



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

CASE NO: LCC 75/2019

Before: MALULEKE AJ

Heard on: 3 FEBRUARY 2026

Delivered on: 1 APRIL 2026

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☒ / No ☐
(3) REVISED: Yes ☐ / No ☒

Date: 01 April 2026

In the matter between:

GD KILPIN ESTATES (PTY) LTD

Applicant

and

CARL VAN DER VYWER

First Respondent

CHRISTA VAN DER VYWER

Second Respondent

ANGELINE VAN DER VYWER

Third Respondent

THEEWATERSKLOOF MUNICIPALITY

Fourth Respondent

ORDER

1. The application is dismissed.
2. There is no order as to costs.

JUDGMENT

MALULEKE AJ

Introduction

[1] This is an application for the eviction of the First to Third Respondents (Respondents) from the farm Boesmansrug, described as Remainder of Portion 8 (Boesmansrug) on the Farm Vygeboom No 86, situated in the Division of Calendon ("the farm"), within the jurisdiction of the Theewaterskloof Municipality, Western Cape. The eviction application is instituted in terms of section 10 of the Extension of Security of Tenure Act 62 of 1997 ("ESTA").

Parties

[2] The Applicant is GD Kilpin Estates (Pty) Ltd, the owner of the farm. Mr Phil Denis Kilpin ("Mr Kilpin") is the Director of the Applicant. He is the deponent to the founding affidavit.

[3] The First to Third Respondents are, Carl van der Vywer ("Mr van der Vywer"), Christa van der Vywer ("Mrs van der Vywer"), and Angeline van der Vywer ("Angeline"), respectively.

[4] The Fourth Respondent is the Theewaterskloof Municipality.

[5] The Department of Land Reform and Rural Development has not been joined to these proceedings.

Brief background

[6] Mr van der Vywer was born on the farm in 1975 to Mrs Patronella van der Vywer, deceased in 2010 and Mr Lodewyk van der Vyver, deceased in 2012, who were both employed on the farm. From 1975 to 1998, Mr van der Vywer lived on the farm with his parents and the Second and Third Respondents. Mr and Mrs van der Vywer, have resided on the land prior to 28 February 1997.

[7] Mr van der Vywer was employed by the Applicant on the farm from 1991, at the age of fifteen (15) years. He signed a Contract of Employment with the Applicant in 1994 and was allocated a house on the farm in 1998, wherein himself, Mrs van der Vywer and Angeline moved to.

[8] In 2005, the farm was leased out to More Son Trust for a period of seven (7) years, as a result of the foregoing, Mr van der Vywer had to sign a seven year employment contract with More Son Trust who employed him as spray tractor driver. After the expiry of the seven years period, in 2012, the Applicant recommenced with his farming activities and entered into a new employment contract with Mr van der Vywer.

[9] In 2015, Mr van der Vywer qualified as a truck driver with Code 14 and was elevated to the position of a truck driver. Mr van der Vywer's income was increased however, he did not sign a new contract as the Applicant stated that the 2012 contract of employment remains effective.

[10] Mr van der Vywer's Contract of Employment was terminated on 18 September 2017 for operational requirements (retrenchment). Prior to terminating Mr van der Vywer's Contract of Employment, the consultation process prescribed by section 189 of the Labour Relations Act 66 of 1995 ("LRA"), was followed. During this process, an alternative position was offered to Mr van der Vywer, which he however declined because it reduced the salary he was earning at the time, and it was going to leave

him and his family worse off.¹ Mr van der Vywer's Contract of Employment was therefore terminated.

[11] The Applicant offered Mr van der Vywer an amount of R50 000 to assist with the relocation of the Respondents, however Mr van der Vywer did not accept it.

[12] The Applicant dispute that Mr van der Vywer obtained a right of residence for himself and his dependents by virtue of his employment on the farm. Further, the Applicant dispute that Mrs van der Vywer obtained a right of residence in her own right and assert that her right of residence is derived from the fact that she is the child of the First and Second Respondents.

[13] The Applicant asserts that Mrs van der Vywer is a periodical worker employed by Stripe Investments 54 (Pty) Ltd. Boesmansrug Farm Trust holds 100% shares of Stripe Investments 54 (Pty) Ltd. In terms of her Contract of Employment,² she does not qualify for housing on the land.

[14] Therefore, the Applicant states that the underlying reason for granting accommodation to Mr van der Vywer on the farm fell away when Mr van der Vywer's Contract of Employment was terminated. Further, that the Contract of Employment was terminated fairly and no unfair dismissal dispute is currently pending at the Commission for Conciliation, Mediation and Arbitration ("CCMA") and that all amounts due and payable to Mr van der Vywer by virtue of his employment and termination thereof, have been paid to him and that there is no amount outstanding.

[15] Accordingly, the Applicant asserts that the Respondents' right of residence on the farm was properly terminated, irrespective of whether such right emanated from a contract or employment, birth or any other reason. Further, Mr van der Vywer is permanently employed by LV Contracts Transport and the Respondents can afford alternative accommodation.

¹ Annexure "B" attached to the Answering Affidavit, p57.

² Founding Affidavit, paragraph 5.2

Issues that are to be determined

[16] The issues to be determined are whether:

- a. Mr van der Vywer, was an "occupier" under ESTA before he was employed by the Applicant in 1991, at the time when he was 15 years old;
- b. If Mr van der Vywer, was an occupier, did he waive³ his right to occupy or was his right to occupy terminated by:
 - i. Signing the Contract of Employment in 1994 with the Applicant. A copy of the Contract of Employment is not annexed to the Founding Affidavit or the Replying Affidavit;
 - ii. Being allocated a house on the farm in 1998 by the Applicant.
 - iii. Signing another contract in 2005 with More Son Trust who was a lessee from 2005 to 2012; or
 - iv. Signing another contract with the Applicant in 2012 which stated that Mr van der Vywer will sign a separate housing contract with the Applicant. Copies of the Contract of Employment and the Housing Contract are not annexed to the Founding Affidavit or the Replying Affidavit and there is no proof that a separate housing contract was signed between the Applicant and Mr van der Vywer;
- c. The eviction of Mr van der Vywer is just and equitable?
- d. Mrs van der Vywer is an "occupier" under ESTA or her right of residence was derived from that of Mr van der Vywer?
- e. If Mrs van der Vywer is an occupier, can her right of residence be terminated because of the termination of the contract of employment of Mr van der Wyver, even if it terminated his right of residence?

³ ESTA section 25. Legal status of agreements

(1) The waiver by an occupier of his or her rights in terms of this Act shall be void, unless it is permitted by this Act or incorporated in an order of a court.

(2) A court shall have regard to, but not be bound by, any agreement in so far as that agreement seeks to limit any of the rights of an occupier in terms of this Act.

(3) Notwithstanding the provisions of subsections (1) and (2), if an occupier vacates the land concerned freely and willingly, while being aware of his or her rights in terms of this Act, he or she shall not be entitled to institute proceedings for restoration in terms of section 14.

- f. The eviction of Mrs van der Vywer is just and equitable?
- g. Angeline is an "occupier" under ESTA or is her right of residence derived from the fact that she is the child of Mr van der Vywer and Mrs van der Vywer?
- h. The eviction of Angela is just and equitable.

Applicant's case

[17] Mr van der Vywer's Contract of Employment was terminated on 18 September 2017 for operational requirements ("retrenchment"). Prior to terminating the Contract of Employment, the consultation process prescribed by section 189 of the LRA was followed. During that process, an alternative position was offered to the Mr van der Vywer, which he however declined, therefore his Contract of Employment was terminated. The Applicant argues that:

- 17.1 The underlying reason for the Applicant granting accommodation to the Respondents on the land fell away when Mr van der Vywer's Contract of Employment was terminated.
- 17.2 The Respondents were invited to attend a meeting with the Applicant and the Applicant's Attorney and Labour Consultant on 5 February 2019, to grant all the Respondents an opportunity to make representations as to why their rights of residence on the land should not be terminated.
- 17.3 After listening to all the representations made by the Respondents, the Applicant decided to terminate the right of residence of the Respondents. The termination was conveyed to the Respondents by means of a letter delivered to them by the Sheriff. Also, paragraph 10 of the Replying Affidavit states:

"As it can be seen in annexures "PDK 5" and "PDK 9" of the Applicant's Founding Affidavit, the right of residence of the Respondents were properly terminated irrespective of whether such right of residence emanated from a contract of employment, birth or for any other reason."

17.4 In the conclusion of the Founding Affidavit, the Applicant states that in paragraph 12:

"Wherefore and as any right of residence which the First, Second and Third Respondent may have had on the Applicant's land, has been lawfully terminated and as the Applicant has complied with the requirements of ESTA, the Applicant prays for an order in the following manner:

12.1 that the First, Second and Third Respondents and everybody holding under them vacate the house which they currently occupy and to leave the Applicant's land on or by a date determined by the honourable court.

12.2 that the honourable court determine a date on which the eviction order may be executed in the event that the First, Second and Third Respondents and everybody holding under them, should they fail to comply with 12.1 above.

12.3 ..."

17.5 The Applicant admits in paragraph 5.1 of the Replying Affidavit that severance package was not paid to Mr van der Vywer because he is permanently employed by LV Contracts Transport and he received the Provident Fund payment, and he offered Mr van der Vywer fifty thousand rand (R50 000,00) to assist with the relocation of the Respondents, however, Mr van der Vywer did not accept it.

17.6 Mrs van der Vywer is still employed on a periodical on the Applicant's farm.

17.7 Mrs van der Vywer's parents, both mother and father, who are sixty-three (63) and seventy (70) years old respectively reside with them on the

farm that her father is on the wheelchair. Though they receive government pension, they are still dependent on the Respondents.

Meaningful engagement with the Municipality

17.8. The Applicant stated that consultation with the Municipality regarding emergency and or permanent alternative accommodation will be done in due course and the supplementary affidavits will be filled by the Applicant, however, in the supplementary affidavit submitted and the replying affidavit, there was no mention of meaningful engagement with the Municipality regarding emergency and or permanent alternative accommodation, except for the compliance reports submitted by the Municipality and the Probation Officer.

Comparative hardship

[18] The farming operations on the farm are seriously prejudiced by the continued unlawful occupation of the house by the Respondents due to the fact that employees who are entitled to accommodation for themselves and their families cannot be properly housed on the Applicant's land.

[19] The Applicant submits that it has made out a case in terms of sections 10(2) and (3) of ESTA, for an order of eviction against the Respondents.

Respondents' case

[20] Mr van der Vywer states that he was born on the farm in 1975 and therefore denies that he obtained the right of residence solely by virtue of his employment, and argues that:

20.1. The Applicant did not consider all the representations, he made a representation that he is multi-skilled, has given twenty-five (25) years of his life to the Applicant and has had an impeccable

employment record with the Applicant, which the Applicant ignored.

- 20.2. When Mr van der Vywer's Contract of Employment was terminated on 18 September 2017, he was offered an alternative position which reduced his salary and he declined, because in his representation as required by section 8(1)(e), he requested to be given his job back,⁴ however, his representation was not considered and his Contract of Employment was terminated.
- 20.3. It is not correct that all amounts due and payable to him by virtue of his employment and termination thereof have been paid to him, because he was not paid his severance package. He also attached a copy of a Certificate of Outcome of Dispute referred to Conciliation⁵.
- 20.4. The process of terminating their right of residence was not fair and therefore, denies that their right of residence had been duly and properly terminated.
- 20.5. Mrs van der Merwe was employed on a full time basis at some point, though now she is employed as a periodical worker.
- 20.6. Mr van der Vywer is not permanently employed by LV Contracts Transport, the Company calls him when there is work available and he does not earn anything when there is no work. If he worked for the entire month, he receives R8000, which is reduced by petrol money.⁶

Legal framework

The material provisions of ESTA

[21] ESTA was promulgated to give effect to key constitutional⁷ rights, section 25 on property, including the right to security of tenure, the right not to be arbitrarily evicted,

⁴ Answering Affidavit, paragraph 25.

⁵ Annexure marked "E".

⁶ Answering Affidavit, paragraph 22.

⁷ The Constitution of the Republic of South Africa, 1996.

and section 26, the right of access to adequate housing. It seeks to protect vulnerable occupiers living on land falling within the ambit of ESTA from unjustified evictions and the risk of homelessness. In line with its purpose, ESTA must be interpreted in a manner that promotes these constitutional values and ensures that those who fall within its scope are afforded the fullest possible protection. Any termination of such occupiers' right of occupation must therefore comply strictly with the provisions of ESTA.⁸

[22] The aspirations of ESTA as articulated in its Preamble is to provide measures with State assistance to ensure long-term security of tenure on land, for vulnerable individuals or families residing on rural or peri-urban land with the owner's consent. It was enacted to *inter alia*, regulate conditions of residence on certain land as well as the conditions on and circumstances under which the right of persons to reside on land may be terminated.

[23] The Preamble further states that ESTA also regulates the conditions and circumstances under which persons, whose the rights of residence has been terminated, may be evicted from land and to provide for matters connected therewith.

[24] The material provisions of ESTA include:

24.1. The occupier defined in section 1 of ESTA to mean a person residing on land which belongs to another person, and who on 4 February 1997 or thereafter had consent or another right in law to do so. It excludes a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and a person who has an income in excess of the prescribed amount⁹;

⁸ *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC) para 7; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53 (*Goedgelegen*).

⁹ Prescribed amount is R13 625. 00.

24.2. Section 3¹⁰ of ESTA provides for consent to reside on land. It states that an occupier's right to reside on land arises from express or implied consent from the owner or person in charge, and shall only be terminated in accordance with the provisions of section 8 of ESTA.

24.3. See also *Misty Cliffs Farm (Pty) Ltd and Another v Christoffels and Others*¹¹ where Du Plessis AJ and Bishop AJ held that:

'Consent' under ESTA includes both express and tacit consent. Importantly, the Act establishes legal presumptions regarding consent. A person who has lived openly and continuously on land for over one year is presumed to have consent (section 3 (4)), and after three years, their presence is deemed to have been with the knowledge of the owner (section 3 (5)). These presumptions also become relevant where the formal right of occupation (such as one based on employment) has ended, but no steps have been taken to evict the person...'

24.4. Termination of residence in terms of section 8 of ESTA must be just and equitable, considering the numerated factors in section

¹⁰ Section 3 provides that:

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

¹¹ *Misty Cliffs Farm (Pty) Ltd and Another v Christoffels and Others* [2025] ZALCC 34 para 34.

8(1)(a – e). Only sections 8 (1) to (3)¹² are listed below as they will be the ones relied to.

24.5. Section 9 of ESTA¹³ provides for the limitation of eviction. Section 9(2)(a) – (d) thereof require compliance with section 10 of ESTA¹⁴, if

¹² **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.

¹³ **Section 9 of ESTA provides for limitation on eviction**

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

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

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

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

¹⁴ **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;

the person to be evicted was already an occupier on 4 February 1997 and compliance with section 11¹⁵ if the person became an occupier after 4 February 1997.

(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 months' notice in writing 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;

(d) the occupier—

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

(ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act; or (e) the owner or person in charge or the occupier have attempted mediation to settle the dispute in terms of section 21 or referred the dispute for arbitration in terms of section 22, and the court is satisfied that the circumstances surrounding the order for eviction is of such a nature that it could not be settled by way of mediation or arbitration.

(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.

¹⁵ **11. Order for eviction of person who becomes occupier after 4 February 1997**

(1) If it was an express, material and fair term of the consent granted to an occupier to reside on the land in question, that the consent would terminate upon a fixed or determinable date, a court may on termination of such consent by effluxion of time grant an order for eviction of any person who became an occupier of the land in question after 4 February 1997, if it is just and equitable to do so.

(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—

(a) the court is of the opinion that it is just and equitable to do so; and

(b) the owner or person in charge of the land and the occupier have attempted mediation to settle the dispute in terms of section 21 or referred the dispute for arbitration in terms of section 22, and the court is satisfied that the circumstances surrounding the order for eviction is of such a nature that it could not be settled by way of mediation or arbitration.

(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;

24.6. This means that eviction can only be granted if the statutory pre-conditions in section 9(2)(a) – (d) are met. Further, termination of consent must be just and equitable – substantively and procedurally. In *Snyders v De Jager*¹⁶ the Constitutional Court in paragraph 56 held that:

'Section 8(1) makes it clear that the termination of a right of residence must be just and equitable both at a substantive level as well as at a procedural level. The requirement 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 section 8(1)(e).'

Application of the law

The Respondent's source of right of residence

[25] It is common cause that Mr van der Vywer was born at the farm, the Applicant did not dispute that fact, therefore Mr van der Vywer's occupation preceded his contract of employment. Mr van der Merwe had his own right of occupation even when he was employed by the Applicant while residing with his parents.¹⁷ He was appointed as a general worker on the Farm at the age of fifteen (15) years in 1991 and signed the contract of employment in 1994, three years after he had started working for the Applicant. Section 3 (5) of ESTA provides that 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. Applying this section to these facts confirms that Mr van der Vywer was already deemed an occupier when he signed all the contracts of employment that he has signed.

(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.

¹⁶ *Snyders and Others v De Jager and Others (Appeal)* 2017 (3) SA 545 (CC) (*Snyders v De Jager*).

¹⁷ *Klaase and Another v van der Merwe N.O. and Others* 2016 (6) SA 131 (CC) (*Klaase*).

[26] The question is whether if Mr van der Vywer was an occupier before signing the 1998, 2005 and 2012 Contracts of Employment and did he waive¹⁸ his right to occupy or was his right to occupy terminated? Taking into consideration that section 3 (1) of ESTA provides that "*Consent to an occupier to reside on or use land shall only be terminated in accordance with the provisions of section 8.*" Further, whether, when the Applicant required Mr van der Vywer to sign the contract of employment that he alleges linked Mr van der Vywer's right of residence to his employment, did he terminate the original consent deemed by section 3(5)?

[27] Section 25 (1) of ESTA provides that: "*the waiver by an occupier of his or her rights in terms of this Act shall be void, unless it is permitted by this Act or incorporated in an order of the Court.*" The waiver is not permitted by ESTA and it was not court ordered; therefore, Mr van der Merwe could not have waived his right of residence that he already enjoyed. If the deemed consent was not terminated by the Applicant and Mr van der Vywer did not waived his right of residence, it means Mr van der Vywer had two sources of occupation. Whether the Applicant believes that Mr van der Vywer did not have the right of occupation before the signing of the contract of employment or believes that Mr van der Vywer waived his right of occupation by signing the contract of employment, that belief is void in terms of section 25(1) of ESTA.

[28] Further, section 25(2) of ESTA provides that "*the Court must have regard to, but not be bound by, any agreement in so far as that agreement seeks to limit any of the rights of an occupier in terms of this Act.*" It is common cause that Mr van der Vywer signed the contracts of employment in 1994, 2005 and 2012, these contracts are recognised as far as his employment and the termination thereof are concerned, however, for the purpose of determining consent by the owner or person in charge of the farm, for occupation in the farm for Mr van der Vywer, the court is not bound by the

¹⁸ **ESTA section 25. Legal status of agreements**

(1) The waiver by an occupier of his or her rights in terms of this Act shall be void, unless it is permitted by this Act or incorporated in an order of a court.

(2) A court shall have regard to, but not be bound by, any agreement in so far as that agreement seeks to limit any of the rights of an occupier in terms of this Act.

(3) Notwithstanding the provisions of subsections (1) and (2), if an occupier vacates the land concerned freely and willingly, while being aware of his or her rights in terms of this Act, he or she shall not be entitled to institute proceedings for restoration in terms of section 14.

contract of employment which links its termination to automatic termination of occupation in the farm.

Whether Mrs van der Vywer is an “occupier” under ESTA or her right of residence was derived from that of Mr van der Vywer

[29] In the Constitutional Court case of *Klaase*, Matojane AJ stated in paragraph 66 that:

‘The Land Claims Court’s finding that Mrs Klaase occupied the premises under her husband” subordinates her rights to those of Mr Klaase. The phrase is demeaning and is not what is contemplated by section 10(3) of ESTA. It demeans Mrs Klaase’s rights of equality and human dignity to describe her occupation in those terms. She is an occupier entitled to the protection of ESTA. The construction by the Land Claims Court would perpetuate the indignity suffered by many women similarly placed, whose rights as occupiers ought to be secured’

[30] Du Plessis AJ aptly responds to the question of whether Mrs van der Vywer has a right of residence in her own right or derives her right under Mr van der Vywer in the case of *Van Der Merwe N.O and Others v Stoffels and Others*,¹⁹ in paragraphs 12 to 16 and states that:

‘The argument that all respondents’ rights of residence stem from Mr Stoffels is unpersuasive. Section 1 defines an “occupier” as any person living on land with “consent or another right in law”. Consent can be explicit, implied, or assumed. Section 3(4) presumes consent unless proven otherwise and section 3(5) considers continuous and open residence for a year as being with consent.

Courts must guard against an automatic acceptance of occupation rights derived from employment alone,²⁰ especially in instances where an earlier verbal agreement or

¹⁹ *Van Der Merwe N.O and Others v Stoffels and Others* (LanC2025/032788) [2025] ZALCC 44.

²⁰ *Misty Cliffs Farm (Pty) Ltd and Another v Christoffels and Others* (LanC28/2025) [2025] ZALCC 34 paras 41 – 43.

continuous occupation established consent,²¹ and a later (often contested) written agreement limited what was purportedly verbally agreed.

Accordingly, each respondent's occupation must be assessed on its own merits: by reference to employment contracts, historic residence, independent consent, or statutory presumptions. The termination of one household member's employment does not, without further cause, extinguish the lawful occupation rights of other members who meet the statutory criteria.

Even if one were to accept that Mr Stoffels signed an agreement in 2019 that expressly linked his housing to his employment, this does not automatically mean that the agreement binds Ms Stoffels. This is for various reasons. Her evidence is that she was employed on the farm in her own right from 2006 until 2016, and that she derived her initial right of residence from her own employment (independent of Mr Stoffels), and presumably, thereafter, in terms of consent (in terms of section 3). If this is the case, Mr Stoffels cannot sign away her rights under his employment contract. Her right, therefore, had to be terminated separately.

Ms Pienaar, similarly, openly resided on the land for more than a year, meaning that consent is presumed under section 3(4) and deemed under section 3(5). Similar arguments may be applicable to the other respondents. Since the magistrate assumed that all the respondents' rights are derived from the first respondent, there was no separate inquiry as to the justness and equitableness of the eviction of the other respondents.'

[31] In *Sterklewies (Pty) Ltd t/a Harris Feedlot v Msimanga & Others*,²² the Court held that:

'Plainly, that is the right to occupy that arises from the express or tacit consent of the owner of the land. In most cases that consent will arise from an agreement between the owner and the occupier, but an agreement, at least if that expression is understood to refer to a contractually binding arrangement, is not in my view required. The Act does not describe an occupier as a person occupying land in terms of an agreement or contract, but as a person occupying with the consent of the owner.'

²¹ In terms of section 3.

²² *Sterklewies (Pty) Ltd t/a Harris Feedlot v Msimanga & Others* 2012 (5) SA 392.

[32] It is clear from *Van Der Merwe N.O and Others v Stoffels and Others*,²³ above that the argument by the Applicant that Mrs van der Vywer and Angeline's *rights of residence stem from Mr van der Vywer* is unpersuasive, because section 1 of ESTA defines an "occupier" as any person living on land with "consent or another right in law". Consent can be explicit, implied, or assumed. Section 3(4) presumes consent unless proven otherwise and section 3(5) considers continuous and open residence for three year as being with consent. It is also clear from *Sterklewies (Pty) Ltd t/a Harris Feedlot v Msimanga & Others*,²⁴ above that "... the Act does not describe an occupier as a person occupying land in terms of an agreement or contract, but as a person occupying with the consent of the owner."

[33] Mrs van der Vywer openly resided on the farm for more than a year; meaning that she is presumed to have the consent of the Applicant in terms of section 3(4) and deemed under section 3(5) to be an occupier in her own right. Her right of residence is not dependent on Mr van der Vywer's. As a result, Mrs van der Vywer did not lose her right of occupation when Mr van der Vywer signed the contract of employment with the Applicant, or when his contract of employment was terminated, she remained an occupier in terms of sections 3(4) and 3(5) of ESTA. The attempt to terminate her right of residence as a result of the termination of Mr van der Vywer's contract of employment is not a lawful ground, and therefore not just and equitable.

[34] In the Constitutional Court case of *Klaase* at paragraph 65, Matojane AJ said:

'In my view, Mrs Klaase has made out a case that she is an occupier in terms of ESTA. As an occupier, Mrs Klaase is entitled to the protections set out in ESTA. An eviction order may be granted against her only if certain conditions are met. The first is that her right of residence must have terminated on lawful grounds, provided that the termination is just and equitable, having regard to certain listed factors.²⁵ So, for as

²³ *Van Der Merwe N.O and Others v Stoffels and Others* (LanC2025/032788) [2025] ZALCC 44.

²⁴ *Sterklewies (Pty) Lrd t/a Harris Feedlot v Msimanga & Others* 2012 (5) SA 392.

²⁵ Those factors are listed at section 8(1) and are—

(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;

long as the right of residence of an occupier like Mrs Klaase has not been terminated in terms of section 8, the occupier may stay. Obviously, section 8 has not been complied with and there was no suggestion that it was. It follows that Mrs Klaase's right of residence was not lawfully terminated. It is accordingly unnecessary for us to consider whether her consent to reside on the property was subject to any conditions, such as the continuation of her marriage or Mr Klaase's continued employment. It is also unnecessary to consider whether, if proper notice had been given, her eviction would have been just and equitable.'

[35] Since Mrs van der Vywer has her right of residence under ESTA, her right of residence should have been terminated in terms of section 8 on lawful grounds related to her and not her husband, and the termination should be just and equitable. Since the Applicant terminated her right of residence on the basis of the termination of Mr van der Vywer's Contract of Employment, the termination of her right of residence is not on lawful ground and therefore not just and equitable.

Whether Angeline is an "occupier" under ESTA or is her right of residence derived from the fact that she is the child of Mr van der Vywer and Mrs van der Vywer

[36] Angeline like her parents, openly resided on the farm for more than a year; meaning that they are presumed to have the consent of the Applicant in terms of section 3(4) and deemed under section 3(5) to be occupiers in their own right after living in the farm openly and the Applicant being aware of that. Her right of residence is not dependent on her parents. Angeline did not lose her right of occupation when Mr van der Vywer signed the contract of employment with the Applicant, or when his contract of employment was terminated, she remained an occupier in terms of sections 3(4) and 3(5) of ESTA. The attempt to terminate her right of residence as a result of

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- (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.

the termination of Mr van der Vywer's contract of employment is not a lawful ground, and therefore not just and equitable.

The Applicant's non-compliance with section 8 of ESTA

[37] It is trite that the onus is on the Applicant to place information before the Court to enable it to have regard to fact the that the termination of the Respondents right of residence was on lawful grounds and to that such termination is just and equitable, having regard to all relevant factors and in particular the list enumerated under section 8 (1) (a) to e)²⁶:

37.1. With regard to subsection (a), the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies:

(a) Mr van der Vywer was not charged with any misconduct, he was retrenched and he was the only employee who was retrenched due to operational requirements. The Applicant alleges that Mr van der Vywer obtained the right of residence by virtue of his employment on the land. Further that, the underlying reason for granting accommodation to Mr van der Vywer on the land therefore fell away when his Contract of Employment was terminated. Clause 12 of the Contract of Employment in Afrikaans, translated to English provides that:

"Accommodation: Permanent employment does **not** automatically include housing; it is granted at the discretion of management and requires a separate housing contract."

Further, a copy of the Housing Contract or Housing Policy is not annexed to the Founding Affidavit or the Replying Affidavit,

²⁶ *Ibid.*

neither is it mention anywhere in the Founding Affidavit or the Replying Affidavit that the Applicant and Mr van der Vywer signed the Housing Contract.

37.2. With regard to subsection (b) the conduct of the parties giving rise to the termination:

(a) Mr van der Vywer was retrenched due to operational requirements in the faming business, therefore it is not because of Mr van der Vywer's conduct.

37.3. With regard to subsection (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:

(a) The Theewaterskloof Municipality report indicates that the municipality does not have alternative accommodation available for the family. They will be considered for future projects. The report further indicates that Mr van der Vywer, Mrs van der Vywer and Angeline are actively looking for possible alternative accommodation, however, affordability remains a challenge and they are registered on the Housing Demand Database.

(b) The probation report provided in terms of section 9(3) of ESTA concluded that the family would be rendered homeless by an eviction, as they do not have suitable alternative accommodation. The report recommends that an eviction order should not be granted and further recommends that the Applicant and Respondents have further meaningful engagements regarding the offer to compensate that was initially made to by the Applicant.

(c) This shows that the Respondents will suffer more hardship if evicted in comparison to the Applicant if eviction is not granted. In the matter of *Timothy Maluleke N.O. v Daniel Philamon Sibanyoni and Others*²⁷ it was held that: "Section 8(1)(c) requires the court to take into account the issue of comparative hardship."

(d) In the matter of *Timothy Maluleke N.O. v Daniel Philamon Sibanyoni and Others*,²⁸ the court held that: "A finding that the provisions of section 8 have not been complied with, ends the matter."

37.4. With regard to subsection (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:

(a) Mr van der Vywer was not charged with any misconduct, but the Contract of Employment was terminated because of retrenchment and in his representation, he had requested that he be offered his job back, however, the Applicant submits that the circumstances surrounding the application for an eviction order is of such a nature that it cannot be settled by way of mediation or arbitration.

(b) The question that will be addressed later is whether Mr van der Vywer's right of residence emanating from the presumption of section 3(4) and deemed in terms of section 3(5) have been terminated.

37.5. With regard to subsection (e) the fairness of the procedure followed by the owner or person in charge, including whether or

²⁷ *Timothy Maluleke N.O. v Daniel Philamon Sibanyoni and Others* (LCC 2018/59) [2020] ZALCC (Timothy Maluleke).

²⁸ *Ibid.*

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:

- (a) The Applicant acknowledges that the Respondents had different sources of consent to occupy the farm. In paragraph 10 of the Replying Affidavit, the Applicant states that:

“As it can be seen in annexures “PDK 5” and “PDK 9” of the Applicant’s Founding Affidavit, the right of residence of the Respondents were properly terminated irrespective of whether such right of residence emanated from a contract of employment, birth or for any other reason.”

- (b) The Applicant failed to satisfy the Court that there are lawful grounds relied on the termination of the right of residence of the Respondents and that the termination is just and equitable. In the matter of *Hatting and Others v Juta*,²⁹ Zondo J. (as he then was), emphasised that Courts need to infuse justice and equity into ESTA eviction enquiry. He further indicated that the termination of the right of residence and eviction must not only be based on a lawful ground. It must also be just and equitable.

The Applicant’s non-compliance with sections 9 and 10 of ESTA

[38] Section 9(2) of ESTA provides that the Court may make an order for the eviction of an occupier if the pre-requisite enumerated in section 9 (2) (a) to (c). This was dealt with in the SCA matter of *Mkangeli and Others v Joubert and Others*³⁰ where the Court said in respect of sections 8 and 9 of ESTA at paragraph 13:

²⁹ *Hatting and Others v Juta* 2013 (3) SA 275 (CC) para 32.

³⁰ *Mkangeli and Others v Joubert and Others* 2002 (4) SA 36 (SCA).

'As to the remedy of eviction, section 9 provides that a court may only issue an eviction order if certain conditions are met. The first such condition is that the occupier's right of residence must have been properly undersection 8. Other conditions prescribed by section 9 (2) include giving of two months' notice not less than two calendar months' written notice of the intended eviction application after the right of residence has been terminated under section 8 (section 9 (2) (d)). In a case such as the present, where the appellants took occupation of Itsoseng after 4 February 1997, section 11 also find application. This section provides that a court may only grant an eviction order if it is of the opinion that it is just and equitable to do so. In deciding whether it is just and equitable to grant an eviction order the court must have regard to the considerations listed in s 11(3), but it is not limited to them. Included amongst these is the consideration 'whether suitable alternative accommodation is available to the occupier' (s 11(3)(c)) and 'the balance of the interests of the owner, ... the occupier and the remaining occupiers on the land' (s 11(3)(e)).'

[39] In the present case, Mr and Mrs van der Vyver took occupation of Boesmansrug before 4 February 1997, therefore section 10 of ESTA finds application. Section 10 provides that an order for the eviction of a person who was an occupier on 4 February 1997 may be granted if, 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; and the occupier has not remedied the breach despite being given one calendar months' notice in writing to do so; or 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. Section 10(2) provides that 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. In deciding whether it is just and equitable to grant an eviction order the court must have regard to the considerations listed in Section 10(3) lists considerations that the court must have regard to, which included amongst others the consideration 'whether suitable alternative accommodation is available to the occupier' including 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 balancing the rights of all with regards to comparative hardship.

[40] In terms of section 10(1), an order for the eviction of a person who was an occupier on 4 February 1997 may be granted if provision in section 10(1) – (3) have been met. However, in this matter, Mr van der Vywer was born in the farm in 1975, he has lived in the farm for 51 years, he knows no other life. He has not breached section 6 (3) of ESTA, as required by section 10(1)(a)(b) and (c) of ESTA. His right of residence did not solely arise from employment, he was retrenched, there was no mediation attempted. The Municipal report states that there is no suitable alternative accommodation available to the Respondents and the Probation Officers report in terms of section 9(3) of ESTA concluded that the family would be rendered homeless by an eviction, as they do not have suitable alternative accommodation and therefore does not recommend that the court grant the eviction order.

[41] The Applicant alleges that the efficient carrying of his business will be seriously prejudiced unless the dwelling is available for occupation by another person employed. The Applicant does not demonstrate how the business would be affected because the employees referred to have been rendering their service from the houses they live in. In *Kanhym (Pty) Ltd v Mashiloane* 1999(2) SA 51 (LCC), Dodson J held at paragraph 12 that land owners cannot merely make averments as to prejudice they would suffer without setting out in detail how they would be prejudiced and the nexus between their prejudice and the Respondents' occupation, he said:

'The only facts alleged by the Applicant to show compliance with section 10(3)(c) were that the house was needed in order to provide accommodation for another employee. On this basis, the Applicant's Attorney argued that it could be inferred that the Applicant would be seriously prejudiced because it always have to build new houses whenever an employee refuses to vacate a house after termination of his employment. The court was then asked to take judicial notice of the costs of building additional accommodation. I have some difficulty in following this reasoning. In any event, I do not agree that a mere averment that the house is needed for another employee justifies the

interference that the efficient carrying on of any operation of the Applicant would be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the applicant. It was necessary that the applicant set out details of the serious prejudice which one or more of its operations would suffer and to identify those operations. The enquiry is specific to that particular occupier (the respondent in this instance) and the particular house which he or she occupies. A causal connection must be shown between the unavailability of that particular dwelling and the serious prejudice which the owner's operation or operations will suffer. No such proof was offered by the applicant.'

[42] The termination of the right of residence of the Respondents lacks substantive and procedural fairness, because section 8(1) of ESTA was not complied with, which requires a phased approach to the termination of the right of residence and the eviction of the occupiers. Even if the Respondents had become occupiers solely pursuant to a contract of employment, a two-stage approach to their eviction was confirmed in the matter of *Sterklewies (Pty) Ltd t/a Harris Feedlot v Msimanga & Others*³¹ where the SCA said the following at paragraph 16:

'The Act contemplates two stages before an eviction order can be made. First the occupier's right of residence must be terminated in terms of s 8 of the Act. The manner in which this is to be done is not specified. Once the right of residence has been terminated then, before an eviction order can be sought, not less than two months' notice of the intention to seek the occupier's eviction must be given to the occupier, the local municipality and the head of the relevant provincial office of the Department of Land Affairs in terms of s 9(2)(d) of the Act. That notice is required to be in a form prescribed by regulations made in terms of s 28 of the Act.'

³¹ *Sterklewies (Pty) Ltd t/a Harris Feedlot v Msimanga & Others* 2012 (5) SA 392.

Discussion

[43] In view of the substantive and procedural defects, the peremptory requirements of section 8 were not met. The Applicant issued a notice of the intention to terminate the right of residence of the Respondents, not on lawful grounds and still failed to terminate the Respondents right of residence, then continued to apply to the Court for an order of eviction of the Respondents.

[44] It is trite that failure to comply with section 8 of ESTA on the lawful termination of the right of residence constitutes the end of the inquiry and an eviction cannot be granted if the termination itself was not just and equitable. This has been aptly put in *Aquarius Platinum (SA) (Pty) v Bonene & others* [2020] 2 All SA 323 (SCA), the Court stated in paragraph 13 that:

'Thus, both the clear meaning of the language of these sections and their context the need to protect the rights of residence of vulnerable persons) indicate a two-stage procedure. Section 8 provides for the termination of the right of residence of an occupier, which must be on lawful ground and just and equitable, taking into account, inter alia, the fairness of the procedure followed before the decision was made to terminate the right of residence. Section 8 at least requires that a decision to terminate the right of residence must be communicated to the occupier. Section 9(2) then provides for the power to order eviction if, inter alia, the occupier's right of residence has been terminated in terms of s 8, the occupier nevertheless did not vacate the land and the owner or person in charge has, after the termination of the right of residence, given two months' written notice of the intention to obtain a n eviction order. Section 8(2) must of course be read with s 8(1) and provides for a specific instance of what may constitute a just and equitable ground for the termination o f a right of residence.'

[45] In the matter of *Timothy Maluleke N.O. v Daniel Philamon Sibanyoni and Others*,³² the court held that: "A finding that the provisions of section 8 have not been complied with, ends the matter.

³²*Timothy Maluleke supra n31 para 65.*

Conclusion

[46] The Applicant terminated the contract of employment of Mr van der Vywer, and then attempted to terminate his right of residence and that of Mrs van der Merwe and Angeline. The Applicant did not comply with section 8 which requires that the termination of the right of residence of an occupier must be on lawful ground and must be just and equitable. Mr van der Vywer was an occupier in terms of sections 3(4) and 3(5) of ESTA before signing the Contract of Employment that purported to link his right of residence to the Contract of Employment. Mr van der Vywer did not lose his right of residence by signing the Contract of Employment and there is no proof that he signed the Housing Contract as stated in the Contract of Employment.

[47] The termination of Mr van der Vywer's right of residence, even if it was solely derived from the Contract of Employment, must be on lawful ground and must be just and equitable. In *Van Der Merwe N.O and Others v Stoffels and Others*,³³ court in paragraphs 17 and 18 held that:

'Section 8(1) – (2) outlines the requirements for a lawful eviction. Section 8(1) establishes a general rule that termination of an occupier's right of residence is only lawful on valid grounds. The termination must be "just and equitable," taking into account all circumstances. The factors listed in this section emphasise that this is a flexible and multi-faceted assessment, not a mechanical test. Section 8(2), although addressing termination of occupation arising from an employment relationship, does not override the protections offered by section 8(1). Therefore, even if an employee's dismissal is lawful under the labour law, the court must still be convinced that the termination of the right of residence is "just and equitable"'

[48] In addition, the rights of residence of Mrs van der Vywer and Angeline are ESTA rights in terms of sections 3(4) and 3(5), and may only be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to section 8(1)(a)-(e), which the Applicant did not take into consideration with regard to Mrs van der Vywer and Angelina.

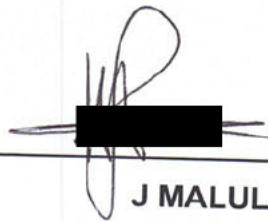
³³*Van Der Merwe N.O and Others v Stoffels and Others* (LanC2025/032788) [2025] ZALCC 44.

[49] Due to failure to comply with the peremptory requirements of the Extension of Security of Tenure Act 62 of 1997, I am unable to grant the eviction order.

Order

[50] In the circumstances, the following order is granted:

1. The application is dismissed.
2. There is no order as to costs.


J MALULEKE
Acting Judge of the Land Court

APPEARANCES:

For the Applicants: Mr Frans Cronje

Instructed by: CRONJÉS INC ATTORNEYS

For the Respondents: Ms K Ngqata

Instructed by: T.J. MGENGWANA