

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

CASE NO: LCC123/2023

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

22 April 2025

SIGNATURE	DATE:
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Heard: 15 – 23 October 2024 and 21 November 2024

Reserved – 13 January 2025

Order: 11 April 2025

Reasons: 22 April 2025

In the matter between:

MANYAKA CALASTINE Khiba

First Applicant

MALEFANE ISAAC Khiba

Second Applicant

MALITABA ALINA Khiba

Third Applicant

TEFO JOHANNES Khiba

Fourth Applicant

and

STEPHANUS FRANCOIS VAN NIEKERK

First Respondent

MICHAEL VAN NIEKERK EIENDOME CC

Second Respondent

SETSOTO LOCAL MUNICIPALITY

Third Respondent

Summary: Land Reform – farm dwellers evicted under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE Act”) - declaration that the eviction of farm dwellers under PIE Act was unlawful – broad jurisdiction of the Land Court to adjudicate matters concerning the rights of occupiers – occupiers granted restoration of their right to residence and use of land in terms of section 14 of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”). No order granted in respect of Second Applicant.

ORDER

1. The eviction of the First, Third and Fourth Applicants on 6 November 2020 is declared unlawful.
2. The above-mentioned Applicants’ rights of residence and use of land on the farm Quaggafontein 208, District Ficksburg, Free State Province (the farm) are restored in terms of section 14 of the Extension of Security of Tenure Act 62 of 1997 in the following terms:
 - 2.1. The aforementioned Applicants are restored access to their homestead site and other land used on the farm within 14 days from date of this order.
 - 2.2. The First and Second Respondents are ordered to take such steps as are necessary to reconstruct the demolished residential home within one month from the date of this order.
 - 2.3. The Applicants’ occupation rights and rights to use land as previously allocated prior to eviction are hereby restored.

2.4. The Applicants' services and amenities enjoyed such as access to wood, fetching water, livestock grazing and all other access as previously granted are hereby restored.

3. The Applicants are entitled to just and equitable compensation in respect of damage to movable property as agreed or to be determined by the Court.

4. There is no order in respect of compensation for the loss of cattle.

5. There is no order in respect of the Second Applicant.

6. The First and Second Respondents are directed to pay the Applicants' costs of suit, jointly and severally, the one paying the other to be absolved.

JUDGMENT

MABASA AJ (COWEN DJP concurring)

Introduction

[1] Can a farm dweller and their family be lawfully evicted under PIE instead of ESTA? This is the central question in this case. It is a challenge to an eviction instituted on notice of motion. The applicants seek a declaration that their eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) was unlawful and they request this Court to restore their rights under section 14 of the Extension of Security of Tenure Act 62 of 1997 (ESTA) and to interdict further interference with their lawfully accrued rights.

[2] The eviction occurred on 6 November 2020, in the middle of the Covid19 pandemic under an order granted by the Ficksburg Magistrate's court under PIE against the Second Applicant. The applicants allege that they were all evicted from the property known as the farm Quaggafontein 208, District Ficksburg, Free State.

Parties

[3] The First Applicant is Manyaka Calastine Khiba (Mrs Khiba), a 62-year-old seasonal farm worker. The Second Applicant is her sister's son, Malefane Isaac Khiba (Malefane). The Third Applicant is Malitaba Alina Khiba (Malitaba), the daughter of another sister. Malitaba has two minor children, R[...] and O[...], who were living with them on the farm. The Fourth Applicant is her biological son, Tefo Johannes Khiba (Tefo).

[4] The First Respondent, Stephanus Francois van Niekerk (Francois) is cited in his personal capacity as the son of the previous owner and the person in charge of the farm Quaggafontein 208, District Ficksburg, Free State (the farm.). The Second Respondent, Michael van Niekerk Eiendom CC (the CC) is the owner of the farm. The Third Respondent is the Setsoto Local Municipality (the municipality) who is merely cited as an interested party. The First and Second Respondents oppose the application, and I refer to them collectively as the respondents.

Background

[5] Mr David Pelesa Khiba (Pelesa), the brother of Mrs Khiba, worked as a labourer on the farm from 1987. He arrived with his wife and mother. He passed away in 2005 and was buried on the farm. These are common cause facts.

[6] Mrs Khiba alleges that she arrived on the farm in 1988 to live with Pelesa. She says she lived with him, his wife, their mother, Matoti,¹ her brother Paulos, Malefane and Malitaba. After Pelesa's death, the family lived in three mud huts with their mother until the date of eviction.

[7] Francois disputes that Mrs Khiba ever resided on the farm with her family. He avers that only Malefane was in unlawful occupation of the mud hut on the farm, after Pelesa's death. He says that Malefane arrived in 2015, without consent and was accordingly lawfully evicted under PIE. He further contends that Malefane was

¹ Due to the Sesotho pronunciation the spelling of this name (and others) may be slightly different in other parts of the judgment. (e.g. Malitaba as Mmaditaba, or variations of the name Magied as Magidi or Thabiso). The names of places are also spelled differently e.g. Somerhoogte as Zomerhoogte, or Christophil as Christofeel on the record.

the only person living in the homestead, and that Mrs Khiba was married to David Jakob and lived on a neighbouring farm, Christophil.² Insofar as Malitaba is concerned, he states that she was also married and lived with her husband on another neighbouring, farm Jakkalsfontein. Tefo is completely unknown to him.

[8] As a result of the disputes of fact, the matter was referred for oral evidence. Five witnesses gave evidence for the applicants and three for the respondents.

[9] Before dealing with the merits of the dispute, I briefly consider the litigation history between the parties.

Points *in limine*

[10] The respondents raised three points *in limine* namely, *lis alibi pendens*, misjoinder and jurisdiction.

[11] During the first hearing on 12 July 2024, the respondents abandoned the first two points *in limine* and they warrant no further discussion.

[12] The respondents persisted with the point that the Land Court lacks jurisdiction based on the argument that the applicants were evicted pursuant to an order granted by the Ficksburg Magistrate's Court under the PIE Act, and that eviction order has not been rescinded.

[13] The parties were requested to file supplementary heads dealing with jurisdiction. During a pre-trial conference held on 24 July 2024, it was agreed that the Court's decision on jurisdiction should be held over pending determination of the main dispute in circumstances where the eviction order was granted only against Malefane. Oral evidence was heard on 15 to 25 October 2024 (excluding 24 October 2024), and an inspection *in loco* was conducted on 6 December 2024. Judgment was reserved after receipt of the inspection minute on 12 January 2025.

² Opposing Affidavit para 60.

[14] I deal with the issue of jurisdiction below.

Issues

[15] The remaining issues for determination were crystalized as follows:

- a. Whether the Second Applicant was unlawfully evicted under PIE Act?
- b. Whether the applicants were occupiers in terms of ESTA?
- c. Whether the applicants' eviction satisfied the requirements of ESTA?
- d. If so, what relief should be granted?

Witnesses for the applicants

Mrs Khiba

[16] During oral evidence Mrs Khiba testified that she was born on Zevenfontein Farm in Ficksburg on 11 September 1957. She is the seventh of eleven siblings, with two born on Kromdraai and the rest on Zevenfontein. It takes about two hours to walk from Quaggafontein to Zevenfontein, passing through three farms.

[17] Mrs Khiba revealed that her parents, Malefane Khiba and Mmatello Matoti Khiba, passed away. Her father died in 1960 and was buried at Tefello, while her mother passed away in 2014 and was buried at Quaggafontein. When asked if “Tefello” was a Sothofication of the original place name, she simply said it was the name she had always known.

[18] She testified to having three children, only one of whom, Tefo Johannes Khiba, survives. Tefo is the Fourth Applicant in this case. Her deceased children were Dimakatso Khiba, born in Tefeni in 1981 and buried on Quaggafontein in 2018, and Matoung Khiba, buried in 1985 at Tefello. She also considers Malefane Isaac Khiba and Malitaba Alina Khiba, children of her sisters, as her own, as they grew up under her leadership and care.

[19] Mrs Khiba testified that she was in Court because Francois van Niekerk and Michael van Niekerk broke into her family's home while she was away, taking all their belongings and leaving them on the street. She explained that "Magidi" is a Sesotho name for Magiel, their father, and Lilian was their mother. She knew Lilian and her children, including Pule (Michael), Moshoeshoe (Francois), Nthabiseng, Mpho and Puleng van Niekerk.

[20] She lived at Spitzkop before moving to Quaggafontein, although initially she could not recall the exact date of her arrival on the farm. She left Spitzkop because Mr Andries Swanepoel, the owner, mistreated his workers. When she moved to Quaggafontein, she was accompanied by her family – there were seven in total; her brother Pelesa, his wife Mamokethi, their mother Matodi Matelo Khiba, her daughter Dimakatso, a brother Phoka, and Malefane. Tefo, who was born in June 1992, had not yet been born at the time. The farm owner was Magidi, who lived there with his wife Lilian and their three children.

[21] Her brother, Pelesa, had found accommodation for them after an altercation with Andries Swanepoel. She worked on Magidi's farm as a seasonal labourer planting potatoes. She confirmed the presence of a dairy, but did not work in the dairy. She stated that cherries were grown on another farm, Straat Corner, also owned by Magidi.

[22] Initially, she stated the Van Niekerk twins were born in around 1998 but later corrected herself, confirming that they were born in 1990, a few years after she moved there. She recalled Magidi celebrating their birth with a braai for the men. Upon arriving at Quaggafontein, she found other families already living there, including Delport Rapuleng, Themo Mofuti, Siliakana, and a Rakoto.

[23] Describing their living conditions, she stated that her family first stayed in a shack before building a mud hut. Some of the other workers lived in brick houses provided by the employer but her family constructed their own home. She lived with her mother and three children, while her brother and his wife resided in a separate mud hut.

[24] She was unfamiliar with the term "labourer's dwelling" and stated that there was no designated compound for workers. Her family brought eleven cattle from their previous home and Magidi allocated three grazing camps for the workers.

[25] Mrs Khiba testified that when Magidi ceased farming and left the farm, he convened a meeting with all the male workers, including one who was no longer employed there. He informed them that they could continue living on the farm but that he could no longer afford to pay wages, urging them to seek employment elsewhere while maintaining their residence and the three camps. One of the camps was where they were staying, another was 'down there' and the third was just across the road from where they were staying. She was not able to describe how large the camps or residential area were.

[26] She testified about a burial site on the farm, where her brother David, her mother Matello, her younger brother Ramoketsu and her eldest daughter Dimakatso were laid to rest.

[27] Regarding the farm's subsequent operations, she explained that after Magidi stopped farming, the land was rented out; first to Khumi van Der Riet from Christophil and later to Lofrie from Harmonia, nearby farms. Her family remained on the farm throughout these transitions until they were forcibly evicted in November 2020, while Lofrie was still leasing the property. During this period, her children attended nearby schools, beginning at Zomerhoogte before moving on to Harmonia and other schools in the surrounding areas.

[28] She testified that Magidi provided her and her brother with two electricity meter boxes for their mud huts.

The eviction

[29] Mrs Khiba first learned of her eviction while in town when she received a phone call from Tswanelo Modise, who stays on the farm, informing her that her belongings had been placed on the road. The goods were later collected by the municipality, but many items were lost or damaged when their home was

demolished. She grew emotional as she described the destruction of her property, which included tables, her coal stove and 'many things ... when the walls fell'. Other damaged goods were dishes, a solar panel and batteries. She described all the items that were being stored at a municipal storage facility, shown to her in photographs, including a freezer she had purchased from Russell's store in Ficksburg, with a receipt dated 02/03/2019 showing her address as Quaggafontein Farm. She also pointed to a chest of drawers of her brothers', a cabinet and a dish, a basin, a drum, clothing, blankets, beds and a leather drum her mother used at church. Some of their other goods were stolen, and she reported the theft to the police but received no response.

[30] She was asked what happened to the cattle and she testified that Magidi's children took her cattle to Rosendal, where livestock are treated for diseases and they had to pay R29 000 to retrieve them.

[31] She later confirmed arriving at Quaggafontein in 1988. She spoke fondly of Magidi, describing him as a kind and respected man fluent in Sesotho. She recalled that the name of his father was Fanie. She lamented that living conditions worsened after his death, particularly due to the treatment of workers by his children.

[32] She recalled cooking on her coal stove, gathering wood and cow dung with Magidi's knowledge. She also described how, sometimes during school holidays, Magidi gathered the workers' children to throw poison in the mealie fields to control pests, rewarding them with money.

[33] She concluded her testimony by requesting the return of her home and cattle, stating that she now lived on someone else's property in Ficksburg.

[34] During cross-examination, inconsistencies in her affidavits and testimony were highlighted. Counsel for the respondents, Mr De Leeuw, pointed out that she had stated on affidavit that her brother started working on the farm in 1987, which she then said was not correct. She also acknowledged that Malefane, whom she referred to as her son, was not biologically hers but was raised by her and who she

regards as her son. Similarly, Malitaba, listed as her daughter in the affidavit, was actually a sibling's child whom she had also raised.

[35] Mr De Leeuw noted a contradiction between her affidavit and oral testimony regarding her pregnancy on arrival at the farm, which she admitted was incorrect. She explained that she had signed the affidavit without reading it due to her poor eyesight and that she had explained what was written to her lawyer. Mr De Leeuw put to her that he would argue that she is an unreliable witness having made several contradicting statements under oath.

[36] When asked about Mr van Niekerk, she confirmed knowing him well. He questioned her about Thabiso's identity, and she replied that he was the father, commonly known as Magidi.

[37] She was questioned about her relationship with Lillian and testified that Lillian occasionally bought electricity for her but that she was not employed in Lillian's house, contrary to the version put to her that all female workers had to clean the house once or twice a month. She insisted that while she worked in the fields, many other women worked in the house. Mr De Leeuw put to her that Lillian would testify that she did not know her and that Mrs Khiba did not reside there, but Mrs Khiba maintained her version and that Lillian knew her well.

[38] The questioning then shifted to her relationship with David Jakob, who worked on a neighboring farm, Christophil, owned by Mr Khumi. She stated that she had visited Christophil but always returned to Quaggafontein. Mr De Leeuw put to her that that Michael van Niekerk would testify that he only saw her at Christophil when doing vacation work, which she disputed, insisting that while there was a time she visited Christophil, she returned to Quaggafontein where she resided first with her mother, and until her eviction. Mr De Leeuw put it to her that Francois van Niekerk would testify that since 2015 only one person had lived in the mud hut, being Malefane and that before that, only Pelesa and her mother had stayed there. Mrs Khiba maintained that when they arrived at Quaggafontein, the whole family came.

[39] Further cross-examination covered a range of matters such as her work history planting potatoes, her signature of documents following the eviction and financial transactions, including the 2019 receipt for a deep freezer. Mr De Leeuw stated that the receipt did not prove her residence on the farm given its recent date, and that eviction proceedings were then pending, but she maintained that it listed her Quaggafontein address.

[40] Mr De Leeuw suggested there was no evidence that Tefo was born on the farm or attended any of the local schools. Her response was that Tefo gave his birth certificate to a teacher and that many of her documents were destroyed in the eviction.

[41] He also questioned the farm children's involvement in fieldwork, particularly the use of poison to control pests. Mrs Khiba insisted the practice was safe under adult supervision, while Mr De Leeuw put to her that it was dangerous, and that Lillian would testify that her husband would not have allowed it. It was also put to her that her version of her arrival dates could not stand scrutiny because Francois was only born in 1989. She maintained that the family was not there when Francois was born but that she knows the date of their arrival as 1988.

[42] On the events that occurred when Magied retired, Mr De Leeuw put it to Mrs Khiba that Lillian would testify that he only gave consent to permanent workers to continue residing. She maintained that she was in the hands of her brother and that even when her brother passed on, Magied was still there, but they were not evicted as Magied had given them a place to stay and a camp where the cattle would graze. It was only when Magied passed that Lillian and her children started to change things. She explained further that even after Palesa passed on, Magied asked that her brother from Qwa-Qwa be called and it was decided that she would from then be responsible for the cattle. However, she confirmed that the discussions about ongoing occupancy between Magied and the workers only took place with the men and that she was not a permanent worker.

[43] During re-examination, Mrs Khiba reiterated that her documents were lost or damaged during the eviction. She confirmed that Magied had called a meeting with

all the men working on the farm when he stopped farming (and permanent female employees), assuring them that they could continue living there but must find employment elsewhere. She also confirmed that Pelesa's cattle were entrusted to her after his passing in 2005. This was after her brother had been called who confirmed that she was now responsible for the cattle. There was no reason for the cattle to be removed and Magied agreed to this.

[44] She stated that while some men who were allowed to stay on the farm eventually left, Phoshoko Joseph Molete remained despite working elsewhere. She confirmed her inability to read English and that she could only read Sesotho, though she never finished school.

[45] Mrs Khiba responded to various questions from the Court. In doing so, she described her mud hut stating it was made out of soil, water and planks. She clarified that she has never been able to read English and that before her eyesight deteriorated, she could only read Sesotho. She had not finished her schooling. Finally, she was asked when the cattle were removed from the farm, to which she answered: 2016. At that stage there were eleven cattle, three male and eight female.

Mr Malefane Isaac Khiba (Malefane)

[46] Malefane testified that he was born on 29 March 1984 at Tshepedi farm. His mother is Somalefu Martha Khiba. He explained that they moved out of Tshepedi when he was still a baby. He currently resides in Zone 6, Ficksburg. Prior to this, he lived on Quaggafontein farm, where he arrived in 1988 at the age of approximately four years. He confirmed that Mrs Khiba, told him that they arrived in 1988 with the entire family, including his uncle Pelesa, his grandmother Matello, Manyaka, Phoka, Dimakatso, and himself.

[47] He further testified that he grew up on the farm and had several friends there, two of whom he named as Lefu Makweleka and Morena Motsekane.

[48] He started school at Zomerhoogte in 1993 in Substandard A (now Grade 1). When the school burned down in 1996, he transferred to a school on Harmonia until standard 6. He later attended Barend van Rensburg High School.

[49] Malefane testified that he knew the previous owner of the farm, Mr Magiel van Niekerk, since 1988, along with his children; Francois (Moshoeshoe), Michael (Pule) and Lilian (Ma Lerato). He did not know the names of the other Van Niekerk children.

[50] He stated that the reason why he is in Court and his testimony involves the destruction of their property at Quaggafontein and the theft of their cattle on the farm.

[51] Regarding his aunt, Mrs Khiba, he testified that she had raised him, and he regarded her as a mother figure. She had worked hard to support him and his sister, Malitaba. Mrs Khiba worked as a seasonal worker on the farm ('piece-job') and did not have many friends, her family was her focus.

[52] He stated that Malitaba is a sister and they grew up together. She also attended school at Zomerhoogte and later a school in Vereeniging. She is now married to Ezekiel Shadrach Nthai, and they have two children. Malitaba was married in a traditional wedding in 2013 at Jakkalsfontein, a nearby farm.

[53] When asked whether he had been friends with the Van Niekerk children, Mr Khiba confirmed that he had not.

[54] He mentioned that Tefo was a good student who also attended Zomerhoogte, later transferring to Marallaneng School in Ficksburg. He provided the names of Tefo's friends, all of whom lived on the farm. (Pitso Sahisa, Okero Mafuti, Lerato Siso Piteng, although some have since left. Siso Piteng remains on the farm.

[55] He testified that his family owned 11 head of cattle, which Francois and Michael took to the pound. He was responsible for the cattle, which were kept grazing on the three camps on the farm. He also confirmed that there were several family graves located on the property.

[56] During cross-examination, Malefane confirmed that he was born in 1984 and moved to the farm in 1988, as told to him by Mrs Khiba. He agreed that he had no independent recollection of the event. He acknowledged listening to her testimony in Court the previous day. He confirmed that while he could read English, he does not understand it, which is why he required an interpreter.

[57] Mr De Leeuw submitted that, while Malefane testified that he moved to the farm in 1988 with his family, an affidavit he signed on 14 September 2021 stated that he "joined" his uncle. He accepted that this is not the truth and is a false statement, insisting that they had arrived as a family. He also clarified that although they all stayed with his uncle, they did not live in the same mud hut; his uncle had his own mud hut.

[58] Mr De Leeuw noted that his sister, Malitaba, was not listed among those who arrived at the farm, but Malefane insisted that he had mentioned her. When asked whether Malitaba was born on the farm, he confirmed that she had lived there all her life and was born on the farm. Mr De Leeuw pointed out that Mrs Khiba's testimony stated that Malitaba was born elsewhere, and a birth certificate confirmed that she was born in Sebokeng, not on the farm. Malefane responded that he did not know this.

[59] It was also put to Malefane that Zomerhoogte was a community school and attending it did not necessarily confirm that a person resided on Quaggafontein farm. He maintained that he had lived on the farm, even though children from neighboring farms like Christophil and Jakkalsfontein also attended Zomerhoogte.

[60] Regarding Manyaka's relationship with David Jakob, Malefane said he was too young to interfere and that he was not aware of it. He testified that although he could not recall exactly when Malitaba attended Zomerhoogte, he remembered that she went to primary school there, later transferring to Harmonia and then to Vereeniging for high school. He stated that Malitaba eventually returned and married at Jakkalsfontein. He agreed that there was a period when Malitaba was away from the farm due to attending school.

[61] He was questioned about Tefo's birth year, confirming it was 1992, not 1994. He stated that Tefo started school in SubA at Zomerhoogte, but counsel noted that the school had burned down in 1996, and Tefo could not have attended it in 1998 at the age of six. Malefane explained that after the fire, shacks at Jakkalsfontein were used as classrooms for the children from Zomerhoogte. It was put to him that this was inconsistent with the evidence of moving to Harmonia.

[62] Mr De Leeuw pointed out that Tefo was never mentioned in any court papers or in the subsequent legal aid application, suggesting that Tefo never lived on the farm. Despite this, Malefane insisted that Tefo had lived there.

[63] Mr De Leeuw put to Malefane that Mrs Lilian would testify that Malefane himself never lived on the farm, only visiting his uncle Pelesa from time to time. He disagreed, stating that he lived there. It was put to him that Mrs Lilian would also testify that she only noticed him on the farm in 2014, after his grandmother's death, when he occupied the mud hut without consent, and when the cattle were noticed grazing illegally. He disagreed, stating that the cattle had been on the farm for a long time.

[64] Mr De Leeuw asked whether Francois was born when he arrived on the farm, and he responded that he did not know. It was put to him that Francois and Michael would testify that they never saw him while growing up on the farm, to which he again replied that he had been living there for a long time. He maintained that he knew the late Mr van Niekerk, his wife, and their children, Francois and Michael, though he did not know the other children. Mr De Leeuw put it to him that this was because, by 2014, when he unlawfully occupied the farm, the other Van Niekerk children no longer lived there. Malefane however, maintained his position that he had lived on the farm for a long time and only knew the names of Francois and Michael.

[65] There was no re-examination.

Mr Tefo Johannes Khiba (Tefo)

[66] Tefo testified that he is 32 years old, and he was born on 14 June 1992 on Quaggafontein farm. As a child, he played with Francois and Michael, whom he also knew by their Sesotho names. He confirmed that his mother is Manyaka Calastina Khiba. He recalled starting preschool at Jakkalsfontein, a neighboring farm owned by Mr Henry Du Preez. Tefo expressed uncertainty as to whether Mr Du Preez would recognize him, as they had not seen each other for many years, but testified that he would recognize him and that he knows him.

[67] He stated that it was customary on the farm for white people to be given black names, and Mr Du Preez was referred to as "Mojalefa". Tefo further explained that at the crèche he attended, his teacher was the mother-in-law of Malitaba, a woman named Matsitso, who is still residing in Ficksburg. After crèche, he attended Zomerhoogte Primary School until Standard 5 but could not recall the exact age at which he left. He mentioned the names of some of his teachers, although he noted that most of them had passed away, and the school had since shut down.

[68] After Zomerhoogte, he moved to Harmonia Intermediate School for Grades 8 and 9. He named his teachers and the principal and explained that Harmonia is located about 11 to 12 kilometers from Quaggafontein. After completing Grade 9 in 2008, he transferred to Marallaneng High School in Ficksburg, where he continued his education.

[69] He described his early life on the farm from 1992 to 2009, playing with Francois and Michael. He knew both boys and their parents by their Sesotho and English or Afrikaans names. He described Michael's father "Thabiso" as a hefty man who drove a white Isuzu, while Michael's mother, Lilian (also known as "Ma Lerato"), drove a VW Microbus and transported children to school.

[70] Tefo shared fond memories of playing soccer and hunting birds with Francois and Michael. He never joined them in swimming due to fear of water. He described Francois as shorter than Michael. They also fished in the dam. He described the farm's layout, including a T-junction, an off-ramp to the main house, and a tree-lined path. There was a grave site and a stormwater dam near the house.

[71] Tefo testified that during Christmas, the Van Niekerks would give them sweets, and Michael would sometimes join them for African beer. He mentioned that Michael's mother (Lilian) sold natural water and bred chickens which were slaughtered and cleaned by the women working in the house. The chickens' feet and intestines were given to the workers. There was a structure near the house where belts and biltong were made. Tefo stated that Francois and Michael knew him, though they might deny it.

[72] He testified that his family kept cattle and chickens and after his uncle's death, he was responsible for looking after the cattle and that Malefane was still in high school.

[73] He further testified that Malitaba practically raised him, carrying him on her back, bathing, and feeding him while they were at school together. Malitaba's mother was Mamotshega Khiba, and Malefane's mother was Malefo Khiba. Tefo's siblings, Mmatong and Dimakatso, both passed away, and Dimakatso was buried on the farm in 2018.

[74] Tefo recalled an incident where a farmworker, Mr Mokete Letsika (whom he described as very light in complexion) committed suicide by hanging himself in the trees near the main house.

[75] He named his friends Magodi Mafuti, Okero and Siso Piteng who is still living on the farm. He also mentioned several families still residing on the farm, such as the Mokgothi, Tsekane, and Tladi families, who lived close to his homestead.

[76] When questioned about the absence of his school report cards and birth certificate in the court proceedings, he explained that his report cards from Zomerhoogte were lost after the demolition of the homestead, and that he could obtain his intermediate school report cards from Harmonia. He identified his family home in the photographs presented in Court and pointed out various household items and their locations within the property. He did so with particularity, noting for example that a particular dish was used for salads, especially in December. He

pointed to clothes, a basin, a bathtub they used for washing, the family beds, his grandmother's drum, blankets, a bed cover, a table, a fridge.

[77] He was not present during the eviction, as he was in QwaQwa at the time, which is about two hours from Quaggafontein. He received a phone call about the eviction and saw pictures on social media. He contacted the local council and was told that their property would be collected from the street and stored at the municipality premises.

[78] Tefo testified that his family resided in a mud hut, and after his uncle's death, his room was converted into a kitchen. He provided detailed descriptions of the layout of the hut, including the dining room, kitchen, and bedrooms, as well as specific furniture and appliances that were present, such as a stove, fridge, and solar panels.

[79] He also described the neighbour, Mr Sekhane's house, as well as the children of the neighbouring families, Mastompana, Malepe and Ramatsira Sekhane. Their mother was Mafeleng and their father Silas Sekhane.

[80] Next to them were the Mafoti's, Tugela, Hosea, Mantobi, and their mother was Madibuseng. Their father Thabiyane passed away recently.

[81] Under cross examination, Tefo confirmed that he was present in Court when his mother had testified but said that he did not listen attentively and was there for support. Tefo also explained that he was unaware of the need for a supporting affidavit in the case when questioned about it. He was working in QwaQwa at the time and his name was not included on the land rights inquiry forms because he was not present when they were completed. He testified that he was present in the Ficksburg proceedings and recalls being mentioned. He testified that his coming and going is not a problem and that Michael and Francois also come and go. When questioned about how long he was in QwaQwa, he testified that it would be for a year or two but he would then go back to Ficksburg, which is his home. He said he can prove that he was staying at the farm.

[82] During further cross-examination, Tefo was asked about his schooling, to which he reiterated that his reports were lost during the eviction, but Harmonia's report could be obtained. He confirmed using his birth certificate to obtain his Identity document. When confronted with his mother's testimony that he gave the birth certificate to a teacher, Tefo clarified that his mother was elderly and forgetful. He also confirmed that his documents, including family photographs, were kept at the farm and lost or destroyed during the eviction.

[83] Tefo addressed questions regarding his childhood memories, including playing soccer and fishing with Michael and Francois. He confirmed that they were allowed to play after school and went hunting despite assertions from counsel that Lilian would testify otherwise. He stated that Lilian was often occupied in the main house and rarely ventured outside.

[84] He confirmed attending schools in the area until he left for high school. When at high school they would stay in Ficksburg in the week but come back on the weekends, like the Van Niekerk children. He was responsible for looking after the cattle on the farm after school after Pelesa died in 2005. He confirmed that Mrs Khiba took over responsibility for the cattle at that time following the family discussions. However, he would be responsible for making sure the cattle did not go through the fence or to the neighbours' farms. There was brief re-examination.

Malitaba Alina Khiba (Malitaba)

[85] Malitaba testified that she was born in 1988 and was 36 years old. She was born in Zone 12, Sebokeng, Vereeniging, as told by her mother. She considered Mrs Khiba her mother since she did not know her biological mother well.

[86] She explained that she understood the reason for her appearance in Court related to her family being forcefully evicted and their belongings thrown into the street. She identified Francois, the son of Mr Magidi, as the person who placed their property on the street.

[87] She described her upbringing on the farm, where she had known Mrs Khiba as her mother since childhood. She testified about attending school at Zomerhoogte, located just behind their home. She referred to the farm as their home.

[88] She provided a detailed description of the homestead, explaining that it was a mud house, while the neighbour had a brick house. She listed the members of her family who lived with her (Mrs Khiba, Malefane, Tefo and her two children) and described her schooling at Zomerhoogte, where she began Sub A in 1994 and completed Sub B in 1995. In June 1996, the school burned down, and she provided the names of her teachers, Ma-Mupedi and Mr Lenkwe, the principal.

[89] After the fire, they were relocated to a neighbouring farm, Harmonia to continue their schooling. She testified that they were transported to and from school by Mr Magidi and Mr Henry du Preez. She named several individuals who attended school with her, including the late Dimakatso Khiba, Mrs Khiba's child. After completing her education at Zomerhoogte, she attended Harmonia School and again provided the names of her teachers and friends from the farm.

[90] She also gave a detailed description of Mr Magidi, describing him as the "loving" employer of her uncle, Pelesa. She referred to some of Mr Magidi's family members by their Afrikaans and Sesotho names. She mentioned the other families who lived on the farm, stating that there were eight houses on the property.

[91] She confirmed that her uncle, Pelesa passed away in 2005 and is buried on Quaggafontein. She described Mr Magidi as a caring person who loved all the farm residents, and she recalled incidents where children, including herself, would misbehave by stealing fruit from the trees. Mr Magidi would only issue warnings saying "we mustn't eat too much and he also has to eat". She also recalled that, in December, he would distribute sweets to the children and encourage his own children to play with the black children on the farm and to learn their language. She described Mr Magidi as being fluent in Sesotho and stated that he would mediate disputes, such as domestic violence cases, rather than involving the police.

[92] Regarding Ma-Lerato, his wife, she described her as not very talkative, stating that she would greet the children on the farm but otherwise remained quiet. She testified that Michael played with other children on the farm and that Mr Magidi encouraged such interactions.

[93] She stated that Michael often spent time with the children, fishing, hunting or accompanying her uncle, who taught him to drive a tractor and plant seedlings. She described Michael as a loving person, while Francois was more reserved, rarely joining in activities with the other children.

[94] She also described her family's activities on the farm, such as gathering wood and fetching water, which were mostly her chores. Her uncle was a tractor driver, although he struggled with alcohol. She described her memories of Mrs Khiba on the farm, disagreeing with the submissions that Mrs Khiba never lived on the farm, stating that she harvested potatoes and worked on the mealie fields. She also confirmed that Tefo lived there, describing his friends and recalling his playing soccer, and saying that he left the farm for schooling, just like everyone else. After their schooling, the children would come home to Quaggafontein.

[95] She elaborated on her schooling, stating that she attended Zomerhoogte and later transferred to a high school in Sebokeng in 2005. After finishing school, she returned to the farm in 2009 and in 2010 she got married on a neighbouring farm and lived with her husband until he lost his job in 2016. Thereafter, she returned home to the farm. She had two children, aged 11 and 6, and since the eviction, has been living in Ficksburg with them.

[96] On the day of the eviction, she was not at home. She was shown photographs during her testimony and described features of the house layout, and identified several items, including blankets, containers for traditional medicines, a drum her grandmother used to play at church, and a glass dish used for family gatherings. She also noted that some of their property, particularly cooking pots, were missing. She described the homestead's furniture in detail and referred to the family's clothing.

[97] During cross-examination, she confirmed that she could read English but not speak it fluently. Mr De Leeuw pointed out inconsistencies between her testimony and a prior confirmatory affidavit, particularly regarding whether she was born on the farm or Sebokeng. She acknowledged that she was not born on the farm but maintained that she was telling the truth before the Court, explaining that she had been confused when completing the forms after the eviction.

[98] It was put to her that the schools in the area served all children, not just those from the farm, to which she agreed. Counsel suggested that attending school in the area did not prove she lived on the farm, but she insisted that she did live on the farm while attending school. She stated that the district offices could confirm her address at the time. Further, that transport was arranged for them after the school burned down.

[99] Mr De Leeuw submitted that Mrs Lilian would testify that her husband never arranged transport for the children, but Malitaba disagreed, stating that someone must have transported them. He also stated that Magidi never gave her consent to reside on the farm, which she confirmed, explaining that her uncle had been granted consent and informed Mr Magidi that his family would live with him.

[100] She testified that she never worked for Mr Magidi, as she was not of working age, and acknowledged that no direct consent had been given to her to live on the farm as an adult. She confirmed that she had lived on a neighbouring farm after getting married but moved back home after her husband lost his job in 2016. She testified that then “my place or my parents place was warmer than mine”. She agreed with counsel that she had never formally sought consent to move back, reasoning that since she had never informed the farm owners of her departure, she saw no reason to request permission to return.

[101] Mr De Leeuw submitted that Mrs Lilian would testify that she had never seen the Malitaba on the farm, only on the neighboring property. She disputed this, explaining that Mrs Lilian might have seen her as an adult on the neighbouring farm but insisted that she had indeed lived on the farm. She referred to when she was given sweets.

[102] There was no re-examination.

Mamokete Mpheteng (Mamokete)

[103] Mamokete, a 38-year-old woman, testified that she was born on the farm which she referred to as Ha-Fanie, a name historically associated with its previous owner or person in charge, Fanie. Though she did not personally know Fanie, she knew his wife, Mama Cora.

[104] She was born in 1986 and attended Zomerhoogte school from 1993. She knew the children of Fanie and Mama Cora, especially “Thabiso”, the previous owner of the farm. (Thabiso is Mr Michael van Niekerk, also known as Magidi). In their community, Sotho names were given to farm owners and their families. Thabiso was described as joyful, and his name means someone who brings happiness. She mentioned his wife, Ma-Lerato and five children, referring to their Sesotho names, but could not recall their ages.

[105] She shared her memories of growing up on the farm. She was friends with Pule, who used to transport them to and from work, as they worked for Khumi. She described Pule as a friendly and mischievous person who often socialized with the black workers and would drink traditional beer with them after work. She testified that she lived with her parents on the farm, not far from the Khiba family's residence. She is staying now in Ficksburg as has young children attending school. Her father is still living on the farm, which she describes as a home.

[106] She stated that she was familiar with the late Mr Pelesa Khiba who was married to her aunt, Magolodi Sotetsi through a traditional or customary marriage. She also knew Mrs Khiba, who lived peacefully on the farm, as the mother of three children, including Malefane, whom she had known since childhood.

[107] She testified that she was aware of the eviction of the Khiba family from the farm. She learned about the demolition through viral videos on social media and radio reports, but did not personally witness the event. Upon visiting the farm, she

saw that the Khiba family's home had been demolished, and she heard that certain white individuals were present during the eviction.

[108] When asked about Malefane, she described him as a 'cool and collected' and non-violent person. She confirmed that she attended Zomerhoogte school with two of the Khiba children, Malefane and Malitaba. After the school burned down, they were transferred to Harmonia school, and the farm owner, Thabiso, arranged transport for them until she finished her schooling in 1999.

[109] She testified that when they were at school, they would go back to the farm during holidays, and even now she goes to the farm with her children when school closes. She also confirmed that Tefo was born on the farm and later went to school in QwaQwa.

[110] She has known Malitaba since childhood. Malitaba left to attend school in Gauteng and later got married at a neighbouring farm, Jakkalsfontein. Despite moving away, Malitaba regularly returned to the farm.

[111] Mamokete further testified that the farm had always been her home, but she now feared returning due to a letter received by her parents in late 2023, instructing them to vacate the property. The letter was delivered by Thabiso's children. She expressed concern that her parents would be mistreated if the Van Niekerk family discovered she was testifying in Court, as she had previously been warned not to "bad-mouth" them. Despite the threats, she felt compelled to testify that the Khiba family had indeed lived on the farm.

[112] Regarding the farm owner's operations, Mamokete stated that when Thabiso ceased farming in 1998, he allowed the workers, including her father and Pelesa, to remain on the farm and continue using the land for grazing. He had made it clear that no one should leave unless they chose to leave. Although many workers sought employment elsewhere, they continued to stay on the farm. This arrangement remained in place until the owner's death in 2006. After his passing, however, restrictions were placed on the number of cattle they could keep. She agreed that

Mrs Khiba was not a permanent worker, but she was staying with Pelesa who was a permanent worker.

[113] It was put to Mamokete during cross examination that Mrs Lilian, would testify that her late husband, Michael van Niekerk, only gave consent to reside on the farm to permanent workers. She confirmed that they could stay on the farm and look for work elsewhere. While she accepted that Mrs Khiba was not a permanent worker, she was staying with Pelesa who a permanent worker was. She confirmed that Magied passed away in 2006, several years after ceasing farming activities.

[114] During cross-examination, counsel submitted that Zomerhoogte school was not exclusively for children living on Quaggafontein farm, but for children from surrounding farms as well. She agreed but emphasised that she had attended the school while living on the farm, and that she is at Court to say that she went to school with Malitababa and Malefane who were also living on the farm. She also confirmed that Tefo, had initially attended school in Zomerhoogte and later went to school in QwaQwa. She admitted that she has stayed in Ficksburg, where she rents a place, since 2014, so that her children could attend school, but she still regards the farm as her home, and where she will be buried. It is where she returns with her children during holidays.

[115] Mamokete testified that after she had deposed to an affidavit her father was approached with threats. Despite these threats, she came forward to tell the Court what she knew about the Khiba family's residence on the farm.

[116] Mr De Leeuw put it to her that Mrs Lilian would testify that only three individuals had consent to reside on the farm: Pelesa, his mother, and someone named Elisia. She denied this submission stating that she had never heard of Elisia and that her uncle's wife was known as Augustina not Elisia. She concluded by reiterating that she had lived on the farm, that the Khiba family lived there, and that she came to Court to provide her account despite the risks involved. She firmly stated that Thabiso had known Mrs Khiba for years and 'never once did he chase her away'. She confirmed under cross-examination that Malitaba had returned to the

farm after school but shortly thereafter went to Jakkalsfontein where she was married, for several years.

[117] During re-examination, she clarified that her father was considered a permanent worker and that Magied had given consent to such workers to remain on the farm. She described a permanent worker as someone who had signed a contract to work on the farm, and she knew of others who were not permanent workers but had remained on the farm including Malefane. She also spoke of others who had remained on the farm from that time. She reiterated that she knew of no Elisia, and that the name of her aunt, Pelesa's wife, was Malgolodi Akostina Tsotsetsi.

Witnesses for the respondents

Lilian Elizabeth van Niekerk (Mrs van Niekerk)

[118] Mrs van Niekerk testified that she moved to the farm Quaggafontein in 1981 upon marrying her husband, Michael, a farmer. She described the type of farming conducted on the farm as mixed farming, initially involving maize, wheat, and potatoes, later expanding to include sheep and cattle. Although she could not recall exactly when potato farming commenced, she provided a detailed account of her role on the farm. She worked with the wives of the permanent workers, particularly during harvesting. On Saturdays, these women would assist her with cleaning the house, washing windows, and sweeping the yard. She clarified that it was only the wives of permanent workers, not all the women on the farm, who were involved.

[119] She described her relationship with the farm workers as good and testified that she frequently went to the dairy and the land. When potato farming started, she sometimes helped count the pockets of potatoes to be loaded onto lorries. She stated that her husband's relationship with the workers was also good, although he interacted mainly with the male workers, and did not engage with female workers. She said that her husband did not assist female workers with obtaining birth certificates for their children. Her relationship with the female workers was similarly described as good.

[120] She knew the Khiba family, comprising the deceased David, his wife Elisia, and his late mother, Matello.

[121] She recalled Elisia was David's wife but was unsure. When asked if it could have been "Augustina," she rejected it, saying Augustina did her children's laundry on Fridays. She was Silias' wife, she said.

[122] She knew David only by that name, and did not know his second or any other names. She testified that David, his wife, and his mother were the only members of the Khiba family who lived on the farm, with the consent to reside there. No other persons with the surname Khiba lived on the farm.

[123] She was adamant that David was a permanent worker and worked as a tractor driver. She testified that only permanent workers and their wives lived on the farm, and there were no temporary workers living on the farm.

[124] According to her testimony, workers usually resolved disputes among themselves. She could not recall if her husband helped resolve them.

[125] She testified that she did not know Mrs Khiba and she had never worked on the farm. She suggested that she might recognize her if she saw her in person. She did not know the name Manyaka. She said that she would have had interactions with her with her if she had been living on the farm. Regarding Malefane, she recalled an incident in 2014 when she saw him driving sheep into a camp and closing the gate. She asked him who he was, and he responded that he lived in the mud hut. Prior to that, she had never seen him before. Regarding Malitaba she confirmed seeing her at a neighbouring farm, Jakkalsfontein, where she assisted at the dairy. She had never seen her on Quaggafontein, as far as she could recall.

[126] When questioned about whether Malitaba had been seen on the farm before the eviction, she responded that she did not know when the eviction took place, mentioning 2015 or 2016. She also testified that she did not know Tefo and had never seen him on the farm. She stated that David had no children. When informed

that Mrs Khiba claimed they had a shack on the farm when they arrived, she said that she had never seen a shack there.

[127] She described the house where David and his family resided as one with two doors, with David living on one side and his mother on the other. She was shown photographs from the oral evidence bundle³ and confirmed that the house depicted looked similar to David's house, although she could not be certain. She stated however, that there was no DSTV dish as depicted. She stated that no other persons resided there.

[128] She testified that her husband stopped farming in 1998 and told his workers they could stay until they found new jobs, after which they would have to leave and take their cows with them.

[129] This arrangement applied to all permanent workers. She stated that there were no temporary or seasonal workers living on the farm at that time, and that these arrangements were made exclusively with permanent workers.

[130] She denied that her husband ever assigned tasks to children, particularly in handling poison for bugs, as alleged by Mrs Khiba. She elaborated by saying he would never allow children to handle poison. She also denied that he provided transport for the children when the Zomerhoogte school burned down. She said the children walked to school.

[131] She testified that her husband passed away in 2007, next to her in a bakkie when they were returning home from town. Later a service was conducted at the Methodist Church in town.

[132] When asked about the current workers on the farm, she mentioned two ladies both named Emily, Jacob, Lerato, and Kimetso. She did not know their surnames.

³ Volume 5, p202. (see r,34).

[133] She denied her sons went hunting birds with pellet guns with the applicants, claiming her husband would not have allowed it. They could only hunt together. She confirmed her children's names and birthdates, confirming the tradition where her husband provided a sheep for workers to braai after their birth.

[134] She also testified that in 1988 two of her children were born. Francois was born in 1989 and the twins in 1990. Francois was born in 1989 and the twins in 1990. She said she knew their Sesotho names, which was confirmed during her cross-examination. She still lives on the farm, now in a flat next to the main house. Two of her daughters now live in Port Alfred, where they have lived since they left school. One daughter lives in Johannesburg. Michael lives on a nearby farm and Francois lives in the main house on the farm with his wife. There are still farming activities on the farm which Francois and Michael attend to.

[135] During her cross-examination, she described Michael as a hard worker with a passion for driving tractors since a young age. She stated that he would often disappear after school to drive tractors, and a neighbour would call to assure her that he was safe, and either she or a driver would make sure he got home. She denied that her children ever visited the Khiba family's homestead, and when pressed about whether she would have known given that he disappeared at times, she said he only disappeared to drive tractors. She accepted that the farmworkers' children would often come to play soccer at their shed but insisted that they 'never went to play there'. She ultimately accepted that that was at least to her knowledge. She could not remember the names of all the children that played soccer together.

[136] She also denied letting her children swim alone in the dams, stating they only went swimming with an adult or fishing with their father. Though she could not always monitor them closely, she was assured that they followed their father's rules.

[137] She testified that both at the time of and before her husband's death in 2007 she knew all the permanent workers and their families living on the farm. She said that non-permanent workers were not meant to be there, although she acknowledged that some probably were. She named some of the workers, mostly by first name, but could not remember their children stating that some of the children

she did not know at all. She was not in a position to comment on the testimony that children would sometimes eat the fruit on the fruit-trees with her late husband's knowledge.

[138] She described her late husband as a good, peaceful man who preferred to resolve minor disputes without involving the police, though she confirmed that the police would be called if necessary. She confirmed under cross-examination that she would allow the workers to take the intestines of the chickens that were slaughtered. She confirmed that Pelesa had died two years before her husband did.

[139] In response to questions about farming after 1998, she confirmed that her two sons were now responsible for the farming activities, which included maize, cattle, and sheep. She was further asked about the workers' children playing on the farm and conceded that children sometimes played in the fruit trees. She was asked about workers living on the farm and their families. She agreed that some labourers resided in mud houses. However, she could not recall the exact details regarding the maintenance of these houses or who looked after them.

[140] When questioned about specific families on the farm, including the Khiba family, she acknowledged that she knew them but had limited information about their broader family relations or personal circumstances. When she was confronted with the testimony of other witnesses about David's family, she conceded that her knowledge was not comprehensive, and it was possible that other seasonal workers or family members had resided on the farm without her knowledge.

[141] She agreed that David's elderly mother stayed on the farm after his passing in 2006 until she passed away 2014. She was given permission to remain, she said. She accepted both David and his mother are buried on the farm. David's wife left the farm after his passing, around 2010. She did not know who cared for David's elderly mother during this time. She also did not know who maintained the mud hut but agreed that someone had to do it.

[142] When asked if Quaggafontein could have been their home, she said she did not know. Although she maintained that Mrs Khiba only stayed at Christophil, she

acknowledged that Mrs Khiba visited her mother often at Quaggafontein, sometimes for a week or two, and she accepted it could have been longer. She also confirmed that someone committed suicide on the farm, and that person had a light complexion as Tefo had testified.

[143] She confirmed that an affidavit Francois had deposed to saying Pelesa had always resided alone was wrong; he had a wife. Later she said she did not know if they were married or not. She did not, however, recall that he had a brother called Paulus Khiba. She also conceded that there were seasonal workers, and it could have included Mrs Khiba. She ultimately accepted she did not know if Mrs Khiba had arrived in 1988 as she just knows her from Christophil. She also conceded that the children could have lived with their grandmother and stayed on the farm, and that she would not know. She accepted that Mrs Khiba's daughter may have been buried on the farm.

[144] She was questioned about her role on the farm and confirmed that in view of her limited role, her knowledge about the farm people and the work they did would have been limited.

[145] She confirmed that the Khibas owned cattle but said they were illegally on the farm. She confirmed that the Zomerhoogte school burned down, and that children went to Harmonia school in a shed. She ultimately was not able to dispute that Malitaba grew up on Quaggafontein.

[146] Under cross-examination, she disputed the applicants' version about her late husband allowing his workers to stay on at the farm after he stopped farming but accepted that she was not present in the meeting. She insisted that it was only permanent workers who could stay, and their wives.

[147] Under re-examination, Mrs van Niekerk confirmed that those she knew who stayed on were permanent workers. She confirmed that she did not sell the intestines or give them to other workers.

Stefanus Francois van Niekerk (Francois)

[148] Francois testified that he had lived on the farm since birth, estimating his own age to be around 35 or 36. He explained that his understanding of the reason for the proceedings is that the Khiba family assumes they had been illegally evicted when Malefane was evicted.

[149] When asked about his interactions with the farm workers, he said he only knew the men, and interacted with them by driving tractors, herding sheep, and working in the dairy. He confirmed that he knew David from the Khiba family and was told by his mother that David's wife and mother also lived with him. However, he did not interact much with David. He mentioned that he and his brother interacted with other workers, such as Elias and Silias. He recalled playing soccer with five children which he named (Tshepo, Pitso, Lerato Thediso and Boetie, though he could not remember additional names or recognize a person named Tefo, who claimed to have played soccer with him.

[150] He and his brother were the only ones allowed to hunt for birds with pellet guns, as their father forbade friends when hunting. They also could not swim in the river or dam until age 15 or 16, after starting high school without adult supervision. He testified that he had no interactions with children on the farm from high school.

[151] He testified that he does not know Mrs Khiba but knew of her, but only from seeing her at the farm Christophil. He and his brother used to work there and Mrs Khiba used to bring meals to David Jakob with whom she was in a romantic relationship. They would also see her at his house when picking up or dropping off workers. He said it was common knowledge she was living with David Jakob on that farm.

[152] He denied Mrs Khiba's claim of arriving on the farm in 1988 saying he cannot recall seeing her there. He knew David from the Khiba family but was unsure about his family connections. With reference to an affidavit in which he had referred to a Paulus Khiba, he testified that he mistakenly confused Paulus Khiba (a deceased brother of David) with another person also named Paulus.

[153] He stated that he did not know Malitaba personally but that he knew of her, and who she is but only seeing her at Jakkalsfontein dairy. He testified that he could not recall seeing her at any other place, and that as far as he knew she had never resided on Quaggafontein. He also denied knowing or seeing Tefo on the farm or anywhere else. He was asked if he recognized anyone in Court as from the farm and said he did not. He testified that he only met Malefane after returning to the farm in 2015, when Malefane was living in David's house without permission. He testified that he did not play soccer with Malefane as a child.

[154] He explained that he left the farm in 2008 for further studies in Bloemfontein (2008 and 2009). In 2010, he worked on his grandparent's farm and in 2011 both on another farm initially and then at Jakkalsfontein for the rest of the year, when he was back on the farm. From 2012 to 2014, he was working in Zimbabwe and Zambia and in 2015 he returned. Upon his return, he found Malefane living in David's house and his cattle grazing illegally, causing problems with overgrazing. He testified that he and his mother tried multiple interventions with Land Affairs representatives, but Malefane remained uncooperative. This led to the cattle's impoundment in a now defunct pound in Ladybrand.

[155] He confirmed his father allowed workers to keep two branded cattle each (MGY for workers, MGQ for his father) under a specific branding system. Malefane's cattle lacked branding. If branded they would not have been accepted at the pound.

[156] According to his testimony, Malefane was the sole occupant of David's hut when Land Affairs officials and the sheriff visited. He personally never attended Malefane's mud hut. He explained his answer by saying that every time he saw Malefane and when the Sheriff served documents, he was alone. He testified that he would have noticed other occupants because you drive past the houses going to his house and back and the only person he saw there was Malefane.

[157] During cross-examination, he confirmed listening to the applicants' testimony online via Microsoft Teams, though he missed part of Mamokete's evidence. When asked if he knew everyone who lived on the farm since 1988 until his father's death in 2007, he said no, explaining his mother had more information.

[158] He admitted to being unaware of all farm occupants between 2007 and 2015 due to his absences. Since his return, he kept records of all residents on his laptop, including employees and non-employees, as he commenced documenting occupants when issues arose with Malefane. The records included full names, ID numbers, and house numbers. The records were not produced in evidence, however.

[159] He listed five workers; three males (Jacob, Lerato and Kimetso) and two female housekeepers (both called Emily) as the current permanent workers. He mentioned Mokete Mpheteng, his wife and son, as other people who lived on the farm. Mokete had permission to live there, but when asked if his wife had permission too, he answered: 'I would assume so. If they marry. Yes.' He then admitted that he is not sure how the law works. He testified that Mokete's son, with whom he used to play soccer, does not have permission but is still staying there and that is not an issue. On being pressed, he also identified a person called Atalina as living on the farm.

[160] He was pressed on how consent to reside worked on the farm. He testified that children could live with their parents until the age of 18. As adults, they only had consent if they were employed on the farm. He testified that it was only Mokete, who no longer works on the farm, but was granted consent to reside on the farm by his father.

[161] When questioned by Mr Hlapolosa about Mokete's daughter's testimony (Mamokete) he said he did not listen to her whole testimony and did not recall it all. He recalled that she said he had confronted her father. He stated that it was about an Eskom account. He denied that this confrontation involved her testifying in Court. Further, when asked if Mamokete's family home was on the farm, he denied it, saying the farm was "his family home". In his view, people who were not working on the farm could not be considered lawful residents. He was pressed about Mamokete's testimony about her living on the farm, and while he accepted that she may have grown up there, he insisted that she no longer resides there. When presented with her unchallenged evidence that she regards Quaggafontein as her

family home, lives in Ficksburg so her children can attend school but returns when not in Ficksburg, he testified that he has never seen her there and it cannot be her home if she is not living there. When asked whether his seeing or not seeing someone is conclusive of whether they stay at Quaggafontein, he answered that he would assume so, yes, and that if you do not see someone there, they are obviously not living there.

[162] When probed about Malefane's presence on the farm he insisted that Malefane lived alone, and he detailed his repeated interactions with land affairs over Malefane's illegal grazing of cattle.

[163] According to his testimony, he assumed responsibility for managing who resided on the farm since 2015, maintaining records of individuals who had consent to live there. Regarding record-keeping, he mentioned he began formally keeping track of the farm's residents only from 2015. He has his workers tell him if there are visitors. However, when pressed on the Mpetheng family, and Mamokete's visits, he insisted that he would have noticed someone who stayed for a month or two weeks and asked his workers about it. However, he confirmed he had no records on the Mpetheng family.

[164] When asked about various workers and their children, he stated he could not recall all their surnames, being Sesotho names, or the details of their families, but assured Mr Hlapolosa that he recorded this information on his laptop.

[165] He testified that Emily stays alone and the 'other' Emily stays with her husband (whose name he does not know). He accepted they have children, one called Pule, who is now an adult and staying on the farm without consent. They have two adult sons who do not live on the farm. He later mentioned the 'first' Emily has a young child. He confirmed that he had not visited any of the farm residents in their homes but had installed Eskom meters. His employee known as Lerato, he said, lived with his elderly mother Atalina, and despite being registered employees, he did not know their surnames. Kimetso he said, lives on the farm with his wife, Matelo, and he does not know if they have children. Matelo lives in town but visits. Francois confirmed that Kimetso lived in Quaggafontein before he worked for him. Jacob Letsika, he said, lives alone and his wife, who lives in town visits occasionally and

when she does, Jacob usually informs him, although not all the time. He does not regard Jacob's wife as a resident on the farm as she is in town the majority of the time. He did not know the names Mfoti or Sekani mentioned by other witnesses as people living on the farm but maintained he would recognize a person if he saw him.

[166] Francois testified that according to his understanding of legal occupancy, the children of farm workers required consent to stay on the farm once they reached adulthood. When asked if a child who reaches majority is expected to leave the farm, he answered that he expected that they leave the farm and would 'go look for work or further studies or whatever the case may be.' They could, however, visit their parents.

[167] He conceded that he was not a legal expert but believed a person had the right to live on the farm if they were employed on the farm or by his father. When asked about his father giving consent to those not employed, he answered: 'Nobody else would be given consent. Only employed peoples would have consent to live on the farm.' He said that workers have employment contracts but that the consent to reside is not written. He later testified that if you are married then the spouse has consent to reside. While acknowledging ESTA defines occupier's rights, he emphasized his authority as the farm's owner to determine lawful occupancy.

[168] He defined residents as only employees or former employees granted permission by his father, emphasizing that he alone could grant or revoke this permission. Regarding past and current residents, he referred to his mother's knowledge before 2015 and confirmed his own management afterward.

[169] During his lengthy cross-examination, he admitted gaps in his knowledge of certain residents and events, often deferring to his mother's accounts. He indicated that he could not dispute parts of other testimonies, such as individuals who may have resided on the farm, but he argued that some left voluntarily, taking their belongings, which he considered a relinquishment of residency.

[170] He disputed the Khiba family's evidence about their family belongings. He said the belongings in the photographs are all Malefane's belonging as he was living

in the house but suggested that some items might have belonged to his grandmother and that Malefane had moved into his grandmother's house when she died in 2014. Mr Hlapolosa put to him that their evidence was not challenged. Francois responded that identifying property does not mean it is 'their belongings' and said he would 'argue that it could be Malefane's belongings.' At a later stage, when asked about the presence of three beds, he suggested that Mrs Khiba may have stayed there when doing piece jobs.

[171] He was questioned on inconsistencies between his affidavit and his mother's statements, often conceding her version as correct as she had knowledge at the time, or attributing discrepancies to misinformation. When questioned about specific past occupants and their relationships, he claimed limited personal knowledge at relevant times and denied knowledge of the Sekani family or that they had also been evicted in 2020. He said he did not remember Matelo but then accepted she was there. He was questioned about his testimony on Paulus Khiba, and ultimately conceded that a Paulus Khiba, being Palesa Khiba's brother, is buried on the farm.

[172] He persisted that Malefane only moved into the house in 2014, after his grandmother's death. He reiterated that he only knows Malitaba from Jakkalsfontein and disputed that she had returned to Quaggafontein. He admitted that he was only in a position to speculate about where she had lived as a child. He also reiterated that he only knows Mrs Khiba from Christophil and that he does not know Tefo. However, he conceded that he did not remember all of those he played soccer with.

[173] He was also challenged on his statements about cattle ownership and management, admitting his understanding came from what his mother informed him. He testified that David was the only person who had cattle with his father's consent and that he assumed that 'the grandmother' could look after the cattle until the cattle passed. He said that if he was making a decision, he would allow the grandmother to look after cattle until the cattle had passed. He reiterated that his understanding was that workers could keep two cattle. He confirmed that he had contacted the pound in Ladybrand and caused the removal of the cattle, which he insisted were not marked. He accepted that there had been no mention of markings until his cross examination. He did not dispute that Mrs Khiba had to pay R29 000 for the release of the cattle.

[174] Mr Hlapolosa put it to him that his testimony was aimed at isolating and disintegrating the residency and occupancy rights of the Khiba family, which he accepted and went a step further to confirm his intent to dispute their permission to stay on the farm. However, he maintained that he knew Mrs Khiba from Christophil and Malitaba from Jakkalsfontein. He accepted he had been misinformed about Matelo.

[175] It was put to him that he was lying to this Court. Further, that his evidence regarding when Malefane came to reside on the farm conflicted with his affidavit in the Magistrate's Court eviction proceedings.⁴ He conceded that his testimony in that affidavit about Malefane is incorrect suggesting it is a version he got from his mother. On the issue of whether a mud house is a labourer's dwelling, he became argumentative and said both a mud house and a brick house are labourer's dwellings.

[176] In re-examination, Mr De Leeuw focused on Francois understanding of the term labourer's dwelling and clarifying his understanding of occupancy and consent under ESTA.

[177] He also stated that his independent witnesses did not testify due to fear of persecution. Further, he testified that labourers could only grant residence rights for direct family members, not extended relatives, aligning with his understanding of consent and residency policy on the farm.

Michael van Niekerk (Michael)

[178] Michael, born on 17 October 1990, testified that he is now 34 years old and that he had lived on the farm for 30 or 32 years. He stated that the reason for the case is that people who never stayed on the farm now want to come stay there. As a child, he interacted mainly with Silias, a tractor driver, recalling falling asleep on the tractor. He played soccer with five children who he named but could not recall others.

⁴ Page 142 of the Record.

He denied hunting birds with pellet guns or swimming in dams with other children. He said his father would never allow hunting with others.

[179] He confirmed there was only one dam on the farm, which was too small for fishing, though he fished elsewhere with his father and brother. He had limited interactions with workers' children and only visited Emily's house, considering her as a second mother. He testified that he never played or visited the Khiba home. He knew Manyaka only through his work at Christophil farm and said that he knew her as the person who brought David's food for the day, and he would see her at nights when dropping workers. He saw her throughout the time he worked there, he said. He did not know Malefane until 2014. He testified that he knows no member of the Khiba family who stayed there before 2014.

[180] His mother testified he would disappear after school, which he confirmed, explaining he worked at Mr Khumi's farm, driving tractors from age six or seven until 2008. He never saw Malitaba or Tefo and did not know them, nor did he play soccer with Tefo. He said he could not identify anyone in the Court room.

[181] He stated he lived on the farm until 2009, then moved to the USA, returning in 2011 to work for a year on Christophil. He testified that Mrs Khiba was still on Christophil that year. Michael was in the USA again in 2012 and returned in 2013, remaining and working on the farm since. In 2022, he now stays at a neighboring farm De Brug but continued working on Quaggafontein with his brother. He stated that Malefane had been problematic since arriving in 2014, cutting wires and gates and harming cattle with fertilizer. He personally confronted Malefane and saw no one else living in his house. He said he would have seen people from the main house. He confirmed Malefane's cattle were unbranded.

[182] Regarding farm residents, he named six individuals (Jacob, Kimetso, Emily, Adelinah and Sidiso and his dad) and testified that, aside from Malefane since 2014, none of the applicants had lived there.

[183] Cross-examined, he testified that his Sesotho name means Rain but was uncertain about how he got his Sesotho name. He could not recall some past

residents. He confirmed his siblings' Sesotho names and that they visit Quaggafontein which they consider their home. He insisted only those persons working on the farm resided there, some of whom had long served the family. He was unclear about who was staying as Malefane's neighbor. He then recalled that Siliias stayed there, but did not know Siliias's surname. He testified that he did not know Matelo Khiba or David Palesa Khiba.

[184] He recalled only Siliias as a tractor driver but did not dispute that David could have been one, saying he did not recall him. He denied listening to the applicants' testimonies but when confronted with Tefo's evidence that he was a nice and generous person, he commented that it is weird that he cannot remember him, and that if he used to play with him, he would have probably remembered him. He did not dispute Tefo's recollection of his family's vehicles or his testimony about where Michael attended school. He denied fishing or playing with Tefo saying he always played with the same children and would have remembered. He recalled hearing about a suicide on the farm but was too young to remember details.

[185] He testified that the farm was his home and that Manyaka and Malefane were trying to claim residence without having lived there. He did not know Malitaba or Tefo, concluding his testimony without reexamination as the final respondent witness.

Inspection *in loco*

[186] I attended an inspection *in loco* on the farm Quaggafontein Farm near Ficksburg, Free State Province on 6 December 2024. DJP Cowen attended virtually.

[187] The applicants; Manyaka, Malitaba and Malefane Khiba were present, represented by Mr Hlapolosa and Mr Mofokeng.

[188] None of the respondents attended. Their legal representative Mr Botha was present. Three officials from the Department of Agriculture, Land Reform and Rural development as well as a local councillor also attended the proceedings.

[189] The inspection team met near the entrance road to the farm. The parties then agreed to move to the main house and alighted approximately 100 meters away from the Van Niekerk's home.

[190] Mr Botha commenced by pointing out where four cottages and Khiba's home used to be and estimated the distance to be between 500–700 meters away (**Point A**)

[191] The point where we alighted is **Point B** (100 m from the main house). **Point C** was identified as a viewpoint to see the labourers' cottages, (on the road between Point A and Point B).

Observations at Point B

[192] Malitaba pointed out Fanie van Niekerk's old house where peach trees used to grow, as well as the farm owner's family graves.

[193] She also pointed out a chicken processing area, a storage facility for tractors and implements, a cattle kraal, and a water reservoir.

Observations by Mrs Khiba

[194] She pointed to a reservoir, a fountain, a potato storage facility, and potato fields on the mountain behind the main farmhouse.

[195] I inquired about the location where a suicide occurred, which was then pointed out.

[196] Moving to **Point C**, estimated to be 150 meters from the road to where the Khiba house was, Malitaba pointed out a water dam.

[197] Mrs Khiba indicated a site where soil was dug, though its purpose was unclear.

[198] Mr Botha pointed to roads leading to Christophiel and Jakhalsfontein farms.

[199] The dam was confirmed as a past fishing and swimming site, though it was now mostly dry.

Inspection of the Khiba homestead and the road to gain entrance to the Khiba house (Point E)

[200] At the demolished Khiba home, Malitaba pointed out rooms, an open washing area, and a gravesite (**Point D**).

[201] She pointed out the graves of Pelesa, Matello, Dimakatso, and Paulos Khiba.

[202] Two cattle camps were identified: one near the graves, another near the main road.

[203] A further camp was behind the hill (**Point H**)

[204] She also pointed out sites of former residences of various families on the farm such as Gerald, Khiba, Seekane, Mofothi, Rapuleng and Tshoala.

[205] Details of the interior were described, including rooms, furniture, and storage locations.

[206] I enquired about Mmamokete Mpheteng's residence, which was set as the next stop.

Point F: Zomerhoogte School

[207] Malitaba identified the grey house for teachers and the red school building.

[208] I asked if it was the school that burned down, and she confirmed that it was.

[209] Distance to Zomerhoogte was estimated at 300–400 meters from the Khiba home. Zomerhoogte was owned by Mr Henry du Preez.

[210] **Point G** was Jakhalsfontein, home of Mr Henry du Preez.

[211] **Point H** was about 400 meters from Point E, where current farm occupiers live and work.

[212] Malitaba pointed out several occupiers' houses, including those of Matompa, Habofane Maketekete, Kimetso Mofothi, Lerato Rantai, Emily Molete, Emily Mofothi, and Mmamokete Mpheteng.

[213] A demolished mud house of Pule Molete was also noted.

Point I: Cattle Grazing Area

[214] The western side, where cows were seen grazing, a further grazing camp was identified.

Point J: Eviction Site

[215] The site where Mrs Khiba's belongings were left after eviction.

[216] Mr Botha and Mr Hlapolosa pointed out cultivated lands nearby.

[217] Distance from Point J to Quaggafontein farmstead was estimated at 2–3 km.

[218] Malitaba identified a broken wooden piece as part of her wardrobe, left behind with other belongings.

Evaluation of the oral evidence

[219] On the central issue of whether Mrs Khiba resided on the farm, there are two largely irreconcilable versions. It is the version of the Khiba family that they have

lived on the farm from about 1988 with the children coming and going, whereas on the version of the van Niekerk family, they never lived there.

[220] The correct approach to the evaluation of mutually destructive versions was stated in *National Employers' General Insurance v Jagers*⁵ as follows:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case anymore than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true, and that the defendant's version is false.'⁶

[221] When determining probabilities in such a case the *locus classicus* is *Stellenbosch Wine farmers v Martell*⁷ which provides detailed guidelines to assist a court in finding which version is more probable based on the evidence and logical reasoning. It is described by Nienaber JA as follows:

⁵ *National Employers' General Insurance Co LTD v Jagers* 1984 (4) SA 437 (E).

⁶ Ibid at 440D-G.

⁷ *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others* 2003 (1) SA 11 (SCA).

'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.'⁸

[222] In *President of the Republic of South Africa v SARFU*,⁹ the Constitutional Court laid down the principle that if a point in dispute is left unchallenged in cross examination, the party calling the witness is entitled to assume the unchallenged testimony is accepted as correct.

⁸ Ibid para 5.

⁹ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) (SARFU).

[223] It was also stated by Supreme Court of Appeal in *Petersen and Another v Minister of Safety & Security*¹⁰ that not every error made by a witness or inconsistency will affect his credibility. Various considerations are highlighted in that case such as whether a contradiction is an honest mistake, material, and advances or prejudices a party's case, whether it results from erroneous observation in a confused situation or can be attributed to defective recollection. Ultimately, 'in each case, the trier of fact must make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence..¹¹

Assessment of the applicants' factual witnesses

[224] Guided by this legal framework I evaluate the evidence of all the factual witnesses on credibility, reliability, and probabilities.

Mrs Khiba

[225] Mrs Khiba presented as elderly, humble farm dweller, with a demeanor that reflected her simple upbringing and lack of formal education. Throughout her testimony, it was clear that she did not possess literacy skills, as she openly admitted that she could not read or comprehend much English. She also has poor eyesight and cannot see very well. Despite these limitations, she came across as genuine and honest. She provided a detailed account of her life on the farm, including specific names, dates, and events. Her emotional response, particularly when describing the loss and damage of her property during the eviction suggests genuine distress, which supports the impression that she was speaking sincerely.

[226] Mrs Khiba's knowledge of the farm and its people appeared intimate and personal, stemming from decades of living there rather than from second-hand information.

¹⁰*Petersen and Another v Minister of Safety & Security* [2010] 1 All SA 19 (SCA) (Petersen) paras 6-7

¹¹ *S v Oosthuizen* 1982 (3) SA 571(T) at 576G- H cited with approval in *Petersen* supra 10.

[227] During cross-examination, several inconsistencies in her testimony were highlighted (such as differing accounts about the date when she first arrived on the farm, the birth dates of the Van Niekerk children, and details about her own pregnancy) Counsel for the respondents (Mr De Leeuw) emphasised discrepancies between her affidavits and her testimony in court.

[228] Mrs Khiba maintained her version that she is that she is a long-term resident of Quaggafontein, having moved there in 1988. Her detailed knowledge of local names, family relations, and events (such as the celebration of births with a braai for the workers) supports the idea that she is well acquainted with life in the farm. None of her evidence in this regard was challenged.

[229] Her long association with the farm and the richness of her narrative lend credibility and reliability to many elements of her testimony, particularly the background of living conditions, family arrangements, and the traumatic nature of the eviction.

Malefane

[230] Although Malefane appeared terse and unfriendly, he spoke very fondly of Mrs Khiba, but almost with hostility towards the Van Niekerks. His demeanor was calm and composed. He provided an account that appeared earnest, authentic and consistent with his personal experiences growing up on the farm. His oral evidence was detailed, reflecting his familiarity with life on the farm, and he remained firm even under cross-examination. This consistency in his narrative, coupled with his straightforward manner, lends credibility to his account.

Tefo

[231] Tefo displayed an open demeanor that was marked by candour and eagerness to assist the Court, yet his testimony did not appear rehearsed or exaggerated. His willingness and ability to provide thorough and detailed descriptions of events supported his credibility, the level of detail he shared (such as playing soccer, shooting and fishing with the Van Niekerk boys) and the authenticity

with which he shared it, suggested that his knowledge was derived from personal lived experience.

[232] He provided authentic descriptive detail regarding his early life on the farm, his schooling, and daily interactions. His recounting of personal and communal memories, and the manner in which he did so, from the suicide in the trees down to the names of teachers, neighbours, and even physical aspects of the homestead, added a further layer of authenticity to his testimony. His evidence on these aspects remained challenged.

[233] When he was challenged on his account of school attendance at Zomerhoogte and Harmonia, and absence of report cards he provided plausible explanations (such as the demolition of the homestead in the eviction which resulted in the loss of many documents). He honestly and frankly accounted for his absences from the farm at various points and his reasons.

Malitaba

[234] Malitaba presented as somewhat shy and unassuming. Despite her reserved nature, she came across as honest and sincere. Throughout her testimony, she provided a consistent account of events, which was corroborated by other evidence and the testimony of previous witnesses. She spoke with clarity, though modestly, and appeared to be focused on relaying the truth as she understood it. Her responses, though simple, demonstrated a genuine effort to assist the court and provide accurate information, lending credibility to her testimony.

[235] She provided detailed and authentic descriptions of the homestead, family activities, and furniture. She was not challenged on her description of any of the family's furniture and belongings described in the photographic evidence. When confronted with inconsistencies between affidavits, other documents, and her testimony (specifically, regarding her place of birth, Sebokeng, or whether she was born on the farm and when she acquired knowledge of her place of birth), she satisfactorily explains the inconsistencies as confusion rather than lies.

[236] Malitaba's narrative is marked by a strong emotional element, particularly when discussing the forced eviction and the loss of cherished family items, such as their cooking pots. Her detailed descriptions of the homestead, school arrangements, and even the specific roles played by various members of the farm community (such as Mr Magidi and Henry du Preez's arrangements for transportation of the children of farm workers after the school burned down) were conveyed in a way that support that she was recounting her firsthand lived experience.

Mamokete Pheteng

[237] Mamokete came across as considered, thoughtful and straightforward. She answered questions directly, clearly understanding the issues. Her responses were detailed and consistent. Despite apparent threats to her family, she made a conscious decision to testify to share her knowledge of the Khiba family's residence on the farm. She struck me as a courageous person driven by a sense of justice. Her demeanor was composed and confident with a respectful tone which made her a credible witness. Her deep familiarity with the farm residents and their history (Pelesa was married to her aunt, and her knowledge of the original farm name and owners "Ha-Fanie") reinforced her honesty and reliability.

Assessment of the respondents' factual witnesses

Lilian Elizabeth van Niekerk (Mrs van Niekerk)

[238] Mrs van Niekerk provided an extensive account of her history on the farm. Her narrative was delivered in a matter-of-fact tone, suggesting that she was speaking from personal experience. Despite the detail, there were many points where her recollection or knowledge was incomplete or vague. Notably, she made little to no effort to learn or recollect people's names or surnames. While this may partly be explained by ignorance, her demeanor in this regard was generally vague and defensive, and at times evasive.

[239] Throughout her oral evidence, she frequently claimed an inability to recall key events or details, particularly when questioned about facts such as names, dates, or interactions with individuals. This lack of recall extended even to seemingly basic

matters, which one would reasonably expect a witness to remember. For instance, she is uncertain about certain identities (e.g. saying she might recognize Mrs Khiba if she saw her, being unsure whether “Emily” or “Augustina” is the correct name for one of her employees) and about specific details (such as the exact timeline of the school burning down or who lived on the farm).

[240] She also made derogatory references to black people (referring to adult women working for her as “girls” and the gardener as a “boy”, further suggesting both ignorance that is historically explained, and a bias that might have influenced her account. These expressions cast serious doubt on her impartiality and reliability.

[241] Her testimony emphasises a strict view of residency on the farm: she asserts that only permanent workers and their wives, and no temporary workers, resided there.

[242] While she provides detailed operational information (such as her husband’s instructions to workers after 1998 and the description of the house where David’s family lived), there are inconsistencies regarding personal details. For example, she states that David, his wife, and his mother were the only members of the Khiba family on the farm yet later concedes that other seasonal workers or family members may have resided there.

[243] Her inability to recall key dates (e.g., the exact commencement of potato farming) or to firmly identify individuals (e.g., whether “Emily” or “Augustina” is correct) suggests ignorance and weakens the overall impression of her testimony on disputed issues.

[244] Her evidence about Mrs Khiba was contradictory. She first said she did not know Mrs Khiba who had never worked on the farm. But she later said that she knew her from Christophil and that she had often visited her mother sometimes staying for a week or two at a time. These contradictions, when compared with other witnesses’ accounts, detract from her overall reliability and credibility on issues that are central to the dispute.

[245] In areas that go beyond day-to-day operations (for instance, details regarding the identities and residency of various family members or the exact timing of certain events), her memory is sketchy or her knowledge very limited.

Francois van Niekerk (Francois)

[246] Francois' demeanour was dismissive and condescending. He responded to questions with an air of superiority, often failing to fully engage with the details put to him. His tone suggested a lack of respect toward individuals or groups different from himself, hinting at deep-seated biases. He frequently deflected questions, providing incomplete answers, as if unwilling to address certain facts directly. When confronted with inconsistencies, he tended to react defensively, offering explanations that felt contrived or insincere, casting doubt on his overall credibility.

[247] He testified to his long association with the farm, claiming to have lived there since birth and providing a range of details about his interactions, family background, and responsibilities. He was willing to admit gaps in his knowledge (for example, not knowing all names or certain family relationships of workers on the farm) and he acknowledged that he has relied on his mother's accounts for some information. At various points in his testimony, however, he revealed deep ignorance of what was ensuing on the farm.

[248] His narrative was delivered in a straightforward manner. However, he became defensive when he challenged about discrepancies (for instance, his testimony on when Malefane moved into the mud hut or his explanations regarding the cattle). His version was repeatedly challenged by Mr Hlapolosa by pointing to inconsistencies between his affidavit and his oral testimony. It was put to him that he was not truthful in his account.

[249] His testimony contains several internal inconsistencies, for example: his account about Malefane is contradictory: at one point, he insists Malefane lived alone and later admits his testimony about Malefane's arrival conflicts with his prior affidavit.

[250] He confuses individuals (e.g. mistakenly conflating David's deceased brother "Paulos" with another person of the same name) and thereafter accepting that David's deceased brother Paulus is buried on the farm and demonstrates uncertainty about relationships and family connections.

[251] Francois conceded gaps in his knowledge about the occupants on the farm between 2007 and 2015 because he was not there. He relies on his mother for historical details. He cannot be certain about events which occurred during this time.

[252] His credibility is compromised by internal contradictions and by a discernible bias toward a formal, exclusionary interpretation of residency that presented as contrived and with little bearing of the lived reality of family life of those living on the farm. His argumentative responses on specific issues further detract from his credibility.

Michael

[253] Michael presented with a slight speech impediment, which I did not consider relevant. His tone is generally matter of fact when describing his personal experiences, childhood activities, his work history, and his confrontations with Malefane. However, his testimony became less confident when recalling names and relationships; he denies knowing certain individuals (e.g. Tefo and Malitaba).

[254] When pressed in cross-examination, his inability to remember details and his inconsistent responses further affected his initial his apparent composure. He also openly acknowledges certain limits in his memory (e.g. not being able to recall all the names of individual or specific interactions) and admits uncertainty on points like the origin of his own name in Sesotho.

[255] As with the other respondent witnesses, his narrative appeared strongly influenced by his own perspective and bias on who should be considered legitimate residents of the farm. Elements of his testimony appeared designed to align with Francois' testimony, His evidence is consistent with a version that only those working

on the farm are true residents and argues that Malefane and Malitaba are falsely claiming occupancy.

[256] At some point his account is not fully coherent, for instance, he describes his personal involvement with some children, (e.g. playing soccer) and driving tractors yet later states he had limited interactions with workers' children or certain family groups. These inconsistencies weaken the overall reliability of his testimony.

[257] He also had absences from the farm over some four years whilst working and studying abroad which resulted in significant gaps in his knowledge and memory, especially about residents and relationships before his return. His knowledge of which Khiba family members resided on the farm when he was a child is inconsistent with the evidence of his mother and brother, which in turn affects his reliability in respect of his other childhood memories.

Findings on credibility, reliability and probabilities of the applicants' version

[258] Mrs Khiba's detailed narrative and emotive responses suggest she is earnest in her testimony, even though contradictions were noted with earlier affidavits. However, these contradictions are not material and could be attributed in part to her poor eyesight, inability to read and understand affidavits due to limited formal education.

[259] Her long-term association with the farm and the specificity of many details lend reliability to significant parts of her testimony. Her statement about Magidi calling a meeting with the men on the farm when he stopped farming, and the subsequent arrangement for continued residence appears consistent and is supported by other witnesses.

[260] She gave a detailed description of the mud hut where her family resided. It was made out of wood, planks and cow dung. Common sense dictates that such a structure would not have withstood the vicissitudes of the weather elements from for the period from 2005 (when Pelesa died) to 2014 when Malefane allegedly moved in. On the probabilities, such a structure would have required maintenance.

[261] Equally, on the probabilities, somebody had to take care of the elderly Matello who was 94 years old when she passed away in 2014. Accordingly, in terms of probabilities, many key aspects of Mrs Khiba's testimony appear highly plausible and are supported by context.

[262] I therefore accept Mrs Khiba's version as credible and persuasive. Her evidence in all material respects is corroborated by Malefane, Tefo, Malitaba, and Mamokete. I accept their evidence as it was also confirmed during the inspection *in loco* when they pointed out *exactly* where the different rooms of their home were, the gravesite, and the grazing camps amongst others. This evidence was not challenged. None of the van Niekerks attended the inspection *in loco*.

Findings on credibility, reliability and probabilities of the respondents' version

[263] Mrs Van Niekerk's testimony is largely credible when it comes to describing the day-to-day operations and long-term practices on the farm. Her candour in admitting gaps (e.g., uncertain dates or names) adds to her authenticity, yet these same gaps and certain contradictions (about who exactly belonged on the farm) introduce elements of uncertainty that undermines her overall reliability on contested issues. The reliability of her recollections regarding interpersonal relationships and specific contested details is less robust and appears to be selectively framed.

[264] She was unable to corroborate details provided by her sons under oath and her inconsistency undermined her reliability. Taken together Mrs Lilian's evasiveness, failure to recall basic facts, lack of effort in remembering critical details, and biased perspective indicate that her version cannot be relied upon. It appeared that she was either unwilling or unable to provide a clear, reliable account to assist the Court, and her evidence must be treated with considerable caution

[265] Insofar as Francois is concerned, he tried to explain away gaps, attributing certain inconsistencies to his absences or to misinformation provided by his mother. While these explanations are plausible, they do not fully resolve the contradictions,

such as the admitted falsehood regarding Malefane's arrival which he conceded under cross-examination

[266] There is a high probability that his entire narrative, including his precise recollections of family relationships, the complete history of occupancy, and the exact timing of events is contrived. He relies on secondhand information provided by his mother whose own recollections of people who lived on the farm is limited at best. His long absences from the farm means that he has limited knowledge of the residents. He relies for his testimony on a view of residency which is legally not correct and which serves to disintegrate the Khiba family structure.

[267] Michael's reliability on contested historical and familial details are equally weakened by admitted gaps in his knowledge also as result of long absences. This selective testimony reduces the overall probability that his narrative fully and impartially reflects the reality of occupancy and family relations on the farm.

[268] In my view, the probabilities favour the applicants, and I accept their version as probably true. I am satisfied that they succeeded in discharging the onus of proof. I reject the version of the respondents as contrived and impacted by bias and ignorance.

The law

[269] There is no dispute that Quaggafontein is agricultural land.¹² Accordingly, the starting point is ESTA which provides statutory protection against arbitrary eviction for occupiers of such agricultural land.¹³ Section 1 of ESTA defines an "occupier" as a person residing on land which belongs to another person, and who, has on 4 February 1997, or thereafter had consent or another right in law to do so".¹⁴

¹² As contemplated by section 2 of ESTA.

¹³ *Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga and Others* 2012 (5) SA 392 (SCA) para 3.

¹⁴ Section 1 of the Extension of Security of Tenure Act 62 of 1997. There was agreement that the Court may accept that the applicants do not earn in excess of the prescribed amount as contemplated by the definition of occupier.

[270] Consent has been defined by Matojane AJ in *Klaase*¹⁵ as “express or tacit consent of the owner or person in charge of the land”. This is a broad definition of consent. The Constitutional Court was of the view that ‘tacit’ means understood or implied without being stated. Tacit consent is no less actual because it is given tacitly. The question is whether there was consent. The Court confirmed that a restricted meaning of consent is not justified and it is given an even wider meaning under section 3 of ESTA¹⁶ to include presumed consent. The Constitutional Court¹⁷ further held that a person who has continuously and openly resided on land for a period of (a) one year shall be presumed to have consent to do so unless the contrary is proved, and (b) three years shall be deemed to have done so with the knowledge of the owner, or the person in charge.

¹⁵ *Klaase and Another v van der Merwe N.O. and Others* 2016 (6) SA 131 (CC) (*Klaase*) para 49.

¹⁶ **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) The provisions of subsections (4) and (5) shall not be applicable to any land held by or registered in the name of the State or an institution or functionary exercising powers on behalf of the State.

¹⁷ *Klaase* supra n 15 para 59.

[271] In the case of *Hattingh and Others v Juta*,¹⁸ the Constitutional Court recognized that the term "family" should not be narrowly confined to immediate family members such as spouses and dependent children. Instead, it encompasses a wider range of family relationships, including adult children and other relatives, acknowledging the diverse forms that family structures can take. Based on these principles, Mrs Khiba's right to a family life on the farm is recognized provided it is balanced with the legitimate interests of the farm owner.

Is Mrs Khiba an "occupier" as defined in ESTA?

[272] Mrs Khiba's undisputed evidence is that she continuously "resided" openly on the farm for many years in her own right after the death of her brother Pelesa, with the knowledge of the previous owner (Magidi). This ongoing residence on the farm, with the knowledge and tacit approval of Mr Magidi, places her squarely within this definition of ESTA. As illustrated above *Klaase* is authority for the proposition that in cases like this one, where an occupier has lived for more than the prescribed period on the premises with the knowledge of an owner who sits back and does not seek the occupiers' eviction, the ESTA presumption and deeming provision will favour the occupier.¹⁹

[273] The fact that Mrs Khiba left the farm from time to time to pursue romantic relationships does not detract from her occupancy. She consistently returned to the property, thereby maintaining her legitimate occupancy. So did Malitaba, after her husband lost his employment, she said her home was "warmer than her marital home". The Khiba children testified that they left the farm to attend school in other areas just like the Van Niekerk children and their occasional departures for further education were entirely consistent with practices observed in the Van Niekerk family, where leaving the farm to attend school was considered normal and acceptable. Yet, while such behaviour by the Van Niekerk was embraced and even expected, identical actions by the Khiba family meant that they have abandoned their family home. The double standard smack of bias and discrimination.

¹⁸ 2013 (3) SA 275 (CC) (*Hattingh*).

¹⁹ *Klaase* supra n 15 para 54.

[274] As an occupier, Mrs Khiba is thus protected by the provisions of ESTA. An eviction order against her should only have been granted against if certain conditions are met. Our courts, in a long line of cases have confirmed the principle that ESTA envisages a two-stage eviction procedure.²⁰ The first is a notice terminating the occupier's right to reside in terms of section 8.²¹ The second is notice of eviction in terms of section 9 (2) (d).²² An ESTA occupier may only be evicted under an order of

²⁰ *Aquarius Platinum (SA) (Pty) v Bonene and Others* [2020] 2 All SA 323 (SCA), *Snyders and Others v De Jager and Others* 2017 (3) SA 545 (CC) and *Maluleke N.O. v Sibanyoni and Others* [2022] ZASCA 40.

²¹ **8. Termination of right of residence**

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

- (a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
- (b) the conduct of the parties giving rise to the termination;
- (c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
- (d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and
- (e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.

²² **9. Limitation on eviction**

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

(2) The Court may make an order for the eviction of an occupier if

- (a) the occupier's right of residence has been terminated in terms of section 8;
- (b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
- (c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and
- (d) the owner or person in charge has, after the termination of the right of residence, given-
 - (i) the occupier;
 - (ii) the municipality in whose area of jurisdiction the land in question is situated; and
 - (iii) the head of the relevant provincial office of the Department of Rural Development and Land Reform, for information purposes, not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the

Court granted in circumstances where the requirements of section 9 of ESTA are met.

[275] In this case it is clear that the rights of the Khiba family were not terminated in accordance with ESTA. The whole family were evicted when the order that was granted by the Magistrate's Court under PIE operated only against Malefane. No eviction order was granted against Mrs Khiba. The respondents should have pursued an eviction under ESTA citing each member of the family separately.

The position of Malitaba, Malefane and Tefo

[276] All three testified that they left the farm to attend school and thereafter returned home. After school, Malitaba got married and lived with her husband on Jakkalsfontein until he lost his job. She returned to her family home in 2016. Tefo went to work in QwaQwa, for a year or two at a time, but still considered the farm his home and returned to it when not working. That he found work in nearby QwaQwa, a former homeland and where he had finished school, may be understood in light of our history. Malefane never left the farm.

[277] They have always regarded the farm as their permanent home. The place where they "reside". While this term is objective in its meaning, it has been

grounds on which the eviction is based: Provided that if a notice of application to the Court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.

For the purposes of subsection (2)(c), the Court must request a probation officer contemplated in section 1 of the Probation Services Act, 1991 (Act No. 116 of 1991), or an officer of the department or any other officer in the employment of the State, as may be determined by the Minister, to submit a report within a reasonable period-

- (a) on the availability of suitable alternative accommodation to the occupier;
- (b) indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education;
- (c) pointing out any undue hardships which an eviction would cause the occupier; and
- (d) on any other matter as may be prescribed

interpreted by the courts to reflect the socio-economic realities of farm dwellers. In *Nkosi*²³ AJP Meer analysed the relevant jurisprudence²⁴ and concluded that:

'Economic necessity and dire poverty in South Africa have over the years fostered a system of labour migrancy where individuals leave their homes to become units of labour, living in compounds and hostels, be it on the mines or elsewhere. They however return to their physical homes and families on a regular basis, thereby exhibiting an intention to return to their place of residence. Whilst they may be forced through economic necessity to spend

²³ *Nkosi and Another v Zandspruit Trust and Others* [2022] ZALCC 13.

²⁴ See *Mkwanazi v Bivane Bosbou (Pty) Ltd and another; Msimango v De Villiers and another; Ngema and others v Van der Walt and another; Mdletshe v Nxumalo and others* [1999] 1 All SA 59 (LCC), cited with approval in *Kiepersol Poultry Farm (Pty) Ltd v Phasiya* [2009] JOL 24295 (SCA) this Court held:

"The word "reside" has not acquired any technical content and can have a wide variety of meanings. In

each case, it must be determined what meaning the legislature had in mind. The following content given to the word "reside" by Baker J in the matter of *Barrie NO v Ferris and another*, where it was used in a will, conforms in my view to what the legislature intended by using the word "residing" in the definition of labour tenant:

"'Reside' means that a person has his home at the place mentioned. It is his place of abode, the place where he sleeps after the work of the day is done ... It does not include one's weekend cottage unless one is residing there ... The essence of the word is the notion of 'permanent home'

In *Nhlabathi and others v Fick* [2003] 2 All SA 323 (LCC) at paragraph 40, this Court held that "a person resides on land if he considers the land to be his permanent home." In *Mathebula and another v Harry* 2016 (5) SA 534 (LCC), the term was analysed within the social context of the Act and the social and economic concerns which prevail in our society. At paragraphs 21 and 22, the Court stated:

"The meaning of "reside" as used in section 6(2)(dA) should not depend on mathematical formulas, such as how many days in a week a person spends on a particular farm. Nor should it depend on the subjective views of the owner of the land or the occupier. In determining whether a person is resident, there should at least be a degree of actual physical presence. But this need not necessarily be continuous. Importantly, the court should accept that actual physical presence may be interrupted by economic factors, such as employment. Where this is the case, there must at least be an intention - exhibited by conduct - to return on a permanent basis to one's residence. It is wrong to assume, in all instances, that simply because one lives elsewhere out of economic necessity, that fact should ipso facto exclude their residence on a particular farm.

their working life elsewhere, this does not equate to their giving up their place of residence or homes.’²⁵

[278] I accordingly conclude that Malefane, Malitaba and Tefo have demonstrated that they are occupiers under ESTA. However, even if I am not correct in that regard, they would be entitled to stay with Mrs Khiba as an incident of her right to family life.²⁶

The PIE eviction

Third Point *in limine*: Jurisdiction

[279] The respondents contend that this application is flawed as it fails to establish the Land Court’s jurisdiction for the following reasons:

- a. A final eviction order under the PIE Act was granted against Malefane which remains unvaried and unrescinded.
- b. The Land Court lacks jurisdiction under PIE to declare a person an unlawful occupier since PIE only grants jurisdiction to the High Court and Magistrate’s Court. The applicants seek relief under the ESTA, but the Magistrate’s Court in Ficksburg has already ruled on the eviction.
- c. The First, Third, and Fourth Applicants never resided on the farm, and the final eviction order covers any occupiers holding occupancy through the 2nd Applicant.

The unrescinded eviction order granted under PIE

[280] In the case of *Department of Transport and Others v Tasima (Pty) Limited*,²⁷ the Constitutional Court dealt with complex issues related to the validity of court orders and their subsequent effects on other judicial proceedings. The case primarily centered around the continuation of a contract for the management of the Electronic

²⁵ *Nkosi supra* n 23 para 10.

²⁶ *Hattingh supra* n 18 para 40.

²⁷ 2017 (2) SA 622 (CC).

National Traffic Information System (eNaTIS), which was extended under contentious circumstances.

[281] The Constitutional Court concluded that that even if a court order is later found to be based on invalid grounds (such as an unlawful contract extension), it remains effective and binding until it is set aside. This principle is rooted in the need for legal certainty and the rule of law. The proper procedural recourse must be followed to challenge and set aside an invalid court order. Parties must approach the courts to have such orders rescinded or reviewed. The Constitutional Court thus in *Tasima* reinforced the principle that court orders, even if based on invalid acts or decisions, remain effective and binding until properly set aside.

Does the Land Court have jurisdiction in this matter?

[282] ESTA grants the Land Court broad jurisdiction to adjudicate matters concerning the rights of occupiers. Section 20 of ESTA explicitly states that the Land Court has jurisdiction over all matters arising from ESTA, which includes disputes about the restoration of rights. Section 14 of ESTA provides the right to seek relief, including the restoration of rights, for those unlawfully evicted or those whose tenure rights have been unlawfully infringed upon.²⁸

²⁸ 14 Restoration of residence and use of land and payment of damages

(1) A person who has been evicted contrary to the provisions of this Act may institute proceedings in the Court for an order in terms of subsection (3).

(2) A person who- (a) would have had a right to reside on land in terms of section 6 if the provisions of this Act had been in force on 4 February 1997; and (b) was evicted for any reason or by any process between 4 February 1997 and the commencement of this Act, may institute proceedings in the Court for an order in terms of subsection (3)

(3) In proceedings in terms of subsection (1) or (2) the court may, subject to the conditions that it may impose, make an order-

(a) for the restoration of residence on and use of land by the person concerned, on such terms as it deems just;

(b) for the repair, reconstruction or replacement of any building, structure, installation or thing that was peacefully occupied or used by the person immediately prior to his or her eviction, in so far as it was damaged, demolished or destroyed during or after such eviction;

(c) for the restoration of any services to which the person had a right in terms of section 6;

[283] Although PIE specifically grants jurisdiction to the High Court and Magistrate's Court for eviction matters, ESTA provides a concurrent jurisdictional framework where issues of tenure security and unlawful eviction are concerned. The relief sought by the applicants under section 14 of ESTA is distinct from the original eviction order under PIE; it pertains to the restoration of their tenure rights, which fall squarely within the Land Court's jurisdiction.

[284] The applicants are not merely contesting the eviction itself but are seeking to have their rights as occupiers restored, as guaranteed under ESTA. This request for restoration of rights is fundamentally a matter for the Land Court and within its jurisdiction.

[285] The relief sought includes ensuring that the eviction was lawful and that their rights under ESTA were not infringed upon. Given that the Land Court, with its broader remedial jurisdiction, is empowered to oversee and rectify issues of tenure security and unlawful eviction under ESTA, it is the appropriate forum for this matter. The failure by the Ficksburg Magistrate's Court to consider the impact of the eviction order on all those residing under the second respondent (Malefane) amounts to a procedural defect. ESTA protections were not considered.

(d) for the payment of compensation contemplated in section 13;

(e) for the payment of damages, including but not limited to damages for suffering or inconvenience caused by the eviction; and

(f) for costs.

(4) Where the person contemplated in subsection (2) was evicted in terms of an order of the Court-

(a) the proceedings contemplated in subsection (1) shall be instituted within one year of the commencement of this Act; and

(b) the court shall in addition to any other factor which it deems just and equitable, take into account-

(i) whether the order of eviction would have been granted if the proceedings had been instituted after the commencement of this Act; and

(ii) whether the person ordered to be evicted was effectively represented in those proceedings, either by himself or herself or by another person.

[286] Section 24 (1)(c) of the Land Court Act 6 of 2023 (Land Court Act) states that the Court has the power to decide any issue in terms of *any other law*, which is not ordinarily within its jurisdiction but is sufficiently connected to a matter within its jurisdiction, if the Court considers it in the interests of justice to do so.

What is the meaning of “any other law”?

[287] Section 7 of the Land Court Act states that the Land Court has jurisdiction "in respect of all matters in terms of this Act or any other law to be determined by the Court". This phrase "any other law" can be interpreted broadly or narrowly. On a broad interpretation it may include all laws that relate to the subject matter the Land Court is designed to address, such as tenure security, land reform and restitution.

[288] Such a broad approach to was adopted by the Constitutional Court in *Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)* where the Court advanced a progressive view of interpreting socio-economic rights.

[289] Alternatively, "any other law" might be interpreted narrowly to mean laws specifically mentioned or directly related to the Land Court Act's primary purpose. The preamble of the Land Court Act notes that "it is necessary that land reform in its entirety be accelerated in a lawful and equitable manner, guided by progressive jurisprudence". Progressive jurisprudence is designed to breathe life into the foundational aspirations of the Constitution.

[290] In this context, progressive jurisprudence refers a judicial approach that aims to advance social justice, equity, and the redress of historical injustices. Such an approach mandates a consideration of overlapping forms of oppression on the grounds of age, race, gender and culture. Mrs Khiba, as a black, elderly, woman farm dweller is uniquely situated at the focal point where these exceptionally powerful and prevalent systems of oppression come together, resulting in gender specific, and race specific harm.

[291] This Court has a unique mandate as a court of law and equity. It is enjoined to promote the ideal of access to land on an equitable basis and to facilitate land justice

through transformative constitutionalism. Accordingly, a contextual, purposive approach to interpreting the phrase "any other law" demands an interpretation to include all laws that relate to the subject matter the Land Court is designed to address.

[292] When a statute like the PIE Act, directly affects land tenure and the protection of occupiers' rights (as safeguarded under ESTA), it becomes reasonable to conclude that the Land Court's jurisdiction extends to reviewing such orders. The statutory language supports an interpretation where the court is empowered to address any law that impacts the core subject matter of land reform and tenure security.

Can the Land Court set aside the PIE judgment?

[293] Under the provisions of the Land Court Act, the Court is a Superior Court that has the authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a Division of the High Court of South Africa has in terms of the Superior Courts Act in relation to matters under its jurisdiction; "Inherent jurisdiction" is a discretionary power possessed by the Superior Courts in South Africa. It is described as the unwritten power without which the Court is unable to function with justice and good reason."²⁹

[294] Section 173 of the Constitution provides that "*the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own processes, and to develop the common law, taking into account the interests of justice*". This inherent power enables the court to review and correct errors even in cases where the statute appears to limit its scope. Such powers have been recognized under the broader constitutional framework, ensuring that the courts can fill gaps where strict statutory interpretation might otherwise lead to injustice.

²⁹ Taitz, J The Inherent Jurisdiction of the Supreme Court (1985, Juta) 1.

[295] Under ESTA, an eviction order is permissible only if the occupier's right of residence has been terminated on lawful, just and equitable grounds in terms of sections 8 and 9. In Mrs Khiba's case, there is no evidence of any valid termination of her residence, as no steps were taken to rescind or negate her right of occupancy.

[296] When an eviction order under PIE potentially violates the protections offered by ESTA, there is a compelling constitutional rationale to expand the Land Court's jurisdiction. This expansion is not arbitrary; it is rooted in the need to reconcile conflicting statutory provisions to protect fundamental rights.

[297] The PIE application to evict the Khiba family represents a misapplication of the law. It effectively circumvents the statutory protections afforded to occupiers under ESTA. Therefore, the Land Court is empowered under section 27(b) of the Land Court Act to set aside the PIE order that was granted as a result of an obvious error.³⁰

Conclusion and relief

[298] At the heart of this matter lies the contention that PIE was incorrectly used to circumvent the protections of ESTA. This unlawful eviction of an elderly farm dweller and her family during the height of the COVID-19 pandemic, involving the demolition of their mud hut and the destruction and removal of their belongings, represents a

³⁰ **27. Variation and rescission of orders of Court**

The Court may, on application of any person affected thereby, or acting of its own accord in cases falling under paragraph (b), and subject to the rules, vary or rescind any judgment or order—

- (a) erroneously sought or erroneously granted in the absence of the person against whom that judgment or order was granted;
- (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission;
- (c) which was void from its inception or was obtained by fraud or mistake common to the parties; or
- (d) in respect of which no appeal lies,

grave violation of multiple fundamental rights guaranteed under the Constitution. It infringes on her right to human dignity, adequate housing, and security of tenure.³¹

[299] The eviction was preceded by the impounding and loss of the family cattle but it has not been demonstrated in these proceedings that those events were part of the eviction process. What is demonstrated is that the applicants had the right to use grazing land comprising three grazing camps as part of the consent to occupy. That must be restored.

[300] The cattle impoundment, however, cannot merely be overlooked. Given our history of systemic inequality and land dispossession, such actions perpetuate historical injustices and continue to undermine the transformative ideals of the Constitution. This requires a judicial approach that seeks to protect land rights and turn the tide on the legacy of inequality and marginalization that still plagues the majority of the population. The history of land and cattle dispossession is intimately connected in our history.³² The unlawful impoundment of cattle can constitute a constructive eviction or otherwise form part of an unlawful eviction. However, that case was not pleaded or made out. In these circumstances, no order is made in respect of that part of the relief sought³³

[301] My conclusion is that that the Khiba family was unlawfully evicted and should be restored to their homestead on the farm. Any relief should deter future violations.

[302] In this regard I am guided by Ngcukaitobi AJ in *Sibanyoni v Holtzhauzen*³⁴ where he referred to the principles enunciated in *Hoffman v South African Airways*³⁵ explaining that appropriate relief should contain these features:

‘The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing

³¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

³² *Sibanyoni v Holtzhauzen and Others* [2019] ZALCC 12.

³³ Rule 33(9).

³⁴ *Supra* n 32.

³⁵ 2001(1) SA 1 (CC) para 45

process must at least be guided by the objective, first, to address the wrong occasion by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief.’³⁶

The Khiba family have demonstrated a clear right to residence on the farm and the use of land, that has been infringed, due to the unlawful actions of the respondents. They suffered actual harm as confirmed during oral evidence. Section 14 of ESTA provides a remedy in these circumstances.

[303] With regard to the issue of costs, the practice of this Court is generally not to award costs as it deals with inherently social justice matters which requires it not to unduly burden indigent litigants. However, there are exceptions to this rule. This is such an exceptional case where incorrect legislation was used as a legal maneuver, designed to circumvent statutory protections, and to evict vulnerable farm dwellers. An award of costs against the respondents is to express the displeasure of the Court and to deter future abuse in similar cases.

[304] **Order**

1. The eviction of the First, Third and Fourth Applicants on 6 November 2020 is declared unlawful.
2. The above-mentioned Applicants’ rights of residence and use of land on the farm Quaggafontein 208, District Ficksburg, Free State Province (the farm) are restored in terms of section 14 of the Extension of Security of Tenure Act 62 of 1997 in the following terms:
 - 2.1. The aforementioned Applicants are restored access to their homestead site and other land used on the farm within 14 days from date of this order.
 - 2.2. The First and Second Respondents are ordered to take such steps as are necessary to reconstruct the demolished residential home within one month from the date of this order.
 - 2.3. The Applicants’ occupation rights and rights to use land as previously allocated prior to eviction are hereby restored.

³⁶ *Sibanyoni* supra n 32 para 104.

2.4. The Applicants' services and amenities enjoyed such as access to wood, fetching water, livestock grazing and all other access as previously granted are hereby restored.

3. The Applicants are entitled to just and equitable compensation in respect of damage to movable property as agreed or to be determined by the Court.

4. There is no order in respect of compensation for the loss of cattle.

5. There is no order in respect of the Second Applicant.

6. The First and Second Respondents are directed to pay the Applicants' costs of suit, jointly and severally, the one paying the other to be absolved.

Cowen DJP

[305] I have read the judgment of my sister Mabasa AJ. I am in agreement with the order she makes. Our points of difference are limited and can be dealt with briefly. I deal first with evidence and its evaluation and thereafter with legal matters.

[306] I am in substantial agreement with the manner in which my sister broadly sets out the witness' evidence, mindful that not all testimony considered is reflected and at times the recordal reflects summary.

[307] I too have considered the evidence in light of the case law referred to in the section headed 'Evaluation of the oral evidence'. In evaluating the evidence, I am in broad agreement with the findings in paragraphs 225 to 237 regarding the evidence of the applicants. I would merely highlight that I have given consideration to each of the inconsistencies (internal or otherwise) highlighted by Mr de Leeuw in his cross-examination and the witness' explanation and demeanour when dealing with these. In light of *Petersen*,³⁷ the inconsistencies, whether viewed in isolation or cumulatively, are not of the sort that undermined any witness' evidence and were adequately explained.

³⁷ Supra n 10 and 11.

[308] I decline to make credibility findings against Mrs van Niekerk impugning her truthfulness. To the extent that my sister's evaluation of evidence may be regarded as doing so, I respectfully disagree. In *SARFU*, the Constitutional Court held:³⁸

'The institution of cross-examination not only constitutes a right; it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation intended to be made to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as corrected. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.'

[309] At various points, Mr Hlapolosa put imputations regarding truthfulness to Francois in respect of certain testimony. He also put to Francois that his entire testimony was aimed at isolating and disintegrating the residency and occupancy rights of the Khiba family, which Francois did not dispute. In my view, Mr Hlapolosa's latter imputation was correctly framed and pertinently put to the witness. As to Francois' overall credibility, it is possible that Francois may genuinely believe the factual version that he advanced about the Khiba family's residence patterns, even if highly contrived. But if he does, it merely manifests a deep ignorance and absence of knowledge about the lived realities of those living on Quaggafontein and their family lives and economic realities. It also reveals an absence of knowledge of the correct legal position about the residence rights that ESTA confers in view of South Africa's history of land and cattle dispossession.

[310] I accept the evidence of Malitaba, Malefane, Tefo and Mamokete as credible and reliable in all material aspects. The evidence in my view both corroborates Mrs Khiba's evidence, is mutually corroborative and may be independently accepted.

³⁸ Supra n 9 para 61.

[311] I am unable to agree with my sister's reliance in paragraph 262 on the inspection *in loco* and pointings out made at that time to support their evidence. It is not uncommon for this Court to conduct inspections *in loco*, which can serve valuable purposes. They are usually done prior to or during a trial. They are usually minuted, as in this case. During the course of an inspection it is customary for counsel or an attorney to point out places or things that will be, or were referred to during evidence and material locations may be marked with the assistance of GPS markers or maps. Photographs may also be taken. At the least, the inspection will assist the Court to place the written and oral evidence that is given at trial in a context and to make spatial or physical sense of it. The minute will form part of the record of the trial. The minute and related maps and photographs may well be referred to during evidence by witnesses and may be a source of material for cross-examination. Although it can happen that a prospective witness or other person may point out a place or thing during an inspection, this is not, in my experience, done under oath and the practice can lead to difficulties with fairness in evaluating evidence. The difficulties become more acute given the complexities that arise when those pointing out are speaking in a language other than the language of record and without the assistance of a sworn interpreter. In this regard, it is frequently the case that between parties, attorneys, counsel and judicial officers, several languages are in play in a trial, a reality of Land Court litigation which requires careful management in accordance with the precepts of the Constitution and mindful of our history in respect of language.

[312] In this case, the inspection was conducted after the trial, with reference to a map and certain distances were noted. The Van Niekerks were not present and neither was their counsel. There was nothing that was pointed out during the inspection that altered my evaluation of the evidence during the trial. From a trial perspective, it only served to place the evidence in a spatial context, which in event was largely achieved with the map then supplied. Had the inspection *in loco* had any material bearing on my evaluation of the evidence at trial, fairness would, in my view, have required that this be duly raised with the parties through their representatives. In this case, the inspection was also arranged with a secondary purpose, being to facilitate interaction between the Department of Agriculture, Land Reform and Rural

Development which has constitutional and statutory responsibilities in respect of securing tenure under *inter alia* section 4 of ESTA, and the parties. In this regard, it is regrettable that the Van Niekerks did not attend.

[313] I agree with the conclusion that each of the applicants have demonstrated that they resided on the farm and enjoyed the protections of ESTA as occupiers having regard to the decision of the Constitutional Court in *Klaase*. In each case, the applicant commenced their residence as family members, in Mrs Khiba's case, of Pelesa.³⁹

[314] In my view, Mrs Khiba became an occupier in her own right well before the death of Pelesa having lived openly and continuously on the farm for many years from 1988. The arrangements put in place after Pelesa's death with Mr Van Niekerk served merely to confirm her residency status and moreover confirmed that she was the person in charge of the family cattle on the three grazing camps. I agree with my sister that Mrs Khiba's stays off the farm to pursue romantic relationship did not affect her residency status and the further findings in paragraph 273. I also agree with the findings and conclusions of my sister in respect of Malitaba, Malefane and Tefo.

[315] I differ with my sister in respect of one primary point of law being whether this Court can entertain the relief sought in respect of Malefane in circumstances where there is an order of the Magistrates Court pursuant to which he was evicted. None of the other applicants were cited in those proceedings as they should have been.⁴⁰

[316] This case is a case that was brought under section 14 of ESTA and the relief granted is granted pursuant thereto.⁴¹ In circumstances where the First, Third and

³⁹ *Hattingh* supra n 18.

⁴⁰ *City of Cape Town v Yawa and Others* [2004] 2 All SA 281 (C); *Illegal Occupiers of Various Erven, Philippi v Monwood Investment Trust Company (Pty) Ltd and others* [2002] 1 All SA 115 (C).

⁴¹ **14 Restoration of residence and use of land and payment of damages**

(1) A person who has been evicted contrary to the provisions of this Act may institute proceedings in the Court for an order in terms of subsection (3).

Fourth Applicants were not cited in the Magistrates Court proceedings and no order was granted against them, there is nothing precluding this Court from granting them the relief that they seek. This is in the exercise of this Court's ordinary jurisdiction.

[317] In my view, different considerations apply to the Second Applicant, Malefane. Although this Court has jurisdiction to review and set aside the order of the Magistrates Court in terms of section 20(1)(c) of ESTA,⁴² that relief was not sought in the notice of motion. That order remains effective and binding and considerations relating to the rule of law and legal certainty require this Court to recognize that.⁴³ The consequence, in my view, is that, at least at this stage, this Court cannot exercise its jurisdiction to grant relief in favour of Malefane, whether of a declaratory

(2) A person who- (a) would have had a right to reside on land in terms of section 6 if the provisions of this Act had been in force on 4 February 1997; and (b) was evicted for any reason or by any process between 4 February 1997 and the commencement of this Act, may institute proceedings in the Court for an order in terms of subsection (3)

(3) In proceedings in terms of subsection (1) or (2) the court may, subject to the conditions that it may impose, make an order-

(a) for the restoration of residence on and use of land by the person concerned, on such terms as it deems just;

(b) for the repair, reconstruction or replacement of any building, structure, installation or thing that was peacefully occupied or used by the person immediately prior to his or her eviction, in so far as it was damaged, demolished or destroyed during or after such eviction;

(c) for the restoration of any services to which the person had a right in terms of section 6;

(d) for the payment of compensation contemplated in section 13;

(e) for the payment of damages, including but not limited to damages for suffering or inconvenience caused by the eviction; and

f) for costs.

(4) Where the person contemplated in subsection (2) was evicted in terms of an order of the Court-

(a) the proceedings contemplated in subsection (1) shall be instituted within one year of the commencement of this Act; and

(b) the court shall in addition to any other factor which it deems just and equitable, take into account-

(i) whether the order of eviction would have been granted if the proceedings had been instituted after the commencement of this Act; and

(ii) whether the person ordered to be evicted was effectively represented in those proceedings, either by himself or herself or by another person.

⁴² *Skhosana and Others v C D Roos t/a Roos Se Oord and Others* [1999] ZALCC 22 para 13.

⁴³ *Tasima supra* n 27.

nature or under section 14. In making no order on this issue, however, the door remains open to Malefane to secure relief in due course.⁴⁴ I pause to note that the mere fact that the order granted does not operate in Malefane's favour does not preclude Mrs Khiba (or him) from exercising his rights to family right provided that is done in a manner that is consistent with section 6 of ESTA. As this is the view I take of the matter, and while I concur in the order made, I reach this conclusion on a different basis to my sister.⁴⁵

[318] Finally, in respect of costs, I agree with my sister that this is an exceptional case where costs should be awarded notwithstanding the usual practice in this Court. In my view, there is insufficient information before this court to conclude that the PIE order was sought as a 'legal maneuver designed to circumvent statutory protections'. However, what is clear is that where evictions are sought under PIE but ESTA applies, this can result not only in tenure insecurity but profoundly damaging consequences for vulnerable occupiers. It results in a perpetuation of our past and not its remedy.

[319] Those who own or who are in control of farms must be familiar with the requirements of ESTA which governs residence of others on their farms and its umbilical link to the Constitution. What is clear in this case is that the First and Second Respondents are unfamiliar with ESTA's requirements, how residency is determined, and the import of seminal Constitutional Court decisions such as *Klaase* and *Hattingh*. A person who seeks to obtain an eviction under PIE on land that is subject to ESTA's requirements under section 2 must act with great caution. In this regard, orders under PIE are not subject to the automatic review jurisdiction of this Court.⁴⁶ It is wholly unjust to require ESTA occupiers, in this case an entire family including an elderly woman over the age of 60 who has resided for a very long time on the farm, to rely on section 14 of ESTA where the very purpose of ESTA is to prevent their arbitrary eviction in the first place. Thus, where occupiers are forced to

⁴⁴ Rule 33(9).

⁴⁵ In paragraphs 279 to 297 of the judgment.

⁴⁶ *Sentrale Karoo Distriksraad v Roman*, *Sentrale Karoo Distriksraad v Koopman* ; *Sentrale Karoo Distriksraad v Krotz* [2000] ZALCC 5 para 5.

assert their section 14 rights in circumstances where it is clear that a landowner or person in charge is not aware of the legal requirements or who is residing on their farms, it should come as no surprise that this Court expresses its displeasure by awarding costs.

D MABASA

Acting Judge of the Land Court

S COWEN

Judge of the Land Court

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