



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

**CASE NO:** LanC 15/2025

**Before:** Du Plessis AJ and Bishop AJ  
**Heard on:** 5 June 2025  
**Delivered on:** 24 June 2025

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|------------------------------------------------------|-------------------------------------------------------------------------------------|
| <b>DELETE WHICHEVER IS NOT APPLICABLE</b>            |                                                                                     |
| (1) REPORTABLE: YES / <del>NO</del>                  |                                                                                     |
| (2) OF INTEREST TO OTHER JUDGES: YES / <del>NO</del> |                                                                                     |
| (3) REVISED: YES / <del>NO</del>                     |                                                                                     |
| 24 June 2025                                         |  |
| DATE                                                 | SIGNATURE                                                                           |

In the matter between:

**BELLE VALLEE VINEYARDS (PTY) LTD**

First Appellant

**GERT VISAGIE**

Second Appellant

and

**JAKOBUS ELRICO LAKEY**

First Respondent

**ZELDA LAKEY**

Second Respondent

**GIA JO LAKEY**

Third Respondent

**ZELNAY LAKEY**

Fourth Respondent

|                                                 |                    |
|-------------------------------------------------|--------------------|
| <b>KEANO LAKEY</b>                              | Fifth Respondent   |
| <b>JAYKEN LUKE LAKEY</b>                        | Sixth Respondent   |
| <b>ALL OTHER PERSONS OCCUPYING THE PREMISES</b> | Seventh Respondent |
| <b>DRAKENSTEIN MUNICIPALITY</b>                 | Eighth Respondent  |
| <b>DEPARTMENT OF LAND AFFAIRS</b>               | Ninth Respondent   |

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## **ORDER**

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1. The appeal is upheld.
2. The First to Seventh Respondents are ordered to vacate the property situated at remainder of portion 11 of the farm Soetendal erf 146 in the Drakenstein Municipality (the Property) by 31 August 2025.
3. In the event that the Respondents fail to vacate the Property by 31 August 2025, the Sheriff is ordered and directed to evict them on any weekday after 6 September 2025 on which the weather is suitable for an eviction.
4. The Appellants shall, within five days of the Respondents vacating the Property, pay to the Respondents R20 000.
5. The Appellants are ordered to transport the children, who are subject to this eviction order, from their new residence to the school they are presently attending and back home every school day from the date of eviction to the end of the 2025 school year.
6. There is no order as to costs.

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## JUDGMENT

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### **BISHOP AJ (DU PLESSIS AJ concurring)**

[1] Many farmworkers in this country live on the farms where they work. That is often because they have employment agreements that allow them to live on the farm, but only for as long as they remain employed. This case – like many that come before this Court – concerns whether, when a landowner has dismissed a farmworker from his employment, it can also evict him and his family from their home.

[2] The First Appellant (**Belle Vallee**) owns a farm called Soetendal outside Wellington. The Second Appellant (**Mr Visagie**) is the sole director of Belle Vallee and the person in charge of Soetendal.

[3] The First to Seventh Respondents (**the Occupiers**) are a family – Mr Lakey, Mrs Lakey and four minor children. Both Mr and Mrs Lakey have worked on the farm in different capacities. Mr Lakey was a general worker and Mrs Lakey worked in the house of Mr Visagie and his wife.

[4] The Appellants claim that the Lakey family's only right to reside on Soetendal flowed from Mr Lakey's employment. Belle Vallee dismissed Mr Lakey in 2020, less than a year-and-a-half after the Lakey family moved onto Soetendal.

[5] Because of his dismissal from employment, Belle Vallee belatedly terminated Mr and Mrs Lakey's right to reside on Soetendal. It then unsuccessfully sought the eviction of the Occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 (**ESTA**). The Wellington Magistrates' Court dismissed the application, and they now appeal to this Court.

[6] This appeal raises difficult and important questions about the eviction of people who lose their employment on farms. When can a court considering eviction under ESTA investigate the fairness of a decision to fire someone? What should a court do when a landowner appears to have made up its mind to terminate an occupier's right of residence, but goes through the motions of affording him an opportunity to make

representations why he should be allowed to remain? How must landowners treat the family of its former employees when it seeks their eviction? Can continued residence after dismissal give rise to a new right to reside when that right was not pleaded? Can a landowner be expected to continue to house a former employee who has threatened to kill the person in charge? What must a court do when an occupier claims they cannot afford alternative accommodation, but earns far more than the threshold to qualify for emergency accommodation from the municipality?

[7] Before I address those questions, I set out the facts against which they must be answered.

### **The Facts**

[8] The Lakey family have lived on Soetendal since 23 May 2019. They live in a house that was previously used as a stable. The couple have four children who are seventeen, thirteen, ten and three. Until 2024 Mrs Lakey's nephew, Monrico Lukas, lived with the couple during the week as his school is near Soetendal. He returned to his family on weekends and holidays. The parties agree that the Appellants did not consent to Monrico residing on Soetendal. Monrico no longer lives on the farm.

[9] The Lakey family's association with the farm began in 2018 when Mrs Lakey started working on the farm caring for seasonal workers' children. Mr Visagie's wife would deduct money from their wages to pay Mrs Lakey. There is a debate about whether this constituted work for the Appellants, or only for the other workers. Nothing turns on the dispute because Mrs Lakey began formally working for Mr and Mrs Visagie in April 2019. There is no written employment contract for Mrs Lakey in the record. Nor, importantly, does she allege that her employment afforded her or her family a right of residence on Soetendal.

[10] Meanwhile, Mr Lakey had begun working on Soetendal on 21 January 2019, although he only signed his employment contract as a general worker with Belle Vallee a few months later on 1 April 2019. The difference seems to be that he was previously employed by a related entity while Belle Vallee sought a UIF registration number. Nothing turns on whether his employment started in January or April.

[11] Mr Lakey's employment contract afforded him and his family a right of residence on Soetendal. The relevant clause stated that "housing is provided to the employee for the period that the employee is employed by the employer. Should the services of the employee be terminated, the housing is also terminated." It listed the people who were permitted to reside – Mr and Mrs Lakey and their three children (the fourth child was born in 2021). Housing was not immediately available, but the family moved into their current residence in May 2019, even though it was in poor condition.

[12] Mr Lakey signed a "housing permit" on 8 January 2020. Like his employment contract, it set various conditions for occupation, and stated that, if Mr Lakey's employment ended, the family would be required to vacate the farm within 30 days.

[13] Less than two years after he started working on Soetendal, Mr Lakey was dismissed. On 4 September 2020, the Appellant delivered a "Notice of Disciplinary Hearing" to Mr Lakey calling on him to appear at a hearing on 7 September 2020 to answer a charge of "taking company property without permission". The charge arose from a burglary of a storeroom in August 2020 where R97 000 of tools and stock was stolen. Previously copper pipes and a pair of shears had also been stolen. The Appellants conducted polygraph tests on the employees, including Mr Lakey. He was the only employee whose answers indicated dishonesty, hence he was charged.

[14] At the hearing, Mr Lakey admitted he had taken and sold the copper pipes without permission. In his answering affidavit, he denies that he took the pipes. He says that two other employees took the pipes (which he claims were iron, not copper). But he admits that he sold the pipes at a scrapyard because he was the only one with his identity document. He stated that the shears belonged to his cousin, not the farm. Despite this explanation, the chairperson of the disciplinary hearing noted that Mr Lakey admitted that he knew the shears had been stolen. Mr Lakey denies making this admission and denies they were stolen.

[15] Based on the admissions at the hearing, the Chairperson found Mr Lakey guilty and recommended dismissal. Mr Visagie indicated that he had "lost all trust in the accused" and accepted the recommendation. The decision to terminate Mr Lakey's employment was taken on 14 September 2020. Mr Lakey did not take the necessary steps to challenge the decision in the Commission for Conciliation, Mediation and

Arbitration (**CCMA**). He explains that he filled in the forms and submitted them by email, but was told he had completed the forms incorrectly. He then lacked the money for petrol to fetch new forms from Cape Town and therefore did not take any further steps. I should say now that this is an unsatisfactory explanation. The CCMA forms are available online and can be submitted online. It was not necessary for Mr Lakey to travel to Cape Town to exercise his right to approach the CCMA.

[16] Two months after Belle Vallee terminated Mr Lakey's employment, on 18 November 2020, it sent him a notice terminating his occupancy of the farm. Mr Lakey did not vacate, and the Appellants took no further formal steps to evict him for two years. Mr Visagie blames their erstwhile attorneys. During this time, Mrs Lakey continued to work for the Appellants. The consequences of the Appellants' inaction are an important point of dispute between the parties. I return to it below.

[17] It was only in December 2022, having appointed new attorneys and counsel, that the Appellants took steps to evict the Lakey family. I return to the details of the interaction between the parties when I consider whether the Appellants afforded Mr and Mrs Lakey an effective opportunity to make representations. In short, in December 2022 the Appellants offered Mrs Lakey three months' rental in alternative accommodation if she vacated the property. She refused. On 3 January 2023, Mr Visagie terminated Mrs Lakey's employment on the basis that they no longer required her services. A few days later the Appellants sent a notice terminating both Mr and Mrs Lakey's right of residence. Just two days after that, they withdrew that decision and gave an opportunity to Mr and Mrs Lakey to make representations on whether they should terminate the right of residence in order to comply with section 8 of ESTA. The Lakeys made representations, but the Appellants nonetheless terminated their rights of residence on 17 January 2023, setting 31 January 2023 as the date for vacation.

[18] On 9 February 2023, Mr Lakey made a threat to kill Mr Visagie. Mr Visagie laid a criminal charge and, on 4 October 2023, Mr Lakey was convicted of assault. I cover the details of this threat below.

[19] In between the threat and the conviction, in August 2023, the Appellants launched the present application to evict the Lakey family. The Appellants cited both

the Drakenstein Municipality and the Department of Land Affairs, which filed reports as envisaged by ESTA.

[20] The Municipality arranged an engagement meeting with the parties which was held on 15 November 2023. In its report, the Municipality explained that it does have emergency accommodation available for people facing eviction. However, to qualify for that housing the evictees must not be “able to address their housing emergency from their own resources”. The Municipality concluded that the Lakey family “does not qualify for emergency accommodation in terms of the Municipality’s Emergency Housing Policy, as the household would most probably not be rendered homeless in the event of an eviction given the [family’s] income level.” I explain how the Municipality reached that conclusion when I consider whether the Occupiers face a risk of homelessness if evicted.

[21] For its part, the Department took a very different view. It recorded that Mr and Mrs Lakey were willing to vacate the land if they could find comparable alternative accommodation. It also recorded that the Appellants were willing to offer R30 000 if they left the farm. Despite recording that the Occupiers had R8 600 in monthly income (R5 600 for Mr Lakey and R3 000 for Mrs Lakey in temporary employment) the Department concluded that they “have no alternative accommodation available to them” and have “no financial means to acquire suitable alternative accommodation”. It recommended that the parties should try to find a solution, and that the Court should not evict unless suitable alternative accommodation was available.

[22] Before hearing the application, the Magistrates’ Court requested the parties to attempt to mediate their dispute. The mediation took place between May and August 2024. It failed to resolve the dispute. The mediator prepared a report describing the parties’ positions and some of her observations. The Appellants were not willing to entertain the option of the Occupiers remaining on the farm. The discussions related, instead, to finding alternative accommodation. The Appellants offered R20 000 if the Occupiers agreed to leave. The Occupiers made attempts to secure accommodation with friends and family, but this was unsuccessful. At the time, both Mr and Mrs Lakey were employed. Based on Mr Lakey’s income, the mediator expressed the view that

“it should be possible for him to rent a house”. Other than the fact that his income affected his eligibility for state housing, there is no basis for this conclusion.<sup>1</sup>

[23] As the mediation failed, the Magistrate heard the eviction application. He dismissed it for several reasons. These are the most important. First, he held that the Appellants had not afforded Mr and Mrs Lakey an effective opportunity to make representations prior to terminating their right of residence. Second, he expressed concern about both the procedural and substantive fairness of Mr Lakey’s dismissal. Third, he held there was no basis to terminate Mrs Lakey’s right of residence other than the termination of her husband’s employment. Fourth, the Magistrates’ Court downplayed the Appellants’ concerns about the Occupiers’ conduct, including Mr Lakey’s threat to kill Mr Visagie, holding that there was no evidence the relationship had broken down irretrievably. Finally, the Magistrate saw a “stark contrast” between the Municipality’s and the Department’s reports on the risk of homelessness. It held that whether the Occupiers faced homelessness if evicted “remains essentially unanswered”; but then seemed to conclude the Occupiers did face that risk.

### **The Requirements for Eviction**

[24] Section 9(2) of ESTA sets four requirements for an eviction. First, the landowner must have terminated the Occupiers’ right of residence in terms of section 8. There is a dispute about whether they have done so. There was no argument that the Occupiers were entitled to the additional protection in section 8(4) of ESTA.

[25] Second, the occupier must not have vacated the land after being given notice by the landowner to do so. There is no debate this requirement is met.

[26] Third, the conditions for eviction in sections 10 or 11 of ESTA must be met. The Lakey family did not reside on the farm in 1997 so the question is whether the eviction is just and equitable in terms of section 11. The issue is hotly contested.

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<sup>1</sup> There was some discussion of what degree of security the R20 000 would afford the occupiers. The mediator considers a possible rental of either R1 000 or R2 000 per month. It is unclear where those figures come from and whether they bear any relation to the actual cost of rental accommodation in the area. I do not afford them any weight.

[27] Fourth, the applicant must have given the required notice in terms of section 9(2)(d) of ESTA. There is no dispute this requirement was met.

[28] If an eviction order is made, the final issue for a court to consider is the date and conditions of that eviction order. This is regulated by section 12 of ESTA.

[29] Accordingly, we need to address three general topics:

[29.1] Whether the termination of the Occupiers' right of residence was consistent with section 8;

[29.2] If so, whether it is just and equitable in terms of section 11 to order their eviction; and

[29.3] If so, what the date and other terms of that eviction order should be in terms of section 12.

### **The Termination of the Right of Residence**

[30] The termination of an occupier's right of residence is governed by section 8 of ESTA. The central provision is section 8(1) which sets out the factors a court must consider in deciding whether the termination of a right of residence is just and equitable.<sup>2</sup>

[31] There are six issues on which the parties focused their disputes.

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<sup>2</sup> ESTA section 8(1) reads:

- (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.

[31.1] First, the Appellants argue that the Magistrate erred in considering the circumstances in which Mr Lakey was dismissed. They contend that, once it was accepted that he was dismissed consistently with the Labour Relations Act 66 of 1995 (**LRA**), sections 8(2) and (3) of ESTA mean that the Magistrate should not have considered whether his dismissal was substantively or procedurally fair.

[31.2] Second, was the Magistrate correct to find that the requirement of a fair procedure in section 8(1)(e) was “not met” because the Appellants had already made up their minds to terminate the right of residence before they afforded the Occupiers an opportunity to make representations?

[31.3] Third, did the Appellants improperly treat Mrs Lakey’s right of residence as subordinate to, or dependent on, Mr Lakey’s right of residence?

[31.4] Fourth, did Mrs Lakey have an independent right of residence other than the one she enjoyed as a result of Mr Lakey’s employment?

[31.5] Fifth, did the delay of just over two years from Mr Lakey’s dismissal and the notice terminating the right of residence in November 2020, to the second round of correspondence starting in December 2022, establish a new basis for the Occupiers to reside on Soetendal?

[31.6] Finally, what should the Court make of the dismissal of Mrs Lakey, just days before her right of residence was terminated?

[32] I address each in turn.

### *The Treatment of Mr Lakey’s Dismissal*

[33] In his evaluation, the Magistrate placed much store on the circumstances in which Mr Lakey was dismissed as an employee. Relying on *Mostert v Duiker*,<sup>3</sup> he held that while he could not second-guess the fairness of Mr Lakey’s dismissal, he could

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<sup>3</sup> 2003 (1) SA 295 (LCC).

consider whether, in light of how and why Mr Lakey was dismissed, it was just and equitable to terminate his right of residence, or to evict him and his family.

[34] The Magistrate found several deficiencies in Mr Lakey's dismissal. One, he found that an additional charge was added late in the process, which denied Mr Lakey a reasonable opportunity to defend his case. Two, he noted that there was no direct evidence that Mr Lakey had admitted being in possession of stolen scissors; the only evidence was the chairperson's observation that he had made that admission. Three, the Appellants relied on Mr Lakey's polygraph, but had not attached the results to the eviction application.

[35] The first point to make is that ESTA requires two separate decisions – a decision to dismiss, and then a decision to terminate a right of residence. Even if the right of residence flows solely from employment, dismissal does not automatically lead to the loss of the right of residence. As Zondo J put it in *Snyders v De Jager*<sup>4</sup>: "The right of residence needed to be terminated on its own in addition to the termination of the contract of employment."<sup>5</sup>

[36] While that much is clear, there is some uncertainty in the case law about when, and to what extent, the reasons for, or the fairness of, a dismissal from employment can influence whether: (a) the termination of a right of residence was just and equitable; and (b) whether eviction is just and equitable.

[37] There are two competing principles at play. Pulling in one direction, ESTA inherently requires a consideration of *all* relevant factors. Section 8(1)(b) expressly requires a court to consider "the conduct of the parties giving rise to the termination". That must surely include both the conduct of the occupier that prompted dismissal, and the conduct of the landowner in dismissing. Excluding a consideration of how and why the employment relationship ended would make that impossible.

[38] Pulling the other way, sections 8(2) and (3) of ESTA recognize that the fairness of the dismissal from employment must be determined by the system specially created to resolve labour disputes. As the Constitutional Court has held in a different context:

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<sup>4</sup> *Snyders and Others v De Jager and Others* [2016] ZACC 55; 2017 (5) BCLR 614 (CC); 2017 (3) SA 545 (CC).

<sup>5</sup> *Ibid* at para 72.

“the existence of a purpose-built employment framework in the form of the LRA ... infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment-related matters.”<sup>6</sup>

[39] Allowing an occupier to relitigate the substantive and procedural fairness of her dismissal may help to ensure that the Court has a full awareness of why the relationship broke down and which party must shoulder what portion of the blame. But it would radically increase the burden on landowners and the Court. In each eviction where the right of residence was terminated through dismissal, it would have to re-establish the fairness and legality of the decision to dismiss, even when it had been upheld by the CCMA and the Labour Court. That would risk different decisions under ESTA and the LRA, reached through very different processes. Or it would require oral evidence whenever there was disagreement about an occupier’s guilt or what process was followed to dismiss her. That approach is untenable.

[40] But the opposite is also unattractive. If the dismissal is treated as inviolable and its reasons and fairness as irrelevant, the court hearing an eviction application will be compelled to close its eyes to obviously relevant information. The reason for dismissal, and not only the fact of dismissal, may make a real difference to whether an occupier’s right of residence may be terminated, or whether an eviction is just and equitable. A court may be more inclined to evict an occupier dismissed for dishonesty or disruptive behaviour, than one who was dismissed for operational reasons or poor performance. And there may also be cases – although they must be rare – where the process followed to dismiss an occupier cannot legitimately be ignored in assessing justice and equity.

[41] There must be a balance between the extremes. But it is not enough to say that each case is decided on its own facts. That provides no guidance to litigants or to Magistrates on what is relevant. Litigants will either waste time and resources leading evidence on irrelevant material, or fail to plead and prove factors later deemed to be relevant. Some Magistrates will strike the balance one way, and others will strike it

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<sup>6</sup> *Chirwa v Transnet Limited and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 41.

differently, leading to inconsistency and unfairness in the application of the law. What is required is a definitive statement of what issues are relevant and when.

[42] We must begin with the text of ESTA. The key provisions are sections 8(2) and (3). Section 8(2) provides that if an occupier's right of residence arises solely from an employment agreement, it "may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act."<sup>7</sup> The purpose of section 8(2) is to prevent the termination of a right of residence where an occupier who resides on the farm solely because of her employment has been dismissed other than in accordance with the LRA. It makes an LRA-compliant dismissal a requirement for terminating that type of right of residence.

[43] Section 8(3) determines how a dispute over dismissal must be resolved, and when such an occupier is deemed to have been dismissed for purposes of ESTA.<sup>8</sup> A "dispute" about whether an occupier's employment has been terminated "shall be dealt with in accordance with the provisions of the Labour Relations Act".

[44] The second part of section 8(3) provides that "the termination shall take effect when any dispute over the termination has been determined in accordance with that Act." In *Malan v Gordon*<sup>9</sup> Dodson J held that the phrase "the termination" in section 8(3) refers to the termination of the right of residence, not the termination of employment.<sup>10</sup> If that was not the case, he reasoned, section 8(3) "would move the effective date of the dismissal and could conceivably give rise to a claim for wages after the dismissal, notwithstanding that the dismissal may be found to have been fair".<sup>11</sup> I disagree.

[45] If "the termination" in section 8(3) refers to the right of residence, the syntax of the provision would entail that dismissal must automatically terminate the occupier's

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<sup>7</sup> ESTA section 8(2) reads in full: "The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act."

<sup>8</sup> ESTA section 8(3) reads in full: "Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act".

<sup>9</sup> *Malan v Gordon and Another* 1999 (3) SA 1033 (LCC).

<sup>10</sup> *Ibid* at para 26.

<sup>11</sup> *Ibid*.

right of residence. But that is not our law. After terminating an occupier's employment, a landowner must still take a separate decision to terminate her right of residence.

[46] Section 8 of ESTA is concerned with the termination of the right of residence. Section 8(3) is concerned with when, for the purposes of ESTA, employment is deemed to have ended, triggering the power to terminate the right of residence. It ends when it has been "dealt with in accordance with" the LRA. Until then the landowner cannot terminate the occupier's right of residence even though, as a matter of labour law, the occupier is no longer an employee. That delay has no consequence for the employment contract, and no consequences for any rights of reinstatement or compensation. Those are all determined exclusively under the LRA. The only legal consequence of section 8(3) is to delay the moment at which a landowner may terminate a right of residence from the moment of dismissal, to the moment of the resolution of the dispute in terms of the LRA. That interpretation "oblige[s] the owner of land to continue housing dismissed employees while a dispute on the validity of the dismissal is pending."<sup>12</sup>

[47] That brings us back to the core issue – what does it mean for a dispute to be "dealt with" or "determined" in accordance with the LRA, and how must a court considering eviction treat the factors related to the dismissal?

[48] In *Snyders*, the Constitutional Court held that where an applicant relies on section 8(2) it would have the onus "to prove that the termination of the occupier's employment had a fair reason ... and that it was effected in accordance with a fair procedure as required by" the LRA.<sup>13</sup> This is an obiter statement. *Snyders* did not turn on whether the occupier had been dismissed in accordance with the LRA. The eviction was overturned because the landowner had not taken a separate decision to terminate the occupier's residence after the dismissal.

[49] In my view, ESTA could not envisage that a landowner would have to independently establish that a dismissal was substantively and procedurally fair in eviction proceedings. The forum for determining that question is the CCMA or the Labour Court, not this Court or the Magistrates' Court. As this Court explained in

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<sup>12</sup> *Karabo and Others v Kok and Others* 1998 (4) SA 1014 (LCC) at para 22.

<sup>13</sup> *Snyders* supra n 4 at para 58.

*Theewaterskloof Holdings*<sup>14</sup>, if an occupier does not challenge his dismissal under the LRA, “a court dealing with the occupier’s eviction under [ESTA] must accept that the dismissal was proper. Such a court has no jurisdiction to decide on that itself.”<sup>15</sup> If this Court has no jurisdiction, then there could never be an onus on the applicant to prove the dismissal was compliant with the LRA.

[50] That approach would also lead to a serious difficulty for the landowner. It dismisses an employee and the CCMA upholds the dismissal. It then seeks eviction but this Court determines the dismissal was contrary to the LRA and therefore it is not just and equitable to terminate the right of residence. The landowner is then stuck. The occupier is no longer an employee. It cannot hold a new, fair process to seek to dismiss a former employee. Yet the occupier has a permanent right of residence even though the mechanisms set up under the LRA determined the dismissal was fair. That is exactly the outcome that sections 8(2) and (3) seek to avoid, at least in most cases.

[51] This Court considered this issue in *Mostert*, on which the Magistrate relied. It held that, in deciding whether to order an eviction, a Court must consider all relevant factors including “the reason for the eviction”. Where the eviction was sought because of the termination of employment, a court must determine “whether, under the circumstances of the alleged dismissal, it would be just and equitable to grant an order for eviction.”<sup>16</sup> In *Mostert*, on the landowner’s own version, it had dismissed the occupier for being drunk at work at a disciplinary hearing held while the occupier was “too drunk” to understand the proceedings. Moloto AJ held that, even on the landowner’s version, it could not be just and equitable to evict.<sup>17</sup>

[52] There is obvious common sense in the approach taken in *Mostert*. Where a landowner accepts the dismissal was unfair, or the undisputed evidence shows conclusively the dismissal was not fair (whether procedurally or substantively), a court considering an eviction flowing from the dismissal should not close its eyes. That will most often occur where the occupier did not approach the CCMA. If she did and the

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<sup>14</sup> *Theewaterskloof Holdings (Edms) Bpk, Glaser Afdeling v Jacobs en Andere* 2002 (3) SA 401 (LCC).

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

<sup>16</sup> *Mostert* supra n 3 at para 10.

<sup>17</sup> *Mostert* supra n 3 at para 13.

dismissal was upheld, it is difficult to imagine circumstances in which an eviction court could second-guess that outcome.

[53] *Mostert* only holds that the circumstances of the dismissal are relevant to determining whether to evict, not determining whether the termination of the right of residence was just and equitable. Yet it seems that, to the extent those circumstances are relevant, they must be relevant under both sections 8 and sections 10 or 11. Section 8(1)(c) makes it relevant to the termination of residence. But it must also be potentially relevant to eviction because of sections 11(3)(d) and, potentially, sections 10(1)(a), (b) and (c).

[54] The Supreme Court of Appeal (**SCA**) considered the conundrum of how the circumstances of dismissal are relevant in *Sterklewies*.<sup>18</sup> Wallis JA set out two possible interpretations of section 8 – that dismissal would always justify termination of residence without any further inquiry, or that a court would still have to consider the justice and equity of termination even after dismissal. He did not decide the issue.

[55] But he held that, if dismissal would not automatically justify the termination of a right of residence that it “would probably require a strong case” to show that termination was not just and equitable. It would have to be a case “based on lengthy residence, old age, ill health, the absence of reasonably equivalent alternative accommodation and evidence showing that the continued presence of the former worker on the erstwhile employer’s property would not impose a burden on the latter.”<sup>19</sup>

[56] Wallis JA also held that, if a complaint about the dismissal is to be raised, “it must be raised by way of allegations in the plea of the former worker whose eviction is being sought and supported by evidence showing that it would, notwithstanding the termination of the former worker’s employment, not be just and equitable to evict him or her from the accommodation provided by the employer in terms of the employment agreement.”<sup>20</sup>

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<sup>18</sup> *Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga and Others* [2012] ZASCA 77; 2012 (5) SA 392 (SCA); [2012] 3 All SA 655 (SCA).

<sup>19</sup> *Ibid* at para 14.

<sup>20</sup> *Ibid* at para 15.

[57] I agree with this general position. Where residence rests on employment, the termination of one will ordinarily justify the termination of the other. A landowner need not identify an additional or special reason in those circumstances. Rather, there must be unusual factors at play to show that it would not be just and equitable to terminate the right of residence. A finding that it is not just and equitable means that, unless new facts arise, the occupier may remain indefinitely on the land without the landowner's consent. There will certainly be situations where ESTA and the Constitution demands that result. And those factors will ordinarily not be related to the fairness of the dismissal, but to its reasons.

[58] That does not mean that occupiers can be dismissed unfairly, only that the guarantee of fair dismissal rests in the specially created mechanisms under the LRA. ESTA prevents any termination of their residence (and therefore their eviction) until they have exhausted those avenues. But if they fail to take advantage of those mechanisms, they cannot rely on ESTA as an alternative forum to litigate the fairness of their dismissal.

[59] So a court considering an eviction must accept that employment terminated and either upheld by the CCMA and the Labour Court, or never challenged in those fora, was consistent with the LRA. Generally, dismissal will justify terminating the right of residence. But the landowner must still take a separate decision which can consider the reason for the dismissal. In deciding whether the termination of the right of residence was just and equitable in terms of section 8(1), a court should not require the landowner to prove the dismissal was consistent with the LRA. But it can consider both the reason for the dismissal and, if there is no dispute it was unfair, its fairness.

[60] The position can be summarized as follows:

[60.1] A right of residence can only be terminated once any dispute about the dismissal has been determined under the LRA.

[60.2] After the dispute has been determined, the landowner must make a separate decision whether or not to terminate the right of residence.

[60.3] The LRA-compliant dismissal will ordinarily justify the termination of the right of residence unless there are special circumstances present.

[60.4] Where the landowner elects to terminate the right of residence, the landowner need only show that the dismissal was upheld by the CCMA or the Labour Court, or that the occupier did not take advantage of those dispute resolution mechanisms. There is no onus on the landowner to establish fairness. Evidence of unfairness put up by the occupier is irrelevant, subject to the exception below.

[60.5] A court will consider the circumstances of the dismissal for the purposes of section 8 in two ways:

[60.5.1] It can always consider the reason the occupier was dismissed. For example, it may not be just and equitable to terminate an occupier's right of residence if she was dismissed for incapacity as opposed to misconduct. And it may be just and equitable to terminate even the residence of even a long-term occupier if the dismissal was for violent or dishonest conduct. But the Court must accept the given reason for the dismissal.

[60.5.2] Where the dispute was not referred to the CCMA or the Labour Court and (a) the landowner accepts that the dismissal was procedurally or substantively unfair, or (b) on the landowner's own version that was manifestly the case, the Court will consider that unfairness as a factor in deciding whether it is just and equitable to terminate the right of residence.

[60.6] If a court concludes that the termination of the right of residence was just and equitable, the Court can also consider the reason for the dismissal when determining whether eviction is just and equitable under sections 10 or 11. It can also consider the fairness of the dismissal in the limited circumstances described above.

[61] There will, no doubt, be unusual cases that justify a different approach. But these principles should apply in most cases.

[62] If we apply those principles to this case, Mr Lakey's complaints about his dismissal are irrelevant. Mr Lakey did not approach the CCMA and so there was no

dispute about the fairness of his dismissal to resolve under the LRA. The Appellants were entitled to terminate his right of residence. The Appellants do not accept the process was unfair, nor was it manifestly so on their version. The correct approach is to accept that Mr Lakey's employment was lawfully terminated for the reasons given – taking the copper pipes without permission and being in possession of stolen shears. That reason must be weighed in the balance with all other factors when the justice and equity of termination is considered.

### Compliance with section 8(1)(e)

[63] Section 8(1)(e) of ESTA requires a court to consider, as one of the factors in assessing whether the termination of a right of residence was just and equitable, “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.”

[64] In *Snyders*, the Constitutional Court wrote that the failure to afford an occupier the right to make representations “would render the purported termination of the right of residence unlawful and invalid”.<sup>21</sup> That holding implies that procedural fairness is an absolute requirement, not merely a factor to consider.

[65] However, both a Full Bench of this Court and the SCA have – post-*Snyders* – interpreted section 8(1)(e) to be merely a factor, not a requirement. As this Court put it in *Le Roux*<sup>22</sup>: section 8(1)(e) “does not contemplate that it will be appropriate in every case that an opportunity be given to make representations before the decision to terminate the right of residence.”<sup>23</sup> And in *Nimble Investments*<sup>24</sup> Schippers JA wrote: “it is clear from the language and syntax of s 8(1)(e) that Parliament did not require an occupier to be given an opportunity to make representations in every case.”<sup>25</sup>

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<sup>21</sup> *Snyders* supra n 4 at para 76.

<sup>22</sup> *Le Roux NO and Another v Louw and Another* [2017] ZALCC 10.

<sup>23</sup> *Ibid* at para 91. See also *Timothy v Sibanyoni and Others* [2020] ZALCC 8 at para 56.

<sup>24</sup> *Nimble Investments (Pty) Ltd v Johanna Malan and Others* [2021] ZASCA 129; [2021] 4 All SA 672 (SCA); 2022 (4) SA 554 (SCA).

<sup>25</sup> *Ibid* at para 69.

[66] This Court is bound by those courts' interpretations of section 8(1)(e) made after *Snyders*. I therefore proceed on the basis that the opportunity to make representations is a factor, not a prerequisite.

[67] The Appellant advanced two grounds for why the process it followed should not count against the justice and equity of its decision to terminate the Occupiers' right of residence. First, it argued that where an occupier's right of residence arises solely from their employment, a fair dismissal procedure constitutes compliance with section 8(1)(e). It relied on *Le Roux*<sup>26</sup> where Canca and Dodson AJJ held that an LRA-compliant dismissal would have the "natural consequence" that the occupier was afforded an effective opportunity to make representations in terms of section 8(1)(e).

[68] This finding is clearly wrong because it fails to distinguish between the decision to terminate employment and the decision to terminate the right of residence. As explained earlier, a landowner that terminates an occupier's employment is *entitled* to also terminate her right of residence. But it must make a separate decision whether or not to do so. Section 8(1)(e) is concerned with the second decision, not the first. The issues the landowner will consider in the two decisions may be entirely different. It may fairly dismiss an employee because of poor health, but still allow her to remain on the farm because of long service.

[69] I accept that the process followed in the termination of employment may be relevant to assessing the fairness of the process followed to terminate the right of residence. But it may not be. This case is a good example. Mr Lakey's employment was terminated in 2020, but his right of residence was only finally terminated in 2023. It is difficult to see how the fairness of the first process could contribute to the fairness of the second given all that may have changed in between.

[70] A fair dismissal does not automatically equate to a fair termination of residence. It will depend on the facts. The question is whether the occupier has had an effective opportunity to make representations as to why, given that his employment has ended, his right of residence should not be terminated.

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<sup>26</sup> *Le Roux* supra n 22 at para 92.

[71] That leaves the Appellants' second argument – that it did afford the Occupiers a fair process. This requires a consideration of two issues: the standard for assessing fairness in this context, and the facts. In assessing both, we must keep in mind that fairness under section 8(1)(e) is not binary – either there was an effective opportunity or there was not. Rather the nature of the opportunity, if any, will determine whether the factor weighs for or against the justice and equity of the termination, and to what extent. It is a matter of degree, not absolutes.

[72] The Magistrate held that the Appellants had not afforded the Occupiers an effective opportunity to make representations because they had already taken the decision to terminate the right of residence before even inviting representations. As section 8(1)(e) requires the opportunity to make representations to be afforded “before” the decision, any request for representations made after the decision was taken is a pointless exercise in box-ticking. It does not afford occupiers an “effective opportunity” to influence the landowner’s decision.

[73] In an ideal world a landowner should always invite representations with an open and inquiring mind that has not yet determined what course to take. But, in my view, little would be served by setting that standard in the context of section 8(1)(e). I say so for five reasons.

[74] First, a landowner is a private party, not an administrative decision-maker. The requirement of an “open mind” is a requirement of administrative law. We can rightly expect those exercising public power to disabuse themselves of preconceptions before they take decisions. They are – or should be – trained and experienced in approaching each decision with an open mind. And they should have no direct interest in the outcome. Private parties are different. They are not exercising public power, but private power that directly affects their personal and commercial interests. It would be unrealistic to subject them to the same rigors of decision-making. It would also make no sense to talk about the “bias” of a landowner – a landowner is entitled to act in its own interest and not the interests of the occupier. The check on abuse of that power are the detailed procedural and substantive protections in ESTA that prevent any termination of residence or eviction that is not just and equitable. It is neither necessary nor appropriate to imagine that landowners can be neutral arbiters of their own disputes.

[75] Second, even administrative decision-makers are entitled to take a decision “in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case.”<sup>27</sup> And even for administrators, an “open mind ... need not be a mind ‘untrammelled by existing principles or policy’.”<sup>28</sup> A landowner who has a general policy to terminate former employees’ rights of residence – which is included in all its employment contracts – is not precluded from following a procedurally fair process merely because its default position is to terminate. As Wallis JA recognized, that will often (but not always) be a just and equitable outcome.

[76] Third, what must a landowner do if it takes a decision to terminate without requesting any representations, but then realises it has erred (as happened here)? On the Magistrate’s approach the landowner is trapped. If it seeks eviction, it risks a finding its termination of the right of residence was not just and equitable. But it can never cure the defect because it will always be told that it was not a meaningful opportunity. It becomes impossible to remedy the initial error leaving an inescapable risk a court will find the right of residence was not lawfully terminated.

[77] Fourth, a “hearing can convert a case that was considered to be open and shut to be open to some doubt, and a case that was considered to be inexplicable to be fully explained.”<sup>29</sup> This aphorism is usually used to explain why procedural fairness is required in an administrative context even when the outcome on the merits seems inevitable. But it applies in this context too. A landowner may intend to terminate an occupier’s right of residence. But his mind may still be swayed by representations. The opportunity creates the possibility for persuasion. The landowner may not be aware of certain facts, or may not have considered alternatives that the occupiers mention for the first time in representations. Those can persuade even if the landowner has already taken a preliminary decision to terminate.

[78] Fifth, the strict approach taken by the Magistrate rewards knowledge of the law, and careful wording of letters rather than actual open mindedness. If a landowner is

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<sup>27</sup> *Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA) at para 1.

<sup>28</sup> C Hoexter & G Penfold *Administrative Law in South Africa* (3 ed, 2021) at 624, quoting *MEC for Environmental Affairs and Development Planning v Clairison’s* CC 2013 (6) SA 235 (SCA) at para 32.

<sup>29</sup> *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 112.

properly advised, they can send the correct letters offering the proper opportunity to make representations without leaving any evidence that they are merely going through the motions. Landowners who are less well-advised and believe (not unreasonably) that dismissal automatically leads to the termination of the right of residence, will be punished for their ignorance or carelessness, not their closed-mindedness.

[79] In sum, evidence that a landowner has already taken a decision to terminate a right of residence before affording an opportunity to make representations is relevant. But it is not determinative. Even a seemingly closed mind can be changed, and it is better to afford a late opportunity to influence a decision than no opportunity at all.

[80] On these facts, how effective was the opportunity afforded to the Occupiers? Mr Lakey was dismissed on 14 September 2020. On 18 November 2020, the Appellants issued a notice terminating his residence. A copy of this notice was not part of the record, so we do not know what it said. What followed was two years of inaction by the Appellant until 21 December 2022 when the Appellants provided a “proposed agreement” to Mrs Lakey. In return for vacating the property by the end of January, the Appellants undertook to pay three months’ rental for the Occupiers’ new accommodation. A meeting was held the same day to discuss the proposal. Mrs Lakey rejected the proposed agreement. She explains she did so because she could not agree to it without discussing it with Mr Lakey, and that they could not find alternative accommodation.

[81] The Appellants then sent notices of termination of residence to Mr and Mrs Lakey on 4 January 2023. However, they were advised that the notices were premature and should be withdrawn. Two days later, the Appellants issued a new notice withdrawing the previous notice and issuing a new one. The notice explains that the Appellants were “advised that, before issuing the Notice of Termination of Residence, it will be fair to grant you with an opportunity to give reasons why your residence on Soetendal Farm should not be terminated.” It then invites written representations within 10 days – by 16 January 2023. The notice explains that the representations “will be duly considered before making a final decision in respect of the termination of your residence”.

[82] Mr and Mrs Lakey made handwritten representations on 16 January 2023. Those representations thank Mr Visagie for “what you have done for us”. They then argue that Mr Lakey was not in fact guilty of the conduct that led to his dismissal. Finally, they explain that they want “a home of our own”. The day after receiving the representations, the Appellants issued a notice terminating both Mr and Mrs Lakey’s right of residence.

[83] The opportunity to make representations was far from perfect. It is evident that, from the moment Mr Lakey was dismissed, the Appellants wanted the family to leave Soetendal. Even when the process resumed in December 2022, the Appellants wanted the Occupiers to leave. When the offer to assist with alternative accommodation failed, they initially purported to terminate without any opportunity for representations. They then reversed course and gave an opportunity for representations only because they were advised they were obliged to do so. It was effective in the sense that the Occupiers in fact took advantage of it. But, given the landowner’s position, those representations were unlikely to influence the Appellants’ ultimate decision. Yet there was an opportunity and the landowner considered the representations before the decision was finally made.

[84] In my view, this is ultimately not a strong factor for or against the termination of residence. The Appellants fumbled their way through trying to show they had given an effective opportunity to make representations, while clearly wanting to remove the Occupiers throughout. But they did, eventually, grant an opportunity; they did not simply launch an application for eviction immediately after dismissal. They followed a flawed process, yet still they granted the Occupiers an opportunity to be heard, which the Occupiers used.

### *Inconsistent with Klaase?*

[85] The Magistrate criticized the Appellants for violating the principles the Constitutional Court established in *Klaase*.<sup>30</sup> He argued that they had wrongly treated

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<sup>30</sup> *Klaase and Another v van der Merwe N.O. and Others* [2016] ZACC 17; 2016 (9) BCLR 1187 (CC); 2016 (6) SA 131 (CC).

Mrs Lakey as occupying the farm “under” Mr Lakey when she was an occupier in her own right.

[86] It is necessary to distinguish between different concepts – who is an “occupier” as defined in ESTA, and the reasons why a landowner may terminate a right of residence.

[87] *Klaase* holds that another adult who occupies land because of a right of residence afforded to another is herself an “occupier” as defined in ESTA not merely a resident. Most often – as in *Klaase* and this case – that is a wife who occupies land because her husband works for the landowner. *Klaase* holds that the landowner must take a separate decision whether to terminate her right of residence, and must cite her separately in eviction proceedings. Her fate is not umbilically tied to her husband’s.

[88] The error the Land Claims Court had made in *Klaase* was in holding that Mrs Klaase was not herself an “occupier” and resided on the property only “under her husband”. That approach improperly “subordinate[d] her rights to those of Mr Klaase” and “demeans Mrs Klaase’s rights of equality and human dignity” because it fails to treat her as occupier in her own right also “entitled to the protection of ESTA.”<sup>31</sup>

[89] The Appellants accept that. They accept Mrs Lakey is an occupier. They wrote to both Mr and Mrs Lakey to ask for representations under section 8(1)(e). They decided to terminate both Mr Lakey’s and Mrs Lakey’s rights of residence. They cited Mrs Lakey separately as a respondent when they sought the family’s eviction. They have complied with *Klaase*.

[90] *Klaase* does not mean that when a landowner dismisses an employee and terminates his right to reside, it cannot also terminate the right to reside of his family who have no other right to reside on the farm. It can; as long as it takes a separate decision to do so, and that decision is just and equitable. Often, but not inexorably, the termination of the employee’s right of residence will justify terminating the right of other adult family members who were given consent to reside because of his employment.

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<sup>31</sup> Ibid para 66.

[91] *Klaase* requires only that each person is treated separately, and a decision to terminate one person's right of residence does not inescapably mean the termination the right of residence of the others. There may be situations where a landowner decides that the ex-employee should no longer live on the farm, but has no difficulty with his family remaining. That is why it must take an independent decision to terminate the wife's right of residency. And a court may decide that it is just and equitable to evict the ex-employee, but not to evict his family. That is why they must be separately cited in the eviction application.

[92] The Appellants complied with the dictates of *Klaase* and the Magistrate's finding to the contrary was mistaken.

#### *Mrs Lakey's Right of Residence*

[93] The Occupiers argued that Mrs Lakey had an additional right of residence flowing from her employment on the farm. Even if her right of residence as Mr Lakey's wife had been terminated, they argued, the Appellants had not recognized her own independent right, and had not terminated it.

[94] In theory, it is possible for an occupier to have multiple rights to reside on a farm. She may have a right as an employee, and a right as the family of another employee. She may have a right as a long-term, non-employed resident, and then obtain an additional right when she is employed. If a landowner seeks to evict a person, they should recognize all the bases on which the occupier resides on the land when they decide whether to terminate the right (or rights) of residence. A decision to terminate a right of residence is unlikely to be just and equitable if it is based on a mistaken understanding of the basis for the occupier's residence.

[95] That may be so in theory, but it does not aid Mrs Lakey on the case as pleaded. The Occupiers never pleaded that Mrs Lakey's employment afforded her a separate right of residence. Quite the opposite. The Appellants pleaded that the right of residence of Mrs Lakey and her children "arose from their family relationship" with Mr Lakey. The Occupiers did not deny that averment. They pleaded that Mrs Lakey also

worked on the farm. But they never pleaded that her employment afforded her a separate right of residency on the farm.

[96] “Holding parties to pleadings is not pedantry.”<sup>32</sup> It is vital for fairness in litigation. The Lakey’s were represented by attorneys who are experienced in ESTA matters. The failure to make the key averment that Mrs Lakey’s employment afforded her a right of residence in addition to Mr Lakey’s employment cannot be seen as simply an oversight. Not every employment on a farm must be accompanied by a right to reside. The averment may well be missing because it is not true. And the failure to make the averment means the Appellants were not afforded the opportunity to refute it by providing evidence of the terms of Mrs Lakey’s employment agreement. On these papers, we cannot conclude that Mrs Lakey had an independent right of residence.

#### *An Alternative Right of Residence*

[97] The Occupiers argued that they had all been afforded a new right of residence through the delay in seeking their eviction and the operation of the presumption in section 3(4) of ESTA.<sup>33</sup>

[98] To recall, Mr Lakey was dismissed on 18 September 2020. After the first notice of termination on 18 November 2020, no further steps were taken to evict them until December 2022. The Occupiers contend that they continuously and openly resided on Soetendal during those two years and therefore they are presumed to have the Appellant’s consent, and the Appellants have failed to rebut that presumption. They also make the related argument that the Appellants’ inaction constituted tacit consent to their continued occupation. This, the Occupiers submit, established a fresh right of residence which the Appellants had not terminated.

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<sup>32</sup> *Damons v City of Cape Town* [2022] ZACC 13; [2022] 7 BLLR 585 (CC); (2022) 43 ILJ 1549 (CC); 2022 (10) BCLR 1202 (CC) para 118, quoting with approval from Jafta J’s dissenting judgment in *South African Transport and Allied Workers Union v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 114.

<sup>33</sup> ESTA section 3(4) reads: “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.”

[99] In *Moladora Trust*,<sup>34</sup> the SCA held that where a landowner alleges it did not consent to an occupier residing<sup>35</sup> on the land and the occupier does not dispute that averment, an occupier cannot rely on section 3(4) to establish a right of residence through tacit consent.<sup>36</sup> That is the case here.

[100] The Appellants averred in the founding affidavit that the “delay of some 2 years is not to be construed as an agreement for the respondents to continue to occupy the property.” The Occupiers’ answer was to “take note” of the paragraph. That is not a denial. It is an acceptance that the Appellants did not consent to the continued occupation during the two years that no steps were taken to evict. Nor was there any positive averment in the answering affidavit that the delay constituted consent. In those circumstances, on the authority of *Moladora Trust*, it was not open to the Occupiers to rely on section 3(4) to establish a new right of residence based on inaction, nor can they rely on tacit consent.

#### *The Termination of Mrs Lakey’s Employment*

[101] The final issue in dispute concerns the termination of Mrs Lakey’s employment. She was employed by Mr and Mrs Visagie from April 2019 – shortly after Mr Lakey started working and a month before they moved onto the farm. She was dismissed on 3 January 2023, just weeks after refusing the offer to vacate Soetendal and a day before a notice terminating her right of residence was sent.

[102] The Appellants claim that she was dismissed for operational reasons. But the timing is more than a little suspicious. There are reasons to draw the inference that she was dismissed to clear the way for the ultimate eviction of the entire family. Yet, in my view, that is not a reason to conclude that the termination of the right of residence of Mrs Lakey was not just and equitable.

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<sup>34</sup> *Moladora Trust v Mereki and Others* [2024] ZASCA 37; 2024 (5) SA 51 (SCA). The judgment overturned the decision of this Court in *Moladora Trust v Mereki and Others* [2022] ZALCC 32; 2023 (3) SA 209 (LCC). An application for leave to appeal the decision of the SCA was recently heard by the Constitutional Court. At the time this judgment was given, the Constitutional Court had not yet decided the matter. We therefore remain bound by the SCA.

<sup>35</sup> In *Moladora Trust* the consent related to grazing cattle, not residence, but the same principle applies.

<sup>36</sup> *Moladora Trust* supra n 34 paras 11-13.

[103] First, as I have explained above, we cannot conclude on the facts before us that Mrs Lakey had a right of residence that flowed from her employment. It was not necessary, therefore, to dismiss her in order to end her right to reside. Mr Lakey's dismissal was sufficient to entitle the Appellants to decide whether to terminate both Mr and Mrs Lakey's rights of residence.

[104] Second, even if the inference is correct, her primary remedy lay in disputing the fairness of her dismissal under the LRA. There is no evidence she pursued that avenue. It is difficult on the scant evidence available to this Court to make any definitive conclusion about whether her dismissal was lawful or not. The timing may be purely coincidental. For the reasons given above, I would be hesitant to enter that terrain where the occupier has not pursued her remedies under the LRA.

[105] Third, the inference is not clearly pleaded in the answering affidavit. While the dates of the dismissal are mentioned, the Respondents do not make the allegation that she was in fact dismissed in order to ease an eviction. The Appellants, therefore, were not called to answer that allegation.

[106] Despite the potentially troubling conduct of the Appellants, I am unable to conclude that Mrs Lakey's dismissal should weigh heavily against the termination of the right of residence.

### *Conclusion on Termination of Right of Residence*

[107] What is left is to weigh the relevant factors and conclude whether the termination was just and equitable. I focus first on Mr Lakey, and then consider whether Mrs Lakey's position is different.

[108] The Occupiers did not dispute the fairness of the employment agreement (ESTA section 8(1)(a)). I have discussed "the conduct of the parties giving rise to the termination" (ESTA section 8(1)(b)). Mr Lakey was dismissed for theft and possession of stolen property. Even his own version does not absolve him of guilt. He did not lodge a dispute at the CCMA and there is no basis, for the reasons given above, to question the fairness of the dismissal.

[109] The “comparative hardship” to the parties rests primarily on issues I consider in more detail when considering the justice and equity of the eviction. The major factors are Mr Lakey’s threats to kill Mr Visagie, and whether the Lakey family will be rendered homeless if they lose their right to reside on Soetendal. As I explain below, the Occupiers will be able to secure alternative accommodation, and Mr Visagie ought not lightly be required to continue to live on a farm with a person who has threatened to kill him.

[110] There was no “reasonable expectation of the renewal of the agreement” (ESTA section 8(1)(d)). And I have dealt with the fairness of the procedure under section 8(1)(e). It was not ideal. But it was good enough that it does not weigh heavily against the justice and equity of terminating the right of residence.

[111] Ultimately, as I have explained above, an LRA-compliant dismissal will ordinarily justify the termination of residence absent special factors. No such factors are present here. Mr Lakey was employed and resident on Soetendal for just a year and a half, has new gainful employment, and suffers no ill-health. His continued presence on the farm will burden the Appellants both because they cannot use the building Mr Lakey and his family occupy, and because he has threatened to kill Mr Visagie. The last occurred shortly after the decision to terminate Mr Lakey’s right of residence was taken. But in my view a court cannot close its eyes to relevant conduct of the parties that occurs after the date of termination in assessing whether, today, the termination of residence is just and equitable.

[112] What of Mrs Lakey? One can certainly have more sympathy with her; she worked on the farm too and lost her job despite committing no misconduct. But she established no right to reside other than the one afforded her as Mr Lakey’s wife. Given that she is no longer employed, nor has any other longstanding connection to Soetendal, this is not the type of case where the family must be allowed to continue to reside after the employee’s right to reside is terminated.

[113] Accordingly, I conclude that with regard to both Mr and Mrs Lakey, the termination of their rights of residence was just and equitable.

### **Is it Just and Equitable to Evict?**

[114] The termination of the right of residence alone does not entitle the Appellants to an eviction order. They must also establish that the eviction is just and equitable in terms of sections 11(2) and (3) of ESTA. Section 11(3) requires the Court to consider five specific factors in making that assessment: “(a) the period that the occupier has resided on the land in question; (b) the fairness of the terms of any agreement between the parties; (c) whether suitable alternative accommodation is available to the occupier; (d) the reason for the proposed eviction; and (e) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land.” A court must also consider all other relevant factors.

[115] It is worth briefly considering the five listed factors before focusing on the issues the parties contended weighed for or against eviction. One, the Lakey family were not longtime residents on Soetendal. They were resident for three-and-a-half years before their right of residence was terminated. It has been another two-and-a-half years since then. Two, no party argued that any term of an agreement was unfair. It is generally fair to link the right of residence of an employee to continued employment. Three, there is a hot debate about the availability of suitable alternative accommodation which I address below. Four, the eviction is sought because Mr Lakey was lawfully dismissed from his employment for offences involving dishonesty, and because of his threats to kill Mr Visagie. And five, the balance of interests turns on two questions – whether the Lakey family can find other housing, and what cost (economic or emotional) there is to the Appellants if the Lakeys are not evicted.

[116] As these are the issues most in dispute, I focus on the reasons for the eviction – Mr Lakey’s dismissal and his threat against Mr Visagie – then the risk of homelessness, and finally other facts that affect the balance of interest between the parties.

### **The Reason for the Eviction**

[117] I have already concluded that this Court must accept that Mr Lakey was lawfully dismissed, and that it was because he sold copper pipes belonging to the Appellants

and was in possession of stolen shears. This is, obviously, an offence involving dishonesty. There is no basis on these facts to second guess the validity of those reasons.

[118] The Appellants relied on an additional reason for the eviction – Mr Lakey’s threat to kill Mr Visagie. The Magistrate downplayed Mr Lakey’s threat to kill Mr Visagie. He held that Mr Lakey had already “faced the full consequences of the law” for the threat, and that it “appears to be more once-off than a repetitive occurrence”. It did not, therefore, constitute a “fundamental breach” of the relationship.

[119] It is worth stating clearly what Mr Lakey did. On 9 February 2023 he was walking on the farm and was drunk. When passing Mr Visagie he screamed at him that he was going to kill him. According to Mr Visagie, he then said: “dié ding is tussen ons twee en dat hy in my ma se p\*\*s sal skop.”<sup>37</sup> Mr Lakey does not deny this conduct. He states only that he was drunk and that he cannot recall what he said. He was convicted of assault, and sentenced to a fine of R3 000, or six months’ imprisonment suspended for five years. And he was declared unfit to possess a firearm. Mr Visagie’s evidence is that he lives in fear of his life because of the threat.

[120] This conduct is obviously unacceptable. It may be that the threats were simply Mr Lakey letting off steam and there is no risk that he would ever act on them. But there is no way to know that; particularly if Mr Lakey is again so drunk he cannot remember his actions. But even if Mr Lakey would not actually seek to hurt or kill Mr Visagie, the threats create a reasonable fear of violence. This, in my view, is a strong factor favouring the eviction of Mr Lakey.

[121] Naturally, Mr Lakey’s conduct cannot be imputed on Mrs Lakey or their children. But the difficulty is that if Mr Lakey is evicted (in part) because he has threatened to kill Mr Visagie, would it be just and equitable to allow Mrs Lakey and her children to remain?

[122] Mr Lakey’s eviction would be ordered, at least in part, because of the threat he poses to Mr Visagie. It would be non-sensical to then permit him to continue to visit his family on the farm. Yet Mrs Lakey and her family retain the right to family life which

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<sup>37</sup> Translation: “This thing is between the two of us and that he will kick me in my ‘ma se p\*\*s’ ”.

should entitle them to visits from Mr Lakey. That is not a tenable situation. Although they are blameless, this is not a situation where it would make sense to separate Mr Lakey's fate from his family's. Nor have they sought an order that would permit the one to remain while the other is evicted.

### *A Risk of Homelessness?*

[123] Section 11(3)(c) of ESTA requires this Court to consider whether "suitable alternative accommodation"<sup>38</sup> is available to the Occupiers. While it is not an absolute rule that occupiers may not be evicted unless suitable alternative accommodation is available, it will be rare case when a court will make such an order.<sup>39</sup>

[124] The dispute between the parties is a factual one: whether the Occupiers will be able to secure suitable alternative accommodation if they are evicted. If they cannot, then there would have to be extremely strong countervailing factors to warrant eviction. If they can, then there would have to be good reasons connecting the Occupiers to this particular land to justify refusing eviction.

[125] What does the evidence show? Let's start with the financial position of the Occupiers, which is based on what they said in their answering affidavit in 2023, and the Department's report. Mr Lakey is currently employed as a technician working at a store in Wellington. In 2023, he earned R1 400 per week, or approximately R5 600 per month. Mrs Lakey is unemployed. In addition, the family receive a child grant of R500 for each of their four children. The Occupiers accordingly have income of approximately R7 600 per month. The Department also recorded that Mrs Lakey was earning R1 500 every two weeks doing temporary work for an events management

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<sup>38</sup> ESTA section 1 defines "suitable alternative accommodation" as:

"alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to-

- (a) the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services;
- (b) their joint earning abilities; and
- (c) the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active".

<sup>39</sup> See, for example, *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) para 15.

company. It is unclear if she is still working there so I discount that income; although Mrs Lakey clearly has the capacity to find employment.

[126] What are the family's monthly expenses? R1 985. They spend R800 for groceries, R300 for electricity, R420 for gas, R160 for a funeral policy, R200 for tithes to the church, and approximately R105 for school fees. That leaves R5 615 in disposable income. These numbers have likely changed slightly since 2023. But there was no suggestion that either the income or expenses are fundamentally different in 2025.

[127] Is that sufficient income to avoid homelessness? The only direct evidence we have is from the Municipality. It explained that in terms of its Temporary Housing Assistance policy, a family generally qualifies for emergency housing if its household income is less than R4 500. This was not an inflexible number, but a "rule of thumb". The Municipality explained that there were no factors that would justify a departure from that flexible rule in this case. As a result, it concluded that the Occupiers did not qualify for emergency housing and "would most probably be able to address their housing emergency from their own resources".

[128] Outside the Municipality's threshold, there is no useful evidence before us about the cost of rental accommodation in the area. The Occupiers state that they have sought rental accommodation without success, but provide no details about those attempts – the nature, location and cost of the accommodation. The Department's section 9(3) report asserts that the Occupiers face homelessness. But it provides no justification for that conclusion, given their income.

[129] Here is the difficulty – Municipalities are required to take reasonable steps to provide access to housing. That must include a policy to provide accommodation to those facing homelessness from eviction.<sup>40</sup> But the Constitution does not require municipalities to house every person who is evicted; where that person can access housing through their own resources it would be perverse to require the municipality to provide immediate housing. That would divert common resources to aid those who do not need it, and reduce the resources available to aid to those truly in need.

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<sup>40</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

[130] A municipality is entitled to draw a line between those who need assistance and those who do not. It can do so through a policy designed for that purpose. That policy must be rational, reasonable, and must comply with the municipality's obligations under sections 26(1) and (2) of the Constitution.

[131] The flexible R4 500 threshold may or may not be a constitutional line for the Drakenstein Municipality to draw. But it is not open to this Court, in these proceedings, to question it. I say that for two reasons.

[132] First, there is no formal challenge to it. The Occupiers have not brought a counter-application to challenge the Policy. This Court must accept that the Policy is lawful unless and until it is set aside.<sup>41</sup> That flows from the principle that a policy is valid unless and until set aside.

[133] But it also flows from the separation of powers and the courts' "institutional respect for the policy-making function of the two other arms of government".<sup>42</sup> It is primarily for the legislative and executive arms to give content to socio-economic rights and for the judiciary to test the lawfulness of their actions in proceedings properly brought to do so. A housing policy will not be constitutional if it makes no provision for those most in need.<sup>43</sup> But where it draws the line of need is inherently a question of policy that requires facts about the cost of accommodation, and an understanding of the municipality's other obligations and budgetary limitations. It would be institutionally inappropriate for this Court to intervene in the Municipality's determination of how to use its funds when there is no proper case before it challenging the Municipality's policy.

[134] Second, even if, despite the absence of a formal challenge, the Court could order the Municipality to provide accommodation, there is no factual basis to do so. Without further evidence, it is impossible to objectively assess whether R4 500 is a reasonable reflection of the cost of securing accommodation in the Wellington area. R4 500 is not a facially irrational amount. And even if it was, the real question in this

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<sup>41</sup> *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC).

<sup>42</sup> *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) para 65.

<sup>43</sup> *Grootboom* supra n 40.

case is whether a family with income of R7 600 per month and monthly disposable income of R5 615 will be rendered homeless without state assistance. Save for the say-so of the Occupiers (repeated by the Department), there is no objective evidence to support that conclusion.

[135] The Occupiers were represented by experienced attorneys who specialize in ESTA matters both before the Magistrates' Court and in this Court. There is an obligation on represented occupiers to provide the factual basis to support an allegation that they risk homelessness.<sup>44</sup> While these Occupiers provided information about their income and expenses, and that they could not be accommodated by family, they put up only a bald statement that they could not find rental accommodation. This was not a difficult burden. They could have put up evidence of the cost of two or three properties they had sought to rent to show they were beyond their means. But there is nothing. Even in the face of the Municipality's report, they put up no further evidence.

[136] On these facts, I can only conclude that there is not a reasonable risk of homelessness. If evicted, the Occupiers will likely be able to afford suitable alternative accommodation. Given their own complaints about the quality of their current accommodation on Soetendal, I cannot conclude that the accommodation will be of substantially inferior quality so it does not meet the definition of suitable alternative accommodation in ESTA.

### *Balance of Interest*

[137] There remain a few other issues to consider in order to assess the balance of interest between the parties.

[138] The Appellants raise several complaints about the Occupiers' conduct and continued occupation of Soetendal. They allege the Occupiers "are currently doing as they please on the property", that Mr Lakey is often drunk and noisy, that the Occupiers' family and friends enter and reside on the property without permission, and

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<sup>44</sup> *Luanga v Perthpark Properties Ltd* 2019 (3) SA 214 (WCC) at para 44. This was said in the context of Prevention of Unlawful Eviction and Illegal Occupation of Land Act 19 of 1998, but in my view it applies also to legally represented occupiers under ESTA.

that they collect firewood without permission. There is a particular complaint about the presence of Monrico. Finally, the Appellants allege that the Occupiers use bucket toilets and make a mess when they empty the buckets in the staff toilets.

[139] The Occupiers deny that they “do as they please”. They admit they have visitors, but allege that other occupiers on the farm do the same. They admit they gather firewood and they admit that Monrico resided on the farm without the Appellants’ permission although she no longer does so. On the toilets, they admit they use bucket toilets because there are no toilets in their house. The same is true for other workers. They deny they are uniquely responsible for any mess caused when emptying the buckets. There is no specific denial that Mr Lakey is often drunk and noisy.

[140] The Appellants do not make the common allegation that they need to use the house to provide accommodation to other employees. Rather, they allege that the house “is no longer suitable as a residence”. The Occupiers do not deny that the house is unsuitable as a residence. Instead, they contend that the house is in the same condition as when they occupied it. It is not clear what the Appellants intend to use the building for if the Lakeys are evicted.

[141] In my view, these facts should have limited weight. These type of generalized allegations, which do not single out particular occupiers or incidents, are very difficult for occupiers to disprove. If the conduct of occupiers is relied on to justify an eviction, landowners should provide as detailed and specific information as possible. But whatever the truth, the respective attitudes towards these complaints are reflective of a breakdown in the relationship between the parties.

[142] The hardship to the Occupiers is limited. They have no historical connection to Soetendal. Their conditions of living on the farm are clearly not ideal. The evidence shows they will be able to find alternative accommodation in the area.

[143] There is a final factor that will ameliorate the consequences of eviction. After they applied for eviction, when the Department was preparing its report, the Appellants offered R30 000 to Mrs Lakey to assist with finding new accommodation. During the mediation, the Appellants offered R20 000. At the hearing, the Court asked if the offer was still open. It also asked if the Appellants would be willing to provide transport to

school to the minor children until the end of the school year.<sup>45</sup> The Appellants' counsel informed us that the Appellants would provide R20 000 and transport for the children. If incorporated in the order, that will further reduce the consequences of the eviction and aid in securing alternative accommodation.

### Conclusion on Eviction

[144] In my view eviction of the Occupiers is just and equitable. The most compelling reasons are Mr Lakey's threats and the fact that there is not a reasonable risk of homelessness. The burden to the Appellants is that Mr Lakey will remain on the farm creating a reasonable fear of harm for Mr Visagie. The burden for the Occupiers if evicted is that they will have to find alternative accommodation – but they have the means to do so. They will have to use what is currently disposable income. But that is not a reason to permit them to remain on Soetendal.

### The Terms of the Eviction

[145] That leaves only the terms on which the eviction should be granted under section 12 of ESTA. The court must determine the date by which the Occupiers must vacate the property, the date of eviction if they do not vacate, and the weather conditions under which the eviction may be conducted.<sup>46</sup> Section 12(2) lists the factors a court must consider in setting the dates.<sup>47</sup>

[146] The key issue in this case is that the Occupiers must be afforded sufficient time to find alternative accommodation. In my view two months is sufficient time.

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<sup>45</sup> This was an offer made by the landowner in *Baron* and which the Constitutional Court approved of in order to limit disruption to the children's schooling. See *Baron and others v Claytile (Pty) Limited and Another* [2017] ZACC 24; 2017 (10) BCLR 1225 (CC); 2017 (5) SA 329 (CC).

<sup>46</sup> ESTA section 12(1).

<sup>47</sup> ESTA section 12(2) reads:

“(2) In determining a just and equitable date the court shall have regard to all relevant factors, including-

- (a) the fairness of the terms of any agreement between the parties;
- (b) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land; and
- (c) the period that the occupier has resided on the land in question.”

Accordingly, I intend to order them to vacate by 31 August 2025. If they fail to vacate, there is no reason to further postpone the date of eviction. It can be conducted a week later, provided it shall not be conducted during inclement weather.

[147] As I mentioned earlier, the eviction is subject to: (a) the Appellants paying the Occupiers R20 000; and (b) the Appellants transporting the minor children to and from school for the remainder of the 2025 school year, if that is required.

## **Conclusion**

[148] Disputes about eviction are often messy. This case is no different. Neither party is all in the right or all in the wrong. Courts must weigh competing facts and try to reach a just outcome. Here, justice and equity require that the Occupiers leave Soetendal and find a new home somewhere else.

[149] The Court would like to thank Legal Aid South Africa for agreeing, at short notice, to represent the Occupiers in this appeal. Although this Court has granted the eviction, the attorneys provided excellent representation for their clients. In accordance with the general practice in this Court, I make no order as to costs.

[150] I make the following order:

1. The appeal is upheld.
2. The First to Seventh Respondents are ordered to vacate the property situated at remainder of portion 11 of the farm Soetendal erf 146 in the Drakenstein Municipality (**the Property**) by 31 August 2025.
3. In the event that the Respondents fail to vacate the Property by 31 August 2025, the Sheriff is ordered and directed to evict them on any weekday after 6 September 2025 on which the weather is suitable for an eviction.
4. The Appellants shall, within five days of the Respondents vacating the Property, pay to the Respondents R20 000.

5. The Appellants are ordered to transport the children, who are subject to this eviction order, from their new residence to the school they are presently attending and back home every school day from the date of eviction to the end of the 2025 school year.
6. There is no order as to costs.



**M BISHOP**

Acting Judge of the Land Court

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Instructed by:

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For the Eighth Respondent:

Instructed by:

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