



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

CASE NO: LCC 03/2020

Not reportable

In the matter between:

ASHANTI WINE AND COUNTRY ESTATE (PTY) LTD Applicant

and

WILLEM CLAASEN	First Respondent
LUWELLYN CLASSEN	Second Respondent
ALUQIA CLASSEN	Third Respondent
RIAAN CLAASEN	Fourth Respondent
ISAAC CLAASEN	Fifth Respondent
DORA CLAASEN	Sixth Respondent
ABRAHAM CLAASEN	Seventh Respondent
SONJA CLAASEN	Eighth Respondent
ZELDA CLAASEN	Ninth Respondent
JOHAN FREDDY FORTUIN	Tenth Respondent

DORIEN FORTUIN	Eleventh Respondent
DENISE VAN ROOYEN	Twelfth Respondent
JASMYN VAN ROOYEN	Thirteenth Respondent
GERSHWIN FORTUIN	Fourteenth Respondent
TASHILL RUITERS	Fifteenth Respondent
KATRIENA JACOBS	Sixteenth Respondent
BERTI JACOBS	Seventeenth Respondent
FRANCOIS ISAACS	Eighteenth Respondent
RICARDO JACOBS	Nineteenth Respondent
BERTRUM JACOBS	Twentieth Respondent
SAHRA FRANSE	Twenty-First Respondent
MATHEUS FRANSE	Twenty-Second Respondent
SANDRA ARENDSE	Twenty-Third Respondent
ANTOINETTE ARENDSE	Twenty-Fourth Respondent
LAXON ARENDSE	Twenty-Fifth Respondent
ELZAAN ARENDSE	Twenty-Sixth Respondent
PRINS PLAATJIES	Twenty-Seventh Respondent
MARIA VAN ROOY	Twenty-Eighth Respondent
PETROLENE THOMAS	Twenty-Ninth Respondent
ROSALINE THOMAS	Thirtieth Respondent
GERHARD THOMAS	Thirty-First Respondent
TIAAN VAN WYK	Thirty-Second Respondent
NETTIE WELCOME HOLLENBACH	Thirty-Third Respondent
NICOLENE HOLLENBACH	Thirty-Fourth Respondent
ALROY HOLLENBACH	Thirty-Fifth Respondent
DIRK PAULSE	Thirty-Sixth Respondent
JACOBA MAGDELENA PAULSE	Thirty-Seventh Respondent
ELMARIE PAULSE	Thirty-Eighth Respondent

PHILLIPINE PAULSE	Thirty-Ninth Respondent
DESIRE PAULSE	Fortieth Respondent
ERNST ARENDSE	Forty-First Respondent
ELIZABETH ARENDSE	Forty-Second Respondent
CHRISZELLE ARENDSE	Forty-Third Respondent
CHRISTIE PRETORIOUS	Forty-Fourth Respondent
GERT VAN DER HEEVER	Forty-Fifth Respondent
KATRIENA CLAASEN	Forty-Sixth Respondent
FRANCINA CLAASEN	Forty-Seventh Respondent
BENINE CLAASEN	Forty-Eighth Respondent
CHRIS CLAASEN	Forty-Ninth Respondent
CHARLENE CLAASEN	Fiftieth Respondent
JACOB FORTUIN	Fifty-First Respondent
LENA ARENDSE	Fifty-Second Respondent
CHARLES FORTUIN	Fifty-Third Respondent
PATRICK ARENDSE	Fifty-Fourth Respondent
SAHRA SANDRA FRANSE	Fifty-Fifth Respondent
PERSENS ARENDSE	Fifty-Sixth Respondent

**ALL THOSE HOLDING TITLE THROUGH
OR UNDER THE FIRST TO FIFTY-SIXTH
RESPONDENTS, OR OCCUPYING, WITH
OR WITHOUT CONSENT, COTTAGES
1, 2, 4, 7, 8, 10, 11, 13, 16, 17 AND 20 AT
FARM ASHANTI, REMAINING EXTENT
OF FARM NO. 1731,**

DRAKENSTEIN MUNICIPALITY, WESTERN CAPE	Fifty-Seventh Respondent
DRAKENSTEIN MUNICIPALITY	Fifty-Eighth Respondent

**DEPARTMENT OF RURAL DEVELOPMENT
AND LAND REFORM**

Fifty-Ninth Respondent

Coram: Deputy Judge President Cowen

Hearing: 28 and 29 August 2025

Delivered on: 28 November 2025

ORDER

[1] The parties are authorised, within two weeks of the date of this order, to approach this Court on notice for an order to re-appoint as a mediator Mr Elton Shortles (or another agreed mediator) for a period of twelve months which may be extended on good cause shown.

[2] The Department of Rural Development and Land Reform is directed to take such steps as may be necessary to finalise the processing of the s 4 applications of the first to fifty seventh respondents within a period of sixty days of the date of this order.

[3] Ashanti is granted leave to renew the application on the same papers supplemented where necessary.

[4] There is no order for costs.

JUDGMENT

Introduction

[1] It is a troubling feature of litigation in this Court that many eviction cases brought under the Extension of Security of Tenure Act 62 of 1997 (ESTA) result in the eviction of occupiers to emergency accommodation. This occurs despite the fact that ESTA is intended to secure the tenure of those vulnerable to eviction and to promote access to suitable alternative accommodation. In this context, this case is unusual for being marked by dedicated efforts on the part of the parties to realise ESTA's intentions. It also focuses attention on the role that mediation can play in securing tenure.¹

[2] The applicant, Ashanti Wine and Country Estate (Pty) Ltd (Ashanti), seeks the eviction of the first to fifty-seventh respondents (the occupiers) in terms of ESTA. The eviction is sought from a property known as the remaining extent of farm 1731 situated in the Drakenstein Municipality, Paarl District, Western Cape (the property), which Ashanti owns.

[3] The occupiers make up a community of some 72 people who have resided on cottages on the property over very many years, in some cases for their entire lives. It is common cause that they are occupiers protected by ESTA. They comprise eleven households. At a point, members (or a member) of each household were employed on the property, which used to be a vineyard, where grapes were grown for the wine industry. The previous owner, C Shell 326 (Pty) Ltd gave employees the right to occupy the cottages together with their family

¹ This is an issue that recently attracted the attention of a Full Court of this Court in *Marais NO and Another v Daniels and Others* [2025] ZALCC 36 (*Marais*).

members. However, since 2006, the property has not been used as a vineyard and the occupiers' employment contracts were terminated.

[4] Ashanti purchased the property at a public auction in April 2010 and has, since then, wished to and has sought to secure the relocation and eviction of the occupiers. This is not the first eviction application instituted by Ashanti: it is preceded by a prior unsuccessful application arising from a purported termination of the occupiers' rights of residence in August 2010. At that time, Ashanti sought their vacation of the property by 30 October 2010. Ashanti offered each family R20 000. Four families left. Most of the families rejected the offer as they would not be able to purchase a house elsewhere and it would leave them homeless and destitute. At a point, Ashanti sought to find an alternative for the occupiers to reside on another portion of the property. However, the Municipality was unwilling to agree to erect structures or install services. Ashanti then instituted eviction proceedings in the Paarl Magistrates Court. The Magistrate refused the eviction application, and, in February 2017, an appeal to the erstwhile Land Claims Court failed.

[5] Ashanti again sought to terminate the occupiers' rights of residence in August 2018 as a precursor to these proceedings. It did so centrally on the basis that the relationship between Ashanti and the occupiers has irretrievably broken down. This is a ground upon which an eviction may be sought under subsec 10(1)(c) of ESTA which authorises an eviction where 'the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship.'

[6] Throughout these proceedings, instituted in January 2020, the respondents have been willing to move if they have access to suitable alternative

accommodation within their means. In turn, Ashanti has made a generous offer to contribute to the occupiers' obtaining secure tenure and suitable alternative accommodation. The occupiers have accepted the offer provided they are in a position to move from the property to the accommodation in question.

[7] Further parties to these proceedings are the Drakenstein Municipality (the Municipality),² the Department of Land Affairs and Rural Development³ (the Department) and the Department of Human Settlements⁴ (the DHS). They are joined in the proceedings due to their statutory responsibilities to report to Court in respect of alternative accommodation and to facilitate access to housing and security of tenure. This is a matter in which all of the parties have actively sought to facilitate the occupiers' access to secure tenure and suitable alternative accommodation, which has not yet been achieved.

[8] This case is somewhat unusual due to the parties' mutual, ongoing and dedicated efforts to find a resolution of the dispute that would result in the provision of land, housing and secure tenure to the occupiers. This is sought to be achieved by invoking s 4 of ESTA which makes provision for State tenure grants to occupiers. After initial informal attempts to resolve the matter, the parties have – over the past two and half years – sought a resolution of these aspects through a court-ordered mediation process. To that end, Ashanti has tendered to pay R350 000 per household, up to a total of R3 850 000. The mediation process has ensued in parallel with a process of active and ongoing case management by the Court. The occupiers wish to accept the offer on the understanding that they will obtain secure tenure and suitable alternative accommodation with the provision of additional funds through s 4 grants.

² As the fifty eighth respondent.

³ As the fifty ninth respondent.

⁴ As the sixtieth respondent.

[9] By the end of May 2025, Ashanti – frustrated by what it saw as a lack of tangible progress and protracted delays in the mediation – insisted on dates being set for the hearing of the matter. The matter was heard on 28 and 29 August 2025. At the commencement of the hearing, Ashanti made a ‘with prejudice’ offer incorporated in a proposed draft order.⁵ In substance the offer had been on the table for some time. Its broad import is that Ashanti will, upon the handing down of the order, pay an amount of R3.85 million (comprising R350 000 per household) into the trust account of specified attorneys. The payment of the funds

‘1. The applicant shall, within seven days of the date of handing down of this order, pay into the trust account of Oosthuizen & Co Attorneys (the holding attorneys), an amount of R3.85 million (the settlement amount), being a payment of R350 000 payable to each household currently present on the property as set out in the papers of record herein.

1.1 The said amounts will be held in trust by the holding attorneys until paid over to the first to fifty seventh respondents’ (the occupiers) attorneys of record, Ashraf Mahomed Attorneys (the occupiers’ attorney(s)) or such other account as the occupiers’ attorney may nominate, as set out below.

2. The occupiers shall vacate the property known as the farm Ashanti, also known as the remaining extent of farm 1731 situated in the Drakenstein Municipality, Paarl District, Western Cape (the property) by no later than the 15th of July 2026, together with their belongings, and place the applicant in peaceful and undisturbed possession thereof.

3. In the event the occupiers fail to vacate the property as set out above, and within the time period specified above, then the sheriff of the above honourable court is authorized and directed to evict the occupiers from the property, together with all persons occupying and / or claiming a right of residence at the property, together with their possessions, and restore the applicant in vacant occupation thereof, said eviction not to take place before the 31st of July 2026.

3.1 In the event it is necessary for the sheriff to so evict the occupiers, then the costs of giving effect to an eviction order shall be deducted from the settlement amount before payment of the residue thereof to the occupiers’ attorneys of record.

3.2 An invoice received from the sheriff of the court as to the amount payable in giving effect to an eviction order shall be deemed to be proof of such amount.

4. In the event the occupiers do so vacate the property as set out above, alternatively are evicted therefrom, then the settlement amount, or the residue thereof after the costs of any eviction have been deducted, shall, upon written confirmation by the applicant’s attorney of record that the applicant has been restored in vacant occupation of the property, be paid by the holding attorneys to the occupiers’ attorneys, said payment to take place within 48 hours of the written confirmation as set out herein.

5. In the event a specific household on the property vacates the property and restores the applicant in vacant occupation of the premises occupied by them, then an amount of R350 000 shall be paid by the holding attorneys into the trust account of occupiers’ attorney.

5.1 Written confirmation by the applicant’s attorney of record that the applicant has been restored in vacant occupation of a specific premises, shall be sufficient for the holding attorneys to pay an amount of R350 0000 into the occupiers’ attorney of record’s trust account, said payment to take place within 48 hours of receive of the written confirmation as set out herein.

6. Any household on the property, or any member of that household, that remains on the property after 30 September 2025 shall lose any entitlement to the R350 000 which the applicant has undertaken to pay to such household.

6.1 An affidavit deposed to by the holding attorney, pursuant to an inspection of the property, to the effect that a household, or member thereof, remains on the property, will be sufficient for the holding attorney to repay to the applicant the amount held by it in respect of such household.

7. There shall be no order as to costs save as set out above.’

is contingent upon the occupiers vacating the property by no later than 31 August 2026. The draft order contemplated that the occupiers may be evicted if the property was not vacated on that date and the costs of eviction would be taken off the R350 000. In other words, Ashanti remained open to contributing a substantial amount of money but sought finality in the matter and a fixed date for vacant occupation. This tender was not accepted in circumstances where, given ongoing delays within the Department in finalising the process of securing tenure, there is simply no assurance that the accommodation will be available by August 2026. Importantly, at this stage, the s 4 grant applications have not been formally approved, although, according to counsel for the Department, this is a formality. Indeed, counsel for the Department invited the Court to subject it to an order to finalise its processes. Shortly after the hearing, Mr Shortles – the mediator – proposed an adjusted draft order also on an open basis. This too came to naught.

[10] In these circumstances, the following issues arise for decision:

- a. An application to strike out various supplementary affidavits;
- b. Whether Ashanti terminated the occupiers' rights of residence in accordance with s 8 of ESTA;
- c. Whether Ashanti has made out a case for the eviction of the occupiers having regard to the provisions of s 11 and subsec 10(1)(c) of ESTA and / or subsec 10(2) of ESTA.
- d. Ongoing mediation and a counter-application instituted by the respondents in which they seek *inter alia* (ongoing) mediation and engagement in respect of the provision of security of tenure pending the delivery of judgment.

Legal framework

[11] ESTA is ‘remedial legislation umbilically linked to the Constitution’ which seeks to protect people whose tenure of land is insecure.⁶ In *Daniels*, the Constitutional Court explored the social and historical background to ESTA tracing the process of dispossession of land and the creation of conditions of insecure tenure.⁷ I do not repeat this history here but it must be kept front of mind when applying ESTA. That history underscores ESTA’s purpose of giving effect to s 25(6) and s 26(1) of the Constitution, which promise security of tenure and the right of access to adequate housing.⁸ Those purposes are recognised in ESTA’s preamble.⁹

[12] Under s 9(2) of ESTA, a court may only make an order for the eviction of an occupier if the conditions in subsecs 9(2)(a) to (d) are complied with.¹⁰ In this

⁶ *Klaase and Another v van der Merwe N.O. and Others* [2016] ZACC 17; 2016 (9) BCLR 1187 (CC); 2016 (6) SA 131 (CC) (*Klaase*) para 51. See too *Molusi and others v Voges NO and others* [2016] ZACC 6; 2016(3) SA 370 (CC) 2016(7) BCLR 839 (CC) (*Molusi*) para 1.

⁷ *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) (*Daniels*) paras 14 to 22. This history was briefly recounted in *Marais* above n 1 at paras 17 to 19.

⁸ *Marais* above n 1 para 20.

⁹ WHEREAS many South Africans do not have secure tenure of their homes and the land which they use and are therefore vulnerable to unfair eviction;

WHEREAS unfair evictions lead to great hardship, conflict and social instability;

WHEREAS this situation is in part the result of past discriminatory laws and practices;

AND WHEREAS it is desirable –

that the law should promote the achievement of long-term security of tenure for occupiers of land, where possible through the joint efforts of occupiers, land owners, and government bodies;

that the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners;

that the law should regulate the eviction of vulnerable occupiers from land in a fair manner, while recognizing the right of landowners to apply to court for an eviction order in appropriate circumstances;

to ensure that occupiers are not further prejudiced;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-’

¹⁰ Section 9 reads: Limitation on eviction

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

(2) A court may make an order for the eviction of an occupier if—

(a) the occupier’s right of residence has been terminated in terms of section 8;

(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—

regard, eviction is a two-phased process entailing initially a termination of an occupier's right of residence in terms of s 8 of ESTA and thereafter an application for eviction before a Court under s 9.¹¹

[13] In adjudicating matters under ESTA, Courts are enjoined to take into account the opposing interests of landowners and occupiers. In *Molusi*,¹² the Constitutional Court held:

‘ESTA requires that the two opposing interests of the landowner and the occupier need to be taken into account before an order for eviction is granted. On the one hand there is the traditional real right inherent in ownership reserving exclusive use and protection of property by the landowner. On the other there is the genuine despair of our people who are in dire need of accommodation. Courts are obliged to balance these interests. A court making an order for eviction must ensure that justice and equity prevail in relation to all concerned. It does so by having regard to the considerations specified in s 8 read with s 9, as well as ss 10 and 11, which make it clear that fairness plays an important role.’

[14] Of similar import is the following dictum of the Constitutional Court in *PE Municipality*,¹³ which, while made in the context of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, has application under ESTA¹⁴: ‘[The judicial function in eviction matters is] not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or *vice versa*. Rather, it is to balance out and reconcile

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- (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 grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of 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.

¹¹ *Aquarius Platinum (SA) (Pty) Ltd v Bonene and others* 2020(5) SA 28(SCA); [2020] 2 All SA 323 (SCA); [2019] ZASCA 7 para 7.

¹² *Molusi* above n 6 para 39.

¹³ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (*PE Municipality*)

¹⁴ *Marais* above n 1 para 61.

the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each case.’¹⁵

[15] The first requirement for an eviction order in issue in this application is that an occupier’s right of residence has been terminated in terms of section 8,¹⁶ which requires *inter alia* that any termination be just and equitable having regard to all relevant factors, and in particular those listed in s 8(1)((a) to (e). What an owner must prove to meet that requirement depends on the facts of a particular case.¹⁷

[16] In this case, the evidence established that several of the occupiers are protected by s 8(4) of ESTA in that they have resided on the property for over ten years and have reached the age of sixty. Section 8(4) confers strong protections

¹⁵ *PE Municipality* above n 13 para 23.

¹⁶ ‘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.

(2) 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.

(3) 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.

(4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and-

(a) has reached the age of 60 years; or

(b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge,

may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.

(5) ...

¹⁷ *Nimble Investments (Pty) Ltd v Johanna Malan and Others* [2021] ZASCA 129; [2021] 4 All SA 672 (SCA); 2022 (4) SA 554 (SCA) at para 61.

against the termination of rights of occupiers in this category that entail that their rights may only be terminated in the narrow circumstances that that occupier has committed a breach contemplated in subsecs 10(1)(a), (b) or (c) of ESTA. Ashanti relies in this regard on subsec 10(1)(c) referred to above.¹⁸

[17] One issue in contention in this case is the duty to act fairly in the process of terminating the occupiers' rights of residence under s 8 of ESTA. In *Snyders*, the Constitutional Court held:

‘Section 8(1) makes it clear that the termination of residence must be just and equitable both at a substantive level as well as at a procedural level. The requirements for the substantive fairness of the termination is captured by the introductory part that requires the termination of a right of residence to be just and equitable. The requirement for procedural fairness is captured in s8(1)(e).’

[18] Importantly, interpreting section 8(1)(e), the Constitutional Court held:

‘ESTA requires the termination of the right of residence to also comply with the requirements of procedural fairness to enable this person to make representations why his or her right of residence should not be terminated. ... A failure to afford a person that right will mean that there was no compliance with this requirement of ESTA. This would render the purported termination of the right of residence unlawful and invalid. It would also mean that there is no compliance with the requirements of ESTA that the eviction must be just and equitable.’

[19] Ashanti, however, relies on the subsequent decision of the Supreme Court of Appeal (SCA) in *Nimble Investments*,¹⁹ to contend that there is no duty to afford such an opportunity in circumstances where a landowner relies on the breakdown of the relationship between an owner and occupier.²⁰ As indicated above, this constitutes a circumstance under which a s 8(4) occupier's rights may be terminated and in which a Court may grant an eviction under section 10(1)(c) of ESTA, and upon which Ashanti relies. In this regard, the SCA held that a construction of ESTA ‘that an owner is required to grant an occupier an

¹⁸ At para 5 and see too n 23 below.

¹⁹ Above n 17.

²⁰ See above at para 5 and n 23 below.

opportunity to make representations once it is found that the occupier has committed a fundamental breach of their relationship which is practically impossible to continue, is both insensible and intolerable. It would also render the provisions of s 10(1)(c) nugatory: what is contemplated is whether objectively the relationship is at an end.’²¹ No argument was, however, addressed on how this Court is to reconcile *Snyders* and *Nimble Investments* or indeed whether the dictum in *Nimble Investments* goes so far as was contended when regard is had to the fuller judgment.²² It is not necessary for me to deal with this, however, as this case is distinguishable from *Nimble Investments* at least because Ashanti did provide an opportunity to the occupiers to make representations before terminating their rights of residence, and in doing so, it in any event assumed a duty to act fairly. Moreover, the question whether there is an irretrievable breakdown of the relationship due to a fundamental breach is and was wholly in dispute and I have concluded that that has not been established. In such a case, it is difficult to see why it would be either insensible or intolerable to consider representations at the stage of termination of rights in terms of s 8. Indeed, at least on the facts in this case, the opposite would be true.

[20] Section 9(2)(c) of ESTA requires that before an eviction order is granted, the conditions for an order for eviction in terms of s 10 or s11 have been complied with’. Section 10 applies to occupiers who were occupiers on 4 February 1997²³

²¹ Para 70.

²² See eg para 68.

²³ Section 10. Order for eviction of person who was occupier on 4 February 1997

(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if –

(a) The occupier has breached section 6(3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;

(b) The owner or person in charge has complied with the terms of any agreement pertaining to the occupier’s right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar month’s notice to do so;

(c) The occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or

(d) The occupier –

(i) Is or was an employee whose right of residence arises solely from that employment; and

and section 11 applies to occupiers who became occupiers thereafter.²⁴ Section 10 imposes more restrictive requirements for an eviction order and conversely, greater protection for occupiers. In this case, Ashanti contends that the occupiers comprise some people who enjoy the protection of s 10 and others who enjoy the lesser protection of s 11. However, in circumstances where Ashanti has not established which occupiers are protected by which provision, and in circumstances where some occupiers enjoy the protection of subsec 8(4), Ashanti was, in effect, constrained to argue its case contending that it has met the requirements of either subsec 10(1)(c) of ESTA or subsec 10(2). Section 10(2) contemplates the grant of an eviction order where there is suitable alternative accommodation available to the occupiers. In any event, Ashanti relies on the same facts and circumstances to justify an eviction under either s 10 or s 11.

(ii) Has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act.

(2) Subject to the provisions of subsection (3), if none of the circumstances referred to in subsection (1) applies, a court may grant an order for eviction if it is satisfied that suitable alternative accommodation is available to the occupier concerned.

(3) If –

(a) Suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;

(b) The owner or person in charge provided the dwelling occupied by the occupier; and

(c) The efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,

A court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to:

(i) The efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and

(ii) The interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted.

²⁴ Section 11: Order for eviction of person who becomes occupier after 4 February 1997

(1) ...

(2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.

(3) In deciding whether it is just and equitable to grant an order for eviction in terms of this section, the court shall have regard to –

(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.

[21] As appears from the provisions of both ss 10 and 11, the availability of suitable alternative accommodation is a material factor, and decisive under s 10(2). ‘Suitable alternative accommodation’ is defined in section 1 of ESTA to mean:

‘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 the occupiers in the household in question for residential accommodation, land for agricultural use and services;

(b) Their joint earning abilities;

The need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active.’

[22] The duty to provide access to housing is a duty that ordinarily resides with the State and not landowners, although there are cases where this duty will reside with the landowner.²⁵ However, in *Blue Moonlight*,²⁶ the Constitutional Court held: ‘It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course, a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient.’

[23] In *Marais*, this Court noted that there are three primary mechanisms through which ESTA seeks to provide security of tenure for those vulnerable to eviction.²⁷ The first is by prescribing that the availability of suitable alternative accommodation is either a relevant consideration or, in some cases, a prerequisite for the grant of an eviction order.²⁸ The second is through the provision of tenure

²⁵ *Baron v Claytile (Pty) Ltd and another* [2017] ZACC 24; 2017(10) BCLR 1225 (CC); 2017(5) SA 329 (CC) at para 37.

²⁶ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC)* [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) at para 40.

²⁷ Above n 1 para 64.

²⁸ Para 65.

grants under s 4 of ESTA, as amended by the Extension of Security of Tenure Amendment Act 2 of 2018 (ESTA Amendment Act).²⁹ One of the uses intended for tenure grants is what is referred to as an ‘off-site development’, which is defined to mean ‘a development which provides the occupants thereof with an independent tenure right on land owned by someone other than the owner of the land on which they resided immediately prior to such development.’ Section 4(2) details criteria relevant to whether the Minister should approve an application for a tenure grant and if so the priority to be given to the application.³⁰ That use is in issue in this case.

[24] The third primary mechanism through which ESTA seeks to provide security of tenure for those vulnerable to eviction arises from the ESTA Amendment Act, by providing for compulsory mediation in certain cases.³¹ While compulsory mediation applies to litigation post the ESTA Amendment Act,³² mediation is nonetheless ‘a suitable vehicle through which the purpose of securing tenure for occupiers may be explored and navigated’, given the multiple overlapping and competing interests at stake.³³ Moreover, as held in *Marais*, ‘mediation provides a vehicle through which the multiple stakeholders involved in the process of securing tenure can find each other’ including not only owners and occupiers but also the relevant Municipality, the Department and other government departments such as DHS.³⁴ Importantly, in *PE Municipality*, the Constitutional Court unanimously endorsed court-ordered mediation in an appropriate case.³⁵

²⁹ Para 66.

³⁰ These include the imminency of an eviction, the attempt made by owners and occupiers to devise a development that entails a mutual accommodation of their interests and whether the development entails a mutual accommodation of the interests of owners and occupiers.

³¹ Para 68.

³² In *Marais*, above n 1, this Court held that the compulsory mediation requirements only apply prospectively and not to proceedings instituted before the ESTA Amendment Act came into operation on 1 April 2025.

³³ *Marais* above n 1 para 67.

³⁴ *Marais* above n 1 para 67.

³⁵ Above n 13 para 45.

[25] Mediation is not the only mechanism through which the position of occupiers is protected. A further mechanism is meaningful engagement, being ‘the process whereby the parties to the litigation engage with each other and the relevant municipality with a view to avoiding the homelessness of the occupier.’³⁶ As held in *Marais*, ‘the requirement of meaningful engagement as a process that must be embarked upon to limit homelessness before an eviction order is granted has long been recognized under ESTA.’³⁷ Moreover, it is a process that is ‘instrumental to finding just and equitable resolutions to eviction disputes and ones that promote tenure security of occupiers and balance the rights of landowners and occupiers.’³⁸

Background to the proceedings

[26] As indicated above, this is not the first eviction application that has been instituted to evict the occupiers. During 2006, the previous owner sought to terminate the occupiers’ rights of residence at the termination of their employment. After Ashanti became the owner of the property some four years later, and in August 2010, Ashanti alleges that its labour consultant Mr Andre Bloem orally terminated the rights of occupation of all occupiers affording them until 30 October 2010 to vacate the property. According to Ashanti, the reasons for termination at that stage were that the property was overcrowded and the cost of accommodating the occupiers was becoming a financial burden Ashanti could not feasibly carry. This led to the unsuccessful eviction proceedings in the Magistrates Court which culminated in 2017 in an unsuccessful appeal to the erstwhile Land Claims Court.

³⁶ *Marais* above n 1 para 74.

³⁷ *Id.*

³⁸ *Marais* above n 1 para 80.

[27] According to Ashanti, there was ongoing material harm occasioned by the breakdown of the relationship. During August 2018, notices were delivered to the occupiers noting that Ashanti was considering terminating their rights of residence on the basis *inter alia* that the relationship between Ashanti and the occupiers had completely broken down for several stated reasons allegedly pertaining to the occupiers' conduct as follows:

- a. There is no meaningful relationship or contact between Ashanti and the occupiers;
- b. The occupiers allow third parties to occupy the property with them. This has resulted in excessive water and electricity consumption, undue strain on sewage and water disposal systems, overcrowding and problems with human, animal and household waste disposal on the property;
- c. Third parties visit the occupiers without obtaining prior consent from Ashanti;
- d. The designated access and exit points are continuously disregarded, with the result of unrestricted flow of people on the property including third parties. This results in security breaches due to persons unknown to them traversing the property with unknown people disturbing the peace with raucous and noisy behaviour accompanied by public abuse of alcohol.
- e. The occupiers are keeping dogs and other animals on the property;
- f. The occupiers are failing to maintain the premises they occupy in a fit and proper condition.
- g. The occupiers are failing or refusing to pay or tender consideration for services consumed by them on the property.

- h. The conduct causes, or allows to be caused, damage to the property including to fencing and a marked increase in the prevalence of theft and vandalism of goods on the property.

[28] The notices invited the occupiers to make written representations by 30 September 2018 as to why their rights should not be terminated. The notices offered certain forms of assistance in obtaining alternative accommodation and recorded that it was Ashanti's hope that the matter could be resolved amicably. The notices encouraged the occupiers to contact *inter alia* the University of Stellenbosch Legal Aid Clinic or another lawyer.

[29] The occupiers did approach the University of Stellenbosch Legal Aid Clinic and an extension of time was afforded to make representations. Save for the occupiers of two cottages, the occupiers submitted representations on 25 October 2018. The occupiers' response was multi-faceted. Ashanti alleges that the response makes it clear that there is no meaningful relationship between Ashanti and the occupiers. The occupiers submitted that they have made numerous attempts to establish such a relationship, but that they are purposely avoided. They denied that they allow third parties to occupy the property with them and further denied the issues related thereto. They denied knowledge of any rule that prior consent was required for visitors. They denied disregarding designated access and exit points or keeping dogs on the property. They denied failing to maintain the premises in a fit and proper condition. They submitted that they had on numerous occasions sought to pay for services, but this was not accepted or even sought. They explained that they would apply for housing at the Municipality and in the meantime offered to pay an unspecified rental. They reiterated that they were unable to afford alternative accommodation.

[30] The representations did not sway Ashanti in its resolve to terminate the occupiers' rights of residence. On 14 November 2018, termination notices were delivered to the occupiers.

[31] Ashanti instituted these proceedings in January 2020. The founding affidavit is deposed to by Mr Bjorn Geiger. In April 2021, after delivery of a notice of bar, the occupiers delivered a notice of counter-application and an answering affidavit, deposed to by Mr Willem Claasen, the first respondent. In this regard, the occupiers have established a committee for purposes of protecting their rights and interests. Mr Willem Claasen is the Chairperson of the Committee and he serves with four other occupiers. Mr Claasen explains upfront that the committee does not represent certain respondents who have left the property or are deceased.³⁹

[32] In the notice of counter-application, the occupiers sought various forms of relief including an order directing the parties to attempt to settle the dispute through a process of mediation and negotiation, and staying the proceedings pending the mediation process, directions concerning the appointment of a mediator, directing the parties to enter into a process of meaningful engagement for purposes of developing a framework to secure the tenure rights of the respondents and ensuring that they are not left homeless and destitute and reporting back to the Court on the progress made on the engagements within three months of the date of the order, ordering that the eviction be stayed pending a land rights audit of the respondents' rights in the event of their defences failing and an eviction order being granted. Ashanti delivered a replying and answering affidavit in February 2022. The delay, they say, was occasioned by efforts on their part to reach an amicable resolution of the matter.

³⁹ This includes the 4th, 6th, 17, 22nd, 23rd, 24th, 34th, 44th and 54th respondents (who have moved) and the 5th, 28th, 33rd and 56th respondents who are deceased.

[33] After an initial postponement, the matter was set down for January 2023. At that time there were two reports before Court from the Municipality and Department. This included a report on possible accommodation and emergency accommodation from the Municipality filed on 19 March 2021 and a report in terms of section 9(3) of ESTA from the Department dated 18 November 2020.

[34] On 27 January 2023, an order was granted by agreement postponing the matter for three months for purposes of mediation. The 60th respondent, the DHS, was joined in the proceedings. The mediator was tasked with attempting to resolve the dispute between the parties regarding the voluntary vacation of the property and the relocation of the occupiers. This ensued in circumstances where, without prejudice to their rights, the occupiers were willing to explore voluntary relocation and Ashanti had offered to make payment of R350 000 per household to this end.

[35] In the January 2023 order, the Municipality was ordered to deliver a report containing a series of information specified in an Annexure A relating to the occupier's position on the housing list, waiting periods, an update of the housing report and whether the occupiers could be accommodated in any formal housing project, an update on the availability of emergency accommodation, details on mechanisms available to the Municipality to assist the residents to obtain housing, the availability and cost of accommodation in the open market for an amount of less than R600 000 and the availability and cost of rental accommodation. The Municipality was directed, in dealing with these matters, to indicate the extent to which it is or is not possible to accommodate the occupiers' wish to stay together and live in proximity to each other. The Municipality delivered its report in March 2023.

[36] The Department was also ordered to deliver a report dealing with various matters specified in an Annexure B. These included a supplementary report in terms of section 9(3) of ESTA addressing the circumstances of the occupiers, their employment status, income, educational status, schooling and financial support, and a further report dealing with, *inter alia*, the feasibility of the Department buying a portion of the property, whether the Department has any mechanisms or funds available to top up the R350 000 offer from Ashanti or to provide land for the occupiers to settle as a community. The Department was also asked to indicate the extent to which it may be possible to accommodate the occupiers' wish to stay together or live in close proximity with each other. The Department delivered its response in March 2023.

[37] The DHS was requested to deliver a report too, on issues set out in an Annexure C. This included the nature and extent of subsidies available to the occupiers to ensure alternative accommodation, the status of pending requests for assistance and related matters, and whether the DHS has any mechanism or funds available *inter alia* to top up Ashanti's offer or to provide land to the occupiers to settle as a community. The DHS delivered its report in February 2023.

[38] Despite delays, a mediator was appointed and the mediation commenced. Under the January 2023 order, the process of case management was to continue to monitor progress in the matter. As matters transpired, and by agreement between the parties, the dates for the mediation were extended in circumstances where progress was being made.⁴⁰ At a point, however, it became necessary to appoint a new mediator,⁴¹ as the first mediator resigned the post that conferred on

⁴⁰ An order dated 6 March 2023 extended the mediation period until 30 June 2023. An order dated 5 June 2023 extended the mediation period until 31 August 2023 and the mediator's mandate was extended. An order dated 4 August 2023 extended the period until 15 September 2023. An order dated 18 October 2023 extended the mediation period until 30 November 2023.

⁴¹ Mr Shortles.

her the entitlement to mediate,⁴² and agreement was reached between the parties regarding a new mediator.

[39] In circumstances where Ashanti had become concerned about the delays in the mediation and absence of concrete progress, the matter was then set down for April 2024. The mediator was requested to deliver a mediation report, the parties were requested to indicate whether they wish to continue with the mediation and provision was made for the delivery of supplementary affidavits. The supplementary affidavits became controversial and are the subject of the application to strike referred to above.

[40] In April 2024, the matter was ultimately postponed until 4 September 2024. The mediation continued in the meantime. By the end of 2024, Ashanti was pressing for the matter to be set down early in 2025, but it continued to co-operate in the mediation process. The mediation continued but Ashanti ultimately insisted that the matter be argued and dates were finally set to hear the matter on 28 and 29 August 2025. A site inspection was conducted in July 2025 and the parties were afforded an opportunity to deliver further affidavits updating the Court and dealing with the issues arising from the site inspection.

Factual background

[41] The facts are gleaned from a consideration of the affidavits placed before Court in light of the principles in *Plascon-Evans*⁴³ and *Wightman*.⁴⁴ Although there are multiple disputes on the papers, the material facts are either common cause or can be determined in light of these principles. At the hearing, counsel for the occupiers contended that if any material disputes of fact cannot be resolved

⁴² Ms Maclons.

⁴³ *Plascon-Evans Paints v Van Riebeeck Paints* 1984(3) 623 (A) (*Plascon Evans*) at 634H-635C

⁴⁴ *Wightman t/a JW Construction v Headfour (Pty) Ltd and ano* 2008(3) SA 371 (SCA) (*Wightman*) para 13.

on affidavit they should be referred to oral evidence. It has not been necessary to reach this issue.

[42] I have also had regard to the further information in the various reports supplied to Court, specifically, the Department's section 9(3) report dated 18 November 2020, the Municipality's Housing Report dated 24 March 2021 and the further reports delivered by the Municipality and Department in March 2023 (including a supplementary section 9(3) report)) and the DHS in February 2023. Also of assistance is a report on available rental stock delivered by Ashanti in February 2023.

[43] During the hearing, Ashanti sought to compare the occupiers' stance in its response to the request for representations and its stance in the answering affidavit, to draw the inference that there has been a change in stance that is difficult to reconcile with a *bona fide* defence. I have compared the responses, and, while there are changes, I do not agree that any change warrants such an inference. In this regard, I am mindful *inter alia* of the differences in the levels of sophistication between the documents responded to and the responses, and that the tenor and content of the documents responded to have, themselves shifted through the proceedings. Further considerations relevant to the assessment of evidence are the occupiers' contentions that aspects of the evidence of Ashanti are hearsay in nature and that allegations made against the occupiers are vague and unsubstantiated and at time gratuitous and inflammatory.

[44] The application to strike relates to an affidavit dated 16 March 2024 deposed to by the occupiers' attorney Mr Ashraf Mahomed on behalf of his clients. The affidavits seek to place before the Court information about the collapse of settlement discussions at a point prior thereto and to impute bad faith on the part of Ashanti and its legal representatives. Ashanti applies to strike the

affidavit and seeks costs, in circumstances where they say its content is irrelevant, defamatory, vexatious and scurrilous. In my view, it is not necessary to deal with the application to strike the affidavit because, although it was filed, it was not admitted into evidence before the Court and in view of subsequent developments, the occupiers do not seek to rely on its content. In view of the absence of any ongoing relevance and its allegedly defamatory content, it warrants emphasis that this Court has not and does not receive the affidavit into evidence. The only issue is costs occasioned by the affidavit, to which I return below.

[45] There are two primary factual issues that require determination. The first is whether there is suitable alternative accommodation available to the occupiers. Should suitable alternative accommodation be available, that would provide a basis, under subsec 10(2) of ESTA, for Ashanti to seek the eviction of the occupiers who are not protected by subsec 8(4). The second is whether there has been an irretrievable breakdown of the relationship between Ashanti and the occupiers as contemplated by subsec 10(1)(c).

Suitable alternative accommodation

[46] The availability of suitable alternative accommodation⁴⁵ stands to be considered in light of the progress made in the mediation process, Ashanti's tender and the available housing stock in the area.

[47] The available private rental stock is dealt with in a report delivered by Ashanti in February 2023 prepared by a Hanno Koen of Greeff Properties and Christies Real Estate. It reveals that at that time there was only one property available in Paarl and Wellington under R5000 per month and only seven properties for occupiers between R5000 and R10 000 per month. This is not enough stock for the occupiers. Moreover, the rental accommodation is clearly

⁴⁵ See definition above para 21.

unaffordable for them, save for Ashanti's tender which would enable them to access rental accommodation for three to four years. There is no Municipal rental stock available, as appears from the Municipality's report of March 2023.

[48] The housing stock available to purchase is dealt with in the Municipality's report of March 2023. That report reveals that there were then some 26 properties for sale in the Drakenstein area under R600 000. Only four properties were slightly under R360 000.00. Most of the properties were well in excess of Ashanti's tendered amount and would only be affordable with subsidies. The mediation and engagement processes have, at least at this stage, not yielded this solution in respect of State tenure grants. Rather, a different solution is being explored and is far advanced.

[49] The Municipality also supplied information as to which of the occupiers are on its housing waiting list, which list serves to facilitate access to housing through the national and provincial governments. Save in respect of two households, it appears that at least one member of each household is on the waiting list. However, there is no clarity about when housing might be delivered under any relevant programme.

[50] The only imminently realisable prospect of securing suitable alternative accommodation for the occupiers emerged from the mediation process and related engagements which ensued under court direction. As indicated above, the mediation process ensued over a very lengthy period of time. A material reason for this was that the delivery model that was being explored by the parties, including the Municipality and the Department was a new one. The Department, in particular, encountered significant challenges in devising how to deliver housing under s 4 of ESTA in circumstances where it is to be part funded by Ashanti and a desirable development by a private developer had been identified. It must be noted that in circumstances where s 4 of ESTA has, for a long time,

contemplated the provision of state subsidies to secure tenure including to occupiers vulnerable to eviction,⁴⁶ it is hard to understand why there are no effective systems in place to deliver suitable alternative accommodation to occupiers not least where an owner is seeking to assist. Nonetheless, given that the ESTA Amendment Act, which commenced only on 1 April 2024, strengthens s 4 and related institutional processes, it may be accepted that Parliament appreciated that there were systemic deficiencies that required redress. It may also be noted that over time, s 4 is only rarely invoked in ESTA matters, a matter of some concern given its materiality to achieving the redistributive and tenure security objectives of ESTA to redress past historical wrongs. In these circumstances, while the mediation process has starkly exposed the inefficiencies in the Department's delivery of s 4 grants and systems, it is nonetheless a source of some comfort that this is a case where its intention to improve and develop these systems was apparent. As the mediator pointed out, 'the absence of an established template compels the parties to navigate uncharted waters, necessitating the development of a bespoke solution.' Moreover, the parties took the view that the mediation in process is unprecedented and held the potential 'to set a transformative precedent, potentially redefining the procedural and legal framework for similar cases that may come before the [Court].'

[51] Little purpose would be served by setting out in detail the multiple mediation meetings, reports and related case management conferences that took place with a view to securing suitable alternative accommodation for the occupiers relying on both the Ashanti offer and s 4 grants. Suffice to emphasise that these were regular and ongoing.

⁴⁶ Before the ESTA Amendment Act, s 4 provided for the grant of subsidies *inter alia* to facilitate off-site developments, to enable occupiers, former occupiers and other persons who need long term security of tenure to acquire land or rights in land and to develop land to occupied in terms of off-site developments.

[52] As the Department's counsel readily conceded, however, the process ensued at a snail's pace, with parties becoming understandably frustrated. In brief, after exploring various options, what was pursued is a process whereby the Department will facilitate the acquisition of title rights over eleven houses to be developed in a development known as the Newton Estate Housing Development. It was Ashanti who identified the development. The Department initially explored a mechanism for doing so directly, which was then abandoned. What was eventually pursued was a process whereby the Department would conclude an agreement with the Municipality to appoint it as its implementing agent for purposes of concluding a service level agreement with the developer, a Silver Crow Properties 20 (Pty) Ltd (the developer).

[53] However, Ashanti ultimately insisted on the matter being set down before the agreement between the Department and Municipality was finally concluded and the s 4 grants approved within the Department. In doing so, Ashanti adopted the stance that there had been no tangible progress in the mediation despite the lapse of a long time. The occupiers and the Department disagreed, in my view with reason. While progress was painstakingly slow, and the dates for delivery of the project were set back, there was progress: the developer offered the properties to the Department, the Department approved the registration of the project and the negotiation and conclusion of an agency agreement between the Municipality and the Department was at a very advanced stage. Nonetheless, in circumstances where Ashanti ultimately sought access to Court to resolve its eviction dispute, the matter was set down. As appears from its draft order submitted at the hearing, Ashanti's tender remained on the table until the end August 2026, but it then sought a fixed date for vacation contending that, if need be, the occupiers could be housed on an interim basis in emergency accommodation. The occupiers and the Department rejected this approach as undignified emphasising that the occupiers should not be treated as if they are goods that might temporarily be

‘stored’. This approach effectively resulted in the mediation process coming to a halt. While Ashanti’s frustration is understandable, this was in my view unfortunate as, in context, the inevitable effect would be to delay progress in securing suitable alternative accommodation and secure tenure for the occupiers even further.

[54] During the site inspection in July 2025, the Court and the parties attended the site of the development, which is in a more urban area but relatively close to the property. While the developer is in the process of constructing the development, none of the planned eleven houses have yet been built. Unsurprisingly, given the ongoing engagement with the Department and the Municipality.

[55] The Court and the parties were, however, shown a built unit of the sort that would be provided. There is and can be no dispute that the proposed houses comprise suitable alternative accommodation as defined in ESTA. The difficulty is that they are not immediately available and the critical juncture has not been reached when the Department has finally approved the s 4 tenure grants. Nor could a date yet be estimated with reasonable accuracy for completion of the units. A further difficulty is that in the circumstances of this case, without ongoing mediation and court oversight, it is difficult to see how the process would come to fruition. This ought not to be the case - the Department ought to be able to implement s 4 of ESTA reasonably, and thus more efficiently and effectively⁴⁷ - but it became starkly apparent during the proceedings that absent such a process in this case, the promise of tenure security in ESTA and the provision of suitable alternative accommodation will not be achieved.

⁴⁷*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) at para 42.

[56] What this means is that at this point the Court cannot conclude that there is suitable alternative accommodation available to the occupiers. It is very likely to become available, at least in circumstances where Ashanti's tender remains on the table, but it is not yet secured.

Irretrievable breakdown of the relationship between the parties

[57] As indicated above, Ashanti relies on s 10(1)(c) of ESTA to ground both the termination of rights of residence of s 8(4) occupiers and the eviction of all occupiers. This entails that 'the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship.' The factual matrix relevant to this assessment is wide-ranging and entails a consideration of Ashanti's position, the occupier's position and the various grounds upon which it is contended that the relationship has broken down. The main aspects are dealt with below.

Ashanti's circumstances

[58] As indicated above, Ashanti purchased the property in 2010. Ashanti explains that when it did so, it did not intend to use it for agricultural purposes, save to a limited extent for what might be regarded as cosmetic purposes. Rather, it wished to use the property for guest accommodation, a conference centre and wedding venue, which are increasingly becoming sources of revenue and employment in the area. Between 2010 and 2015, Ashanti spent some R2 584 240.00 on structures and various costs relating to repairs to wine cellars, a water and borehole pump, a tarred road, improvements to the convention centre, a generator, minor improvements, new irrigation, water tanks and earth moving.

[59] Ashanti proceeded to conclude a lease agreement with Cutting Edge Hospitality, now Metonia Investments (Pty) Ltd. They devised a vision for the property as a wedding venue, boutique hotel and resort and conducted a related feasibility study and valuation. When the proceedings were instituted, Ashanti faced the prospect that the lessee would not be able to conduct business in view of the circumstances prevailing on the property, which Ashanti attributed to the occupiers. However, by the time the application was argued, the lessee had commenced business and was operating the venue. Nonetheless, Ashanti alleges that it is facing serious challenges controlling its property, to which I return below.

The occupiers and their circumstances

[60] The occupiers comprise some 72 people living in eleven households. The occupiers live in a strip of cottages that commences along a road some 50 metres from Ashanti's venue and function site. The occupiers do not pay rent to stay on the property and, save for paying for their own electricity, do not contribute to services. However, they plead that they have offered to pay rental and contribute to services, but Ashanti has always asked for more than what they can afford. Ashanti disputes this saying that they have not received any tender of payment.

[61] The occupiers' cottages are largely uniform in size and design comprising a kitchen and living area, a bathroom and two rooms. Two cottages are slightly larger than the others, with a third room. The bathrooms in these cottages are inside the home whereas the bathrooms in the other cottages are outside on the verandah. The cottages are separately enclosed and each has a garden area and garage. Certain of the cottages have been boarded up as families have left the property. Ashanti says this is to protect the properties which have been vandalised.

[62] Each of the adult occupiers earn less than R13 625.00. Most are unemployed and some are pensioners. The households are multi-generational households and over time, some occupiers have passed away such as Presence Arendse, Johannes Swartz, Freek Bernadie, Isaac Claasen, Gert van der Merwe and recently, Elizabeth Arendse.

[63] Mr Willem Claasen is the head of the household living in Cottage number 1. He explains that he was born on the farm and has lived there his entire life. At the time of deposing to the answering affidavit he was 58 years old. He lives together with his partner Mavis Claasen and their adult children Luwellen Claasen (22) and Anthea Claasen (24). Mr Claasen is employed at Boveland in South Paarl. According to Mr Claasen, his children are seasonal workers. In the first probation officer's report, it is explained that Anthea is a contract worker at a construction site. According to the updated report, she is unemployed and Luwellen Claasen at that stage was employed. There are no school attending children in the household but there appears to be a minor child Amnesia (Anthea's daughter) living on the property. There are thus four adults and one child living in Cottage number 1.

[64] On the information initially supplied to Court, cottage number 2 appeared to comprise of seven adults and three children. The adults are Isaac Claasen (43), Chriszelda Claasen (38), Sonja Claasen (39), Francoise Isaacs, Abraham Samuels, Emile Maarman (22) and Mario Minaar. Isaac was born on the property as was his sister Sonja. His late parents used to work on the property. He worked on the farm as a casual worker. He is now self-employed. Isaac is married to Chriszelda who arrived on the property in 2001 and their children were born on the property. Two occupiers are pensioners (Abraham Samuels and Dora Samuels). They live in a shack in the yard. Chriszelda is employed as a bakery assistant at Shoprite in Paarl. There are three minors in the household: Earl (15),

Randolicia (13) and Shakiel (9). Randolicia and Shakiel attend Sonop Primary and walk to school. Earl attends Paulus Joubert Secondary and also walks to school. According to the updated probation officer's report, there may now be fewer people residing in this cottage.

[65] Mr Johan Freddy Fortuin (49) is the head of the household living in Cottage number 4. He has lived on the property for 40 years and does casual labour on neighbouring farms. He lives together with his wife Doreen Fortuin (46), who has lived there for about 28 years and who does domestic work in Paarl. They live with Johan's daughter, Jasmine van Rooi (25), also born on the farm and who works as a domestic worker in Paarl, Gershwin Fortuin (22), who is a seasonal worker and Tashwill Ruiters (33), who works as a security officer in Paarl, is Jasmine's partner and has lived there for 5 years. When proceedings were instituted, five of the adults of the household had lived on the property for over 20 years. According to the respondents, there are three minors in the household, each born on the property: Tashmaine (4), Tashwill (2) and Daylon (15). Daylon is in Grade 8 at Paulus Joubert Secondary School in Paarl and who walks to school. There thus appear to be five adults and three minors living on the property although according to the updated probation officer's report there are fewer in number.

[66] Ms Katriena Jacobs (52) is the head of the household living in Cottage number 7. She is unemployed and has been living on the property since 1985. She lives with her children Bertram Jacobs (22) and Ricardo Jacobs (25), who were born on the property. There is one school-going child in the household: Shaldien Jacobs (18), writing matric. There thus appear to be four adults living in the cottage.

[67] Ms Sarah Franse is the head of the household residing in Cottage number 8. She lives with Danwill Arendse, Antoinette Arendse, Lauren Arendse and Elzaan Arendse. Sandra Arendse had lived on the property for some 17 years at the time of institution of proceedings. There thus appear to be five occupants in the cottage.

[68] Ms Lena Arendse (66) is the head of household in Cottage number 10. She is a pensioner receiving a State grant. She resides with her brother Jacob Fortuin (70), also a pensioner on a State grant, and Charles Fortuin (43) who is disabled receiving a disability grant. Also living in the household is Charl Samson (21). Jacob Fortuin used to work for the erstwhile owner of the property. There thus appear to be four adults living in the cottage, although the updated probation officer's report suggests there are three.

[69] Mr Prins Plaatjes (55) is the head of the household living in cottage number 11 with his girlfriend Susan Bester. He was born on the property. He does casual labour on surrounding farms. He also lives with Petrolene Thomas (23), Rosaline Thomas (29), Gerhard Thomas (34), Tiaan (Christopher) Van Wyk (35), Ren-Juhale Thomas (8), Germalo Thomas (2), Germarc Thomas (4) and Tatum Thomas (2). Ren-Juhale and Germarc attends school at Sonop Primary School and they walk to school. The four children were born on the property. Gerard Thomas and Roseline Thomas live in a shack in the yard of the property. The members of the household are either unemployed or work nearby. There thus appear to be seven adults and four children living in this cottage.

[70] The following people reside in Cottage Number 13. Francina (Claasen) Smith (55, unemployed), Benine (Claasen) Smith (31, domestic work), Christopher Brendin (Claasen) Smith (24, casual labour on neighbouring farms), Junet Johanna Smith (39, disability grant), Beyonce Smith (16), Bjorgan Smith (7), Katriena Claasen (44, unemployed), Charlene (Claasen) Smith (28,

unemployed), Christiano Claasen (8), Johannes Claasen (24, works on neighbouring farms) and JP Austin Claasen (3). Junet has lived on the property for over 39 years and was born there. Katriena, Francina, and Johannes was also born on the property. There are four children in the household, each born on the property: Beyonce, who attends Paulus Joubert Secondary School; Bjorgan and Christiano, who attend Sonop Primary School. There thus appear to be eight adults and four children living in the cottage although the updated probation officer's report suggests there are fewer.

[71] Nettie Welcome Hollenbach (61), Alroy Hollenbach (33), Denise van Rooi and Angelo Hollenbach (15) reside in Cottage number 16. There is one child in the household, Angelo, who attends school in Paarl. Nettie arrived on the farm in 1985 with her late husband and receives a State pension and Alroy works on a farm in Paarl. Alroy and Angelo were born on the property. According to the updated probation officer's report, Nettie is now deceased and there thus appear to be two adults and one child residing in this house.

[72] Mr Dirk Paulse (58) is the head of household residing in cottage number 17. He works on neighbouring farms. He has been residing on the property since 1982. He resides with Jacoba Magdalena Paulse (53), who is disabled and who arrived on the property in 1991. He also resides with Elmarie Paulse (33, unemployed), Dante Paulse (11), Esstin Paulse (11) Paulse and Phillipien Paulse (28, unemployed). The two children attend school at Sonop Primary and were born on the property. There thus appear to be four adults and two children living in this cottage.

[73] Mr Ernst Arendse is the head of the household residing in Cottage number 20. At the time of instituting proceedings, he had resided on the property for some 30 years with Elizabeth Arendse, now deceased. Also part of the household

are Chriszelle Arendse, Brandley Arendse, Lee Irvin Arendse and Theogin Arendse. It is unclear how many occupants are children.

[74] Each household receives running water and electricity. At the present time, water is sourced from a borehole which is maintained by the applicant (through its lessee). The occupiers say that Ashanti disconnects and reconnects the water without warning. Ashanti explains however that water is only disconnected for purposes of repair and maintenance and with notice. Disruptions to supply occur as a result of factors such as broken pipes or valves or factors beyond Ashanti's control.

[75] Electricity is supplied to each household which pays for it on a pay as you go basis.

[76] There is a sewage system in place and the occupiers accept that sewage is regularly collected. The occupiers say however, that when sewage is not collected, it overflows and runs into the yard causing a health hazard at the houses and preventing the children from playing. Ashanti explains, however, that the sewage system is not meant to deal with the number of people who are residing on the property, which they say has become overcrowded. During the site inspection, and as traversed in the supplementary affidavits, there was some unsanitary fecal material on the grounds outside the cottages, at least of dogs, possibly also human.

[77] The occupiers complain about waste removal, saying it is the duty of Ashanti to remove waste. There is no dispute that there is a serious waste removal challenge on the property. This was visible during the site inspection and canvassed on the affidavits exchanged thereafter. There is litter strewn around the area where the occupiers reside and a large dump in an area adjacent to a dam

which fronts the property. There was no apparent or effective waste removal system in place.

[78] On the evidence before Court, it can be accepted that the situation on the property regarding sewage, fecal material and waste disposal is untenable for both Ashanti and the occupiers and requires remediation.

Control over the property and security concerns

[79] Ashanti pleads in the founding affidavit that it has lost control over its property as a result of the conduct of the occupiers.

[80] In this regard, Ashanti alleges that they are not always aware of who is living on the property as new occupiers have come to live on the property. This is disputed by the occupiers who say that the people who live in the cottages have been the same people and it is relatively easy to keep track of who resides there. They say they have been approachable over time and it is Ashanti which has failed to keep track of who is in occupation. In reply, Ashanti says that it sought to conduct a census at a point and that it is apparent that the identities of some were concealed. However, there is no specificity as to whose identities were concealed and it is difficult to see why this issue was not raised in the founding affidavits. What is apparent from the information before Court, however, is that there are some changes in the composition of the households, some resulting from deaths and births and some resulting from members of families leaving. However, the primary residents appear to be both ascertained and relatively constant, comprising a settled community of people.

[81] The occupiers further dispute that Ashanti has no control over the property noting that Ashanti carries on business there. They reiterate that at the present time, Ashanti runs a wedding and conference venue and provides guest

accommodation. It is indeed so that the business is being conducted on the property, through the lessee, and while challenges are faced, there is thus sufficient control over the property to this end.

[82] Ashanti alleges in the founding affidavit that for security purposes, occupiers are expected to use the single main entry and exit gate, where there is a permanent security presence. Ashanti is not able to afford a permanent security presence over the entirety of the property, it says. At that stage the property was encircled by a security fence to prevent uncontrolled access. However, Ashanti alleged that the prescription has been ignored by the occupiers in that there were multiple pathways leading to points of access along the perimeter of the property. Ashanti contended that it was reasonable to require that access and exit be via the main gate.

[83] In this regard, Ashanti alleged that the property had become ‘plagued by criminality’ due to fact that the security fence around the property had effectively become redundant and in circumstances where third parties access the property without Ashanti’s consent, using points of access other than the main gate. Ashanti alleges that on no occasion has any occupier requested consent for a visitor to the property.

[84] Ashanti further alleges that visitors are expected to conduct themselves decorously with due consideration for the rights of other occupiers, Ashanti and its guests and employees. However, Ashanti claims that criminality, abusive behaviour, public consumption of alcohol and verbal and physical aggression and assault occur on a daily basis.

[85] In this regard, Ashanti provided the Court with a copy of its logbook of incidents between April 2011 and March 2018, during which period some 109 incidents of criminality or vandalism were recorded. Examples highlighted in the

founding affidavit – only a small portion of the incidents – include a break in of the main house in April 2011 during which materials with a sale value (all taps, cables and brass window stays) were stolen; a further break-in of the house on 16 August 2011; in December 2011, occupiers’ children left rubbish at the dam adjacent to the venue in full view of the conference centre and wedding venue; on 31 January 2012, the office of the main house was broken into and records vandalised; on 11 April 2012, gutters at the main function venue were smashed; during June 2012, a person habitually defecated in front of the main entrance to the wine cellar; during February 2013, there was vandalism of concrete slabs cast for construction purposes; on 29 April 2013, a pump was stolen out of the pump room; on 17 July 2013, the function venue was broken into; on 3 September 2013, the security guard at the gate was racially abused by a taxi driver who was refused entry to the property; on 13 September 2013, the farm manager removed 11 puppies from the occupiers’ houses; on 22 October 2013, one of Ashanti’s tenants was threatened with a knife by Bradley Arendse and his car tires slashed [para 35.5.12]; on 14 May 2015, Bradly Arendse beat a dog to death on the property; on 23 June 2014, vacant cottages were vandalised with the doors and windows broken; on 25 August 2014, an occupier unlawfully chopped and sold wood on the property; on November 2014, a guest had his car stoned when leaving the property and was injured; on 16 June 2016, the barricade to prevent people driving onto the property was removed; on 25 June 2016, an intoxicated third party forced his way onto the property; on 15 November 2017, a person was stabbed at the function venue in the head, chest and leg, on 28 December 2018, a guest’s car was broken into and the chef threatened at gun point and there have been various instances of fires set on areas of the property.

[86] Importantly, in these proceedings, Ashanti does not attribute the conduct to any specific occupier but to show that there is an absolute breakdown of the relationship between the occupiers and Ashanti as Ashanti has lost control over

the property. Ashanti accepts that in many instances the conduct may be that of third parties, but because the applicant has no control over the property, it attributes the state of affairs to the breakdown in the relationship with the occupiers.

[87] Ashanti contends that it cannot continue to do business in the sector while this sort of conduct ensues. Moreover, it is highly costly for example the cost of security at the gate is R9100 per month.

[88] The occupiers dispute their responsibility for criminal or aberrant conduct and allege that the allegations in this regard are vague, unsubstantiated and based on hearsay evidence. They say there is no proof that they are responsible for aberrant behaviour or breach of contract. In respect of the issue of access, they say that the main gate is used for vehicles and that there are footpaths elsewhere. They take issue with Ashanti's suggestion that they are responsible for security on the farm, any wrongdoing for exercising their freedom of movement and being to blame for the increase in alleged criminality. They reiterate that none of the occupiers have faced criminal charges or are accused or implicated in wrongdoing. Mr Claasen explains that he believes that many of the instances of alleged criminality related to a Mr Tiel who used to live on the property but left several years earlier. Mr Claasen is not aware of any police presence on the property since 2010. The occupiers allege further that the duty to provide perimeter security is that of Ashanti. On the evidence, it can be accepted that during this period, the occupiers did access the property on foot via footpaths at various points along the perimeter. However, it cannot be accepted that there was a communicated rule regarding access via only the main gate or that any security risk was created by the conduct of the occupiers.

[89] By the time the matter was argued the situation on the farm regarding security had changed. Ashanti had, through its lessee, erected an internal fence

around the area used by its lessee to conduct its business and no longer relied on any perimeter fence to secure the premises. The perimeter fence was effectively no longer in place. The erection of the fence is however a source of controversy as it has resulted in the occupiers having to walk further – around the fence – to access their houses from the main gate.

Costs of accommodating the occupiers and alleged absence of maintenance

[90] Ashanti has carried the costs of accommodating the occupiers since purchasing the property. It alleges that the cost of removing the sewerage is R3726 per month. The cost of electricity, they alleged, comes to some R10 000.00 per month. This however is difficult to reconcile with facts that emerged following the inspection *in loco* which demonstrate that each household pays for electricity on a pay as you go basis. I accept nonetheless that electricity costs are incurred, for example in connection with the borehole which supplies water both to the lessee's operations and to the occupiers.

[91] According to Ashanti, the occupiers reside on the property without any payment or tender of payment for water, sewage removal and household waste. The occupiers say that they have and do tender payment for services. Ashanti disputes this and say that they would accept any contribution for services. I accept on the evidence that the occupiers have tendered payment for services but this does not appear to have been duly explored.

[92] Ashanti alleges that the duty to maintain the houses is that of the occupiers. However, the cottages, they say, have fallen into disrepair and dilapidation. They say that windows are broken, electrical fixtures and fittings have been removed, taps and plumbing appurtenances do not work or have been damaged and the areas surrounding each cottage consists of waste strewn across what used to be

attractive gardens. The occupiers contend that Ashanti is neglecting its own maintenance obligations but also say that the houses are maintained.

Overcrowding

[93] Ashanti alleges that the cottages are hopelessly overcrowded and that there is no space for building further structures and that the sewage system is not built for the number of people in occupation. They say that the houses are built for a nuclear family and are not meant for multi-generational families comprising six to ten people. During argument, counsel for Ashanti identified several houses where the numbers are relatively high. They say that the rule has always been that spouses may live on the property with their children but that the children must leave after they reach the age of majority.

[94] The existence of this rule is denied as is the fact of overcrowding. The occupiers say that the cottages are not overcrowded when one has regard to their size and the number of people living there and that the occupiers themselves have no complaints. They say that there is no evidence before Court that allows the Court to draw conclusions about the standards of overcrowding. They say that there has never been any discussion about the number of people who may live there.

[95] The occupiers also contend that it is not lawful for Ashanti to prescribe that only minor children may live with an occupier as the question, rather is whether there is legal dependency. In this regard, the legal position is governed by section 6(2)(d) of ESTA which confers the right on occupiers to family life which was interpreted by the Constitutional Court in *Hattingh*⁴⁸ to include extended family and not be limited to the nuclear family, mindful that ‘families come in different

⁴⁸ *Hattingh and Others v Juta* [2013] ZACC 5; 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC) at para 34.

shapes and sizes.’⁴⁹ However, since the coming into force of the ESTA Amendment Act, ESTA has defined a family to mean the occupier’s spouse and to include a spouse in a customary law marriage, a child, including an adopted child, or foster care child, a grandchild, a parent and a grandparent who are dependants of the occupier and who reside on the land with the occupier.’⁵⁰ A dependant is defined to mean ‘a family member whom the occupier has a legal duty to support.’⁵¹ It is not possible, on the information to hand, to establish the extent to which those residing in the cottages comprise of families as now defined nor was argument addressed on the proper interpretation of the new definition. However, this is not necessary as what is clear is that all occupiers on the property have at this stage acquired independent rights of occupation as a result of the deeming provisions in subsecs 3(4) and (5) of ESTA.⁵²

Keeping of dogs

[96] A further complaint of Ashanti is that the occupiers keep dogs, which they say is prohibited. This rule they say is because those who attend weddings and conferences do not want to have dogs roaming freely and are rightfully scared of dogs. Moreover, there is problem of faecal matter of the dogs which has become a source of complaints from guests. Ashanti says there is no control over the dogs on the property, which roam at will.

[97] The occupiers dispute that there is a rule about dogs on the farm. They say that those who have dogs buy them food and call them to eat. This response stands in contrast to the response to the request for representations where it was incorrectly stated, somewhat troublingly, that dogs were not kept.

⁴⁹ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 31.

⁵⁰ Section 1 of ESTA.

⁵¹ *Id*

⁵² See *Klaase*, above n 6.

[98] During the site inspection, and canvassed on the affidavits thereafter, it is clear that the occupiers keep dogs on the property. They were tied up in the occupiers' yards, a practise with which Ashanti then took issue.

The relationship between parties

[99] Ashanti contends that initially its relationship with the occupiers was reserved, though marked by suspicion on the part of the occupiers, the relationship has, since 2010, wholly broken down. They contend that the occupiers do not comply with the rules of occupation, which are integral to Ashanti's business, and regard themselves as owners of the property with which they can do as they see fit.

[100] Ashanti claims that it has at all times engaged with the occupiers in a respectful manner and in accordance with the law. According to Ashanti, the relationship between Ashanti and the occupiers is 'marred by, at best, an unwillingness to communicate' and 'not infrequently by hostility and aggression on their part.' These allegations are made at a high level and not particularised.

[101] According to the occupiers, the owners do not interact with them and have not taken the trouble to get to know who they are. They say the owner sends 'workers with papers' to them and refuses to meet with them. They accept that there is no meaningful relationship, but the occupiers expected this to be better. Mr Claasen alleges that there is no breakdown in relationship because Ashanti has not made any effort to have one with the occupiers. He says that better solutions may have been found had there been proper engagement with the occupiers at the time of the allegedly defective attempt to terminate their rights.

[102] In reply, Ashanti accepts that it does not generally interact with the occupiers. The reason, they say is that it was apparent upon Ashanti taking ownership that its presence was not welcomed. They say further that the tenor of the occupiers' answering affidavit itself reveals a breakdown in relations. In this regard there are points where the occupiers' say *inter alia* that they are being treated as slaves or chattels.

Alleged breach of rules / customs

[103] The conduct referred to above is alleged not only to evidence an irretrievable breakdown in the relationship but to constitute a breach of the rules that apply to occupation. Thus Ashanti pleads that there is a breach of the rule that only spouses and children under the age of eighteen may reside in the cottages, there is a breach of the rule against keeping of dogs, the duty to obtain consent for visitors, the duty to access the premises at the main gate and the duty to maintain the premises. The occupiers dispute these rules, in part on the grounds that the rules would be unlawful, violative of dignity or discriminatory and in part on the basis that they were never discussed and have been unilaterally asserted in this application.

Further assessment

[104] Having evaluated the evidence on the relationship between the parties, there can be no doubt that the relationship is highly strained and that it is not a meaningful relationship. Moreover, aspects of the relationship are understandably troubling to Ashanti and the occupiers alike. But that is not the question. The question is whether the occupiers have committed such a fundamental breach of the relationship between them and Ashanti that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship.

[105] In *Nimble Investments*, the SCA held that the wording of s 10(1)(c) ‘makes it clear that what is contemplated is an act of breaking the relationship on the part of the occupier that is essentially impossible to restore.’⁵³ Moreover, the SCA affirmed a finding of this Court that the relationship refers to a social rather than legal relationship and that the requirement is met if ‘it is practically impossible for the relationship to continue due to a lack of mutual trust.’⁵⁴ Factors that must be considered when determining whether an occupier has committed a fundamental breach of the relationship envisaged in s 10(1)(c) of ESTA include ‘the history of the relationship between the parties prior to the conduct giving rise to the breach; the seriousness of the occupier’s conduct and its effect on the relationship and the present attitude to the parties to the relationship as shown by the evidence.’⁵⁵

[106] Inasmuch as Ashanti relies on the existence of rules of conduct to ground any breach of relationship, I am either unable to conclude that the rules have been communicated and put in place or, in certain instances, that they are applicable or lawful. I have dealt above with the inapplicability of the alleged rule regarding only spouses and minor children living in the cottages.

[107] The alleged rule that consent is required to receive visitors is, in my view, inconsistent with ESTA, properly interpreted. In dealing with this issue I am mindful that Ashanti contended it does not arise on the pleadings. On my reading of the papers, the occupiers do take issue with the alleged rule but in any event, this Court is enjoined to interpret and apply ESTA to the facts of the matters that come before it. Section 6(2) of ESTA confers on an occupier the right, balanced with the rights of the owner, to receive *bona fide* visitors at reasonable times and

⁵³ Above n 17 para 46.

⁵⁴ *Id* with reference to *Ovenstone Farms (Pty) Ltd v Persent and another* [2002] ZALCC 31 para 11.

⁵⁵ *Nimble Investments* para 46 to 47

for reasonable periods provided that the owner or person in charge may impose reasonable conditions that are normally applicable to visitors entering such land to safeguard life or property or to prevent the undue disruption of work on the land. In my view, it would unduly restrict this right, in a manner violative of the dignity of occupiers, to render it subject to consent of an owner or person in charge, however reasonably such a power may be exercised. Rather, the conditions an owner or person in charge would need to relate to the manner of exercise of this right rather than the fact of its exercise. This Court is enjoined to interpret ESTA in a manner that promotes the spirit, purport and objects of the Bill of Rights. The Court must afford occupiers the fullest possible protection of their constitutional guarantees and prefer generous constructions over merely textual or legalistic ones.⁵⁶ In my view, even the literal reading of the provision supports the construction I give it.

[108] As for the remaining rules, their existence, or the terms on which they are pleaded are in dispute, and in any event, there is no evidence upon which this Court can conclude that any of the rules were at any stage communicated to the occupiers. On the contrary, they appear to be rules that Ashanti would like to have in place. Put differently, it is clear that there has not been a meaningful relationship between the parties since Ashanti arrived on the property, no effective communication and no real efforts to put in place rules or even systems that reasonably balance the rights of owner and occupier.

[109] Ashanti's reliance on the absence of any contribution to rental or services stands on a somewhat different footing as Ashanti cannot reasonably be expected to cover all of the costs of the occupiers' occupation of the property, not least over such an extended period of time. However, Ashanti's difficulty is that on the

⁵⁶ *Klaase*, above n 6 and *Department of Land Affairs and others v Goedgelegen Tropic Fruits (Pty) Ltd* [2007] ZACC 12; 2007(6) SA 199 (CC); 2007(10) BCLR 1027 (CC) paras 53 and 55.

evidence before me, the occupiers have tendered to contribute to both rental and services and rather, what is starkly absent is any evidence of an attempt by Ashanti to put in place a compensatory system, whether at the time of seeking to terminate the occupier's rights or at any time prior thereto. Rather, Ashanti has, since becoming the owner of the property in 2010 sought the occupiers' relocation and eviction. In these circumstances, I am unable to conclude that any breakdown of relationship as a result of non-payment is either solely due to the conduct of the occupiers or not remediable.

[110] Ashanti's concerns regarding an absence of control over their property are reasonable. However, there are different aspects to this which require consideration to assess the occupiers' role and the impact on the social relationship. Ashanti, on its own version, pertinently does not attribute criminality or vandalism to any of the occupiers. Indeed, they expressly say that they do not do so. Rather, their concern is an absence of control over third parties who gain access to the property due to their absence of control over their property. This, in turn, is allegedly due to uncontrolled visitation and a failure to use the main gate for pedestrian access. I am unable to accept on the evidence before me that the criminality and vandalism is due to these factors or attributable to the occupiers. Moreover, there is an absence of any real effort to put in place systems for visitation and access that reasonably balance the rights of the occupiers and Ashanti. In those circumstances, it is difficult to see how any impact on the social relationship can be said to be irremediable.

[111] The issue of overcrowding is, in my view, a matter of legitimate concern to Ashanti. The cottages are small and while some are clearly not overcrowded, others are accommodating numerous people including apparent newcomers as Ashanti contends. However, Ashanti's difficulty is that it does not distinguish between households that are overcrowded and those that are not and, moreover,

there have been no efforts to remedy the difficulties or to pursue a course where only some people are asked to vacate.

[112] Ashanti's concerns regarding sanitation and waste are, in my view, serious matters and the area used by the occupiers is not kept in an acceptable state. The impact of overcrowding on sanitation may well be a factor, but one that does not warrant a wholesale termination of rights in order to remediate it. What of the issue of waste disposal and the clear prevalence of unacceptable levels of waste strewn across the area of the property used by the occupiers? In my view, this conduct can only have a damaging effect on the social relationship between the parties. However, I am again unpersuaded that this is something that cannot be remediated. In this regard, there was no apparent waste disposal system in place on the property nor can I conclude on the evidence that there have been any serious efforts to put workable systems in place.

[113] In all of the circumstances, I am not satisfied that Ashanti has demonstrated, as a matter of fact, that the occupiers have committed such fundamental breaches of the relationship that it is not practically possible to remedy it, either at all or in a manner that could reasonably restore the relationship. In this regard, I have considered the parallels between this matter and *Skog*,⁵⁷ upon which Ashanti placed heavy reliance and, while there are points of commonality, I am of the view that the evidence in this case does not warrant the findings that were warranted in that matter.

Is a termination of rights in terms of section 8 of ESTA

[114] The first issue is whether Ashanti terminated the occupiers' rights of residence in terms of s 8 of ESTA.

⁵⁷ *Skog NO and others v Agullus and others* 2024(1) SA 72 (SCA).

[115] I consider this in light of the nature of the occupiers' rights of residence. In this regard, it is not in dispute that the occupiers have consent to occupy the property as contemplated by ESTA. The occupiers came to live on the property initially as a result of the employment of one or more members of a family by the erstwhile owner. Family members resided with them as an incident of the right to family life. It can be accepted that as a result of the termination of the relevant occupiers' employment in 2006, their rights to reside there as a result thereof were either terminable or were in fact terminated. To the extent that the rights were terminated at that time, since that time, the occupiers have been living continuously and openly on the property and would now have consent to do so as a result of the deeming provisions in s 3(4) and (5) of ESTA.⁵⁸ Even that consent has now endured over many years. Moreover, as the occupiers contend, some of them enjoy protection under s 8(4) of ESTA.

[116] The occupiers contend first that there was no notice of termination of their rights in that the notices for representations and termination of rights were not sent to each occupier separately. It is common cause that many if not most of the occupiers were sent these notices. However, counsel for the occupiers analysed the papers to identify which of the occupiers did not receive personal notices of termination and I accept that some did not. However, at that time, save for two households, all households were apparently represented by the Stellenbosch Law Clinic and made representations regarding the termination of their rights. However, I am not apprised of sufficient information to conclude whether each occupier was legally represented. On the papers before me, I am constrained to

⁵⁸ Section 3(4) provides: '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.'

Section 3(5) provides: '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.'

conclude that there were some occupiers who were not given notice of termination of rights.

[117] The occupiers contend further that the process of termination of rights was not fair. As set out above, Ashanti did afford or purport to afford the occupiers an opportunity to make representations. However, the occupiers contend that this was a mere box ticking exercise and did not amount to a fair opportunity to engage. In my view there is merit to the occupiers' contention on the facts of this case. As set out above when dealing with the alleged breakdown of the relationship between the parties, I am of the view that a number of the concerns about the relationship Ashanti relies on are matters of substance and legitimate concern. However, what is notably absent in the representations' process is any engagement with the occupiers about potential remedies or solutions. In the circumstances of this case, it is difficult to see how the representations process could be fair unless there was a genuine attempt to engage on both the relational challenges and possible remediation measures. That did not happen.

[118] Thirdly, the occupiers contend that the termination was not substantively justified having regard to relevant considerations.⁵⁹ This is a case where the interests and hardships for owner and occupier are relatively evenly balanced. However, in the light of the assessment of the facts concerning the alleged breakdown of the relationship and the absence of remediation efforts, I am unable to conclude that the termination of rights was just and equitable in all of the circumstances. That consideration is, moreover, decisive in respect of those occupiers who are protected by subsec 8(4) of ESTA.

⁵⁹ See above n 16.

[119] In the result, I agree with the occupiers that the termination of the rights of residence in 2018 was not just and equitable and not in accordance with s 8 of ESTA.

Is an eviction in accordance with s 10 and / or s 11 of ESTA?

[120] In any event, I am unable to conclude that Ashanti has demonstrated compliance with s 10 and / or s 11 of ESTA as required by subsec 9(2)(c) of ESTA.

[121] First, Ashanti does not specify and has not clarified which section applies to which occupiers, an approach which in my view is not regular. But even if I am wrong, Ashanti was resultantly constrained to argue its case by relying, in respect of all respondents, on the more onerous subsec 10(1)(c) of ESTA. I have concluded above that Ashanti has not proven that case.

[122] In these circumstances, Ashanti is constrained to rely, to the extent permissible, on subsec 10(2) of ESTA, the availability of suitable alternative accommodation. This is permissible insofar as the occupiers are not persons protected by subsec 8(4) of ESTA. Ashanti's difficulty in this regard, as set out above, is that while suitable alternative accommodation will likely become available, it is not yet available and, pertinently, Ashanti insisted on having the matter set down before the Department had finalised the process of approval of the s 4 grant applications.

[123] In these circumstances, I am unable to conclude that a case for eviction has been made out.

Further mediation / the counter-application

[124] In the usual course, these findings would result in this Court dismissing the eviction application. However, in my view, such an order is not warranted in circumstances where the parties are so close to securing a meaningful resolution of their dispute through court-ordered mediation and ongoing engagement regarding the availability of suitable alternative accommodation and securing the tenure of the occupiers.

[125] This Court is entitled to decline to make an order where a party has failed to make out a case but may be in a position to do so in due course on supplemented papers.⁶⁰ Ashanti may wish to do so should they consider themselves entitled to continue to pursue terminating the occupiers' rights in accordance with s 8 of ESTA in light of the content of this judgment.

[126] I am of the view, moreover, that this is a case where, despite the already extended process, ongoing mediation is indeed justified⁶¹ and will both serve to balance the interests of occupiers and landowner and serve the central objective of ESTA to secure tenure of occupiers who have occupied land over very many years and whose precarious position is the result of past discriminatory laws and practices. As indicated above, the Constitutional Court set out a brief history of these laws and practices in *Daniels*, which history this Court recently noted in *Marais*,⁶² in which this Court affirmed the value of mediation and engagement in redressing these wrongs.

[127] In *Marais*, the Land Court emphasised that mediation should be conducted speedily and efficiently in order that any limitation of the right of access to Court

⁶⁰ Rule 33(9) which provides: 'The Court, after hearing an application, whether brought *ex parte* or otherwise, may decide to make no order thereon (save as to costs if any) but to grant leave for the applicant to renew the application on the same papers supplemented by such further affidavits and documents as the case may require.'

⁶¹ *PE Municipality* above n 13 para 45 and *Marais* above n 1 para 71.

⁶² Above n 1 paras 17 to 19.

not be unreasonably or unjustifiably limited.⁶³ In the ordinary course, and in view of the extended time already spent in mediation, this consideration would either suggest that further mediation should not be ordered or if it were, that it be ordered for only a limited further period of time. However, in circumstances where this Court is declining to dismiss the application, as set out above, access to justice is better served if the parties are able to continue with the mediation as required and if Ashanti is able, should circumstances warrant it, to continue to pursue the litigation on supplemented papers in due course.

[128] Ashanti sought mediation in the counter-application but at the hearing focused on the need for mediation until judgment. Insofar as the counter-application does not cater for relief post judgment, this Court remains empowered to authorize ongoing court-ordered mediation between the parties.⁶⁴

Order

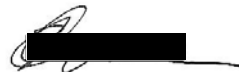
[129] This is not a case where an order for costs is justified in the main application. Ashanti initially sought costs occasioned by the affidavit of Mr Mahomed of 16 March 2024 against Mr Mahomed personally in circumstances where, it says, the allegations are defamatory, vexatious, irrelevant and scurrilous. The request for personal costs was, however, abandoned, in my view responsibly. Nonetheless, I emphasise that the affidavit has not been admitted in evidence and its content is not relevant to the proceedings at this juncture. The allegations contained in the affidavit are very serious and on the information before me, including the application to strike out, would not be sustained. However, I am not persuaded that Mr Mahomed was not acting in good faith to advance the case of his clients, and I can see no reason to depart from the usual rule that no costs be ordered.

⁶³ At para 70.

⁶⁴ *PE Municipality* and s 29 of the Land Court Act 6 of 2023.

[130] The following order is made:

1. The parties are authorised to approach this Court on notice for an order to re-appoint Mr Elton Shortles (or another agreed mediator) for a period of twelve months which may be extended on good cause shown.
2. The Department of Rural Development and Land Reform is directed to take such steps as may be necessary to finalise the processing of the s 4 applications of the first to fifty seventh respondents within a period of sixty days of the date of this order.
3. Ashanti is granted leave to renew the application on the same papers supplemented where necessary.
4. There is no order for costs.



SJ COWEN

Deputy Judge President, Land Court

Appearances:

Applicant: L Wilkin instructed by Harmse Kriel Attorneys

First to Fifty Seventh Respondents: Mr A Mahomed, Ashraf Mahomed Attorneys

Fifty Eighth Respondent: H Scholtz instructed by Blackburn Inc Attorneys

Fifty Eighth Respondent: M Titus instructed by State Attorney, Cape Town