Mbombela's City Planning and Development department has delivered a Housing and Land Availability Report for the eviction.³⁹ The second paragraph of the report states:

"This response has been drafted after investigating the circumstances of the case for providing alternative land for the illegal occupiers in the matter in which the municipality is a respondent."

[157] After setting out the municipality's plans and action regarding further developments in specific areas, the report⁴⁰ concludes as follows:

"Taking all the above into consideration, and as well as the fact that the right to have access to housing is a critical right without which many other fundamental rights cannot be realized, the municipality will be in a position to provide alternative land or housing for the illegal occupiers in the matter, subject they do that the prescribed procedures or followed with regard to registration on the existing housing waiting list for beneficiaries of human settlement development"

[158] In this application, the relevant national and provincial spheres of government is not before court. However, the municipality is. It is generally preferable to join these spheres of government in eviction proceedings⁴¹, the municipality could but has not raised this issue. In my view, the dispute in this application does not warrant a finding that the non-joinder of the relevant national and provincial spheres of government is fatal. I say this

³⁹ The Report is dated 26 April 2021 and was filed on 6 May 2021.

⁴⁰ In paragraph 5 thereof.

⁴¹ See para. 45 of *City of Johannesburg supra*.

because the municipality, in its report does not raise the unavailability of land or funds for the provision of housing to the first respondents should they be evicted.

[159] Save for the report, the municipality has not participated in any manner whatsoever in these proceedings. This is unacceptable in light of the municipality's obligation in terms of section 152 read with Chapter 3 of the Constitution, the provisions of the Local Government: Municipal Systems Act⁴² and the obligations of the municipality in terms of the provisions of the Housing Act.⁴³

[160] While it is clear that land will in future become available, no fixed date is given. In addition, certain procedures for registration upon a waiting list is set as precondition for being a beneficiary of a human settlement. This report is silent on the municipality's obligation to provide temporary housing. The report does not assist for if an eviction order is granted who knows when and if any of the first respondents who are evicted will receive a roof over their heads. They may be left homeless for a substantial time or even without shelter of if they or any one of them do not qualify to benefit from human settlement, they will be homeless, maybe for ever. This would without question infringe upon the first respondents' rights, in particular, section 9 and 26 of the Constitution.

[161] Another solution must be found. That solution lies in the municipality's duty to provide for emergency accommodation. The municipality, being joined in these proceedings has had an opportunity to disclose and explain what contingency arrangements it has in place in the event of a need for emergency housing. The municipality has failed to do so. This leaves me with a conundrum. If the first respondents are evicted, I am unable to determine what a just and equitable order would be for the eviction order to be executed. My order will seek to prevent a misery.

Conclusion

⁴² 32 of 2000.

⁴³ 107 of 1997.

[162] In respect of the persons in the list where only the applicant's version is before me, I find that those persons are occupiers as contemplated in PIE. The applicant is entitled to an order for their eviction.

[163] I find that the category of first respondents mentioned in the answering affidavit against whom the applicant persists with an order for their eviction, save for Rodriques Gastao Maphanga, Salmon Mnguni Ngobeni, Grace Tholiwe Matsabe, Petunia Nokhuthula Mkhari, Hlola Margaret Mhlangu, Mdudusi Ndlovu, Andrew Marwe and Nosiwe Agnes Masangu are occupiers in terms of ESTA. This court has no jurisdiction to order their eviction.

[164] There are two final issues to consider being, the Restitution Act and the present Covid-19 pandemic.

[165] The first respondents raise section 11(7) of the Restitution Act. I find no merit in this defence for it is in my view no bar to an eviction application. It may be a bar to the execution of an eviction order pending the permission of the Commissioner, but it is no bar to an eviction order. I do not express myself in that regard.

[166] The last issue to consider is the present COVID-19 pandemic. Our country is in a state of national disaster due to the COVID-19 pandemic. On 15 June 2021, the Minister of Cooperative Governance and Traditional Affairs, under the provisions of the Disaster Management Act, 2002, determined that the Adjusted Alert Level 3 will apply nationally from 16 June 2021.

[167] Regulation 37 of the Regulation⁴⁴, provides for the eviction and demolition of places of residence. Regulation 37 provides:

⁴⁴ Regulation R530 of the Disaster Management Act 57 of 2002 ("the Act"): Amendment of Regulations issued in terms of Section 27(2) of the Act.

- “(1) A person may not be evicted from his or her land or home or have his or her place of residence demolished for the duration of the national state of disaster unless a competent court has granted that order authorizing the eviction or demolition.*
- (2) A competent court may suspend or stay an order for eviction or demolition contemplated in sub regulation (1) until the lapse or termination of the national state of disaster unless the court is of the opinion that it is not just an equitable to suspend or stay the order having regard, in addition to any other relevant consideration, to –*
- (a) the need, in the public interest for all persons to have access to a place of residence and basic services to protect their health and the health of others and to avoid unnecessary movement and gathering with other persons;*
 - (b) any restrictions on movement or other relevant restrictions in place at the relevant time in terms of these regulations;*
 - (c) the impact of the disaster on the parties;*
 - (d) the prejudice to any party of a delay in executing the order and whether such prejudice outweighs the prejudice of the persons who will be subject to the order;*
 - (e) whether any affected person has been prejudiced in their ability to access legal services as a result of the disaster;*
 - (f) whether affected persons will have immediate access to an alternative place of residence and basic services;*

- (g) *whether adequate measures are in place to protect the health of any person in the process of a relocation;*
- (h) *whether any occupier is causing harm to others or there is a threat to life; and whether the party applying for such an order has taken reasonable steps in good faith, to make alternative arrangements with all affected persons, including but not limited to payment arrangements that would preclude the need for any relocation during the national state of disaster.”*

[168] In addition to barring evictions during the national state of disaster, sub-regulation 37(1) also serves to reaffirm the prohibition against arbitrary and unlawful evictions. Sub-regulation 37(2) gives the court the power to suspend or stay an order for eviction until the lapse or termination of the national state of disaster unless the court is of the opinion that it is not just and equitable to suspend or stay the order having regard to the factors listed in sub-regulations 37(2)(a) to (h). The default position is therefore that, during the duration of the national state of disaster eviction orders are suspended or stayed. Evictions are not prohibited outright. Evictions can still take place but only if it is not just and equitable to suspend or stay the eviction order after having regard to the factors listed in sub-regulations 37(2)(a) to (h).

[169] Sub-regulation 37(2)(a), (f) and (g) concerns me most in this application. I am not able to determine whether the first respondents in respect of whom an eviction order will be granted will have immediate access to a place of residence and basic services to protect their health and the health of others; whether they will have immediate access to an alternative place of residence and basic services; and whether adequate measures are in place to protect the health of any person in the process of the relocation. Without evidence to evaluate the factors listed in sub-regulation 37(2) I am unable to order the immediate execution of the eviction order.

COSTS

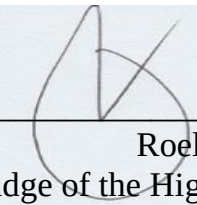
[170] The applicant withdrew the application against some of the respondents while persisting with the relief against other persons on the list including persons who are occupiers as contemplated in ESTA. The first respondents have conducted the litigation in an obstructive manner perhaps losing sight of the unique nature of eviction proceedings. The Rule 6(15) application was not warranted and was dismissed. The first respondents must pay the costs of the Rule 6(15) application. The first respondent's opposition to the Rule 6(5)(e) was unnecessary. However, the applicant was requesting an indulgence to file a further affidavit in the Rule 6(5)(e) application. With regards to the main application, the applicant was therefore only partially successful. In my view each party should carry its own costs in the main application and the Rule 6(5)(e) application.

In the premises, I make the following order:

- a. The first respondents, whose particulars appear on the list annexed to this order, marked "A" (*"the evictees"*), are declared to be occupiers as contemplated in the Prevention of Illegal Evictions and Unlawful Occupation of Land Act, 19 of 1998;
- b. The evictees are evicted from the Remaining Extent of the farm Barclays Vale 288 JT, and the farm Kranskop 1041 JT (*"the property"*);
- c. The Mbombela Local Authority is directed to file and deliver an affidavit setting out what measures it intends to take to give immediate access to the evictees of shelter and basic services, including, evidence in respect of the factors listed in Sub-regulation 37(2)(a), (f) and (g) of Regulation R530 of the Disaster Management Act 57 of 2002 (*"the Act"*): Amendment of Regulations issued in terms of Section 27(2) of the Act, such affidavit to be filed and delivered within 15 days of the date of this order;
- d. The applicant and the evictees are authorised to deliver affidavits in response to the Mbombela Local Authority's affidavit in paragraph (c) above within ten days of the delivery thereof;
- e. The applicant and the evictees are authorised to enrol this application, amplified with the affidavits in paragraphs (d) and (e) above, upon the

judicial case management roll for opposed motions for purposes of the further management of the application.

- f. The order in paragraph (b) above is suspended pending a decision of the court after consideration of the evidence in paragraphs (d) and (e) above;
- g. Should the evictees, fail to vacate the property within 30 days after the date upon which the eviction order is confirmed, the eviction order against them shall be carried out by the second, third and fourth respondents, together with the Sheriff of this court who is hereby authorized and directed to evict the evictees from the property forthwith;
- h. The evictees are ordered to pay the applicant's costs of the Rule 6(15) application jointly and severally, the one paying the other to be absolved.



Roelofse AJ
Acting Judge of the High Court

DATE OF HEARING: 25 May 2021

DATE OF JUDGMENT: 22 June 2021

APPEARANCES

FOR THE APPLICANT:	Adv R du Plessis SC Adv G Bench
INSTRUCTED BY:	Du Toit-Smuts Attorneys
FOR THE RESPONDENTS:	Adv. S Wilson Adv Fakier
INSTRUCTED BY:	Kropman Attorneys

ANNEXURE “A”

PERSONS TO WHOM THE ORDER APPLY

1. Ncaba Mphephetse
2. Betty Ndlovu
3. Sarah
4. Nomsa Mhlongo
5. Thembe Sibuye
6. Rodger Mondlane
7. Marta Dlamini

8. Christina Dlamini/Mathonsi
9. Elias Langa
10. Oracio Themba
11. John Ntimba
12. Jabulani Masuku
13. Makhensa
14. Master
15. Stephen
16. Thapelo Bhangu
17. Nomsa
18. Emmanuel
19. Jacition
20. Amos Ngobeni
21. Lindiwe Ntimba
22. Precious Ndlovu
23. Samson Mathebula
24. Phumzile Ndlovu
25. Batister Ngobeni
26. Zanele Mahlalela
27. Adam Patric
28. Anton Sithole
29. Albeton
30. Emmanuel
31. France
32. Daniel
33. Patrick
34. Fernando
35. Justino
36. Vusi Mathonsi

37. Tsakan Sitha
38. Sibongile Khoza
39. Unice Matsane
40. Vanier Manzini
41. Shongwe Shongwe
42. Boss Mathe
43. Lina Nkuna
44. Rose Mkhonto
45. Sifiso Moreo
46. Alice Sereko
47. Florence Mdaka
48. Ponani Ndlovu
49. Jethro
50. Rodriques Gastao Maphanga
51. Salmon Mnguni Ngobeni
52. Grace Tholiwe Matsabe
53. Petunia Nokhuthula Mkhari
54. Hlola Margaret Mhlangu
55. Mdudusi Ndlovu
56. Andrew Marwe
57. Nosiwe Agnes Masangu