



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 17328/13

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

**J & F LE ROUX PROPERTIES CC
DISTELL LIMITED**

First Applicant
Second Applicant

and

**PONIE MANISI
AND NINE OTHERS**

First Respondent
Second to Tenth Respondents

JUDGMENT DELIVERED ON 4 MARCH 2014

[1] In this matter the applicants have applied, in terms of s 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE'), for the eviction of the first respondent and those members of his family holding under him from a labourer's cottage on the farm Groenvlei, near Worcester. The first respondent had obtained the right to occupy the premises in terms of his erstwhile employment on the farm by the second applicant. He resided there with his family from 1960. When he ceased to be employed in 2004, his continued tenure was thereafter protected in terms of the Extension of Security of Tenure Act 62 of 1997 ('ESTA') by virtue of his status under that Act as an 'occupier'. The applicants allege that the first respondent has ceased to qualify as an occupier in terms of ESTA and that his residual possession of the premises in the circumstances to be described below constitutes unlawful occupation within the meaning of PIE.

[2] The first respondent is currently 75 years old. It is common ground that he has been infirm in recent years and is consequently unable to care for himself. The family members who initially used to attend to his needs at the cottage where he lived have either died or had to give up caring for him on a daily basis because of the demands of their employment. Those family members who still live at the cottage (the third, fourth, seventh and eighth respondents, being three of the first respondent's daughters and his grandson, respectively) are unable to look after him during the week because they have to go to work during the day. As a consequence of this situation the first respondent has been placed in a home for the elderly in Worcester.

[3] According to the answering affidavit made by the first respondent, this happened with his agreement on the understanding that he would stay at the home during the week and return to the cottage on weekends and public holidays when his family members would be available to take care of him. The first respondent averred that aside from 'some clothes and personal effects' all his belongings, including his possessions of sentimental value, are kept at the cottage. He maintains an interest in the upkeep of the garden at the premises, and when he is there gives instructions as to its maintenance. He said, in effect, that he regards the cottage as his home and asserted that he had not abandoned his right to reside at the premises. The first respondent characterised the time that he spends at the old age home as 'temporary absence' from the cottage during the week.

[4] A letter of confirmation from the home concerning the first respondent's position was annexed to the answering affidavit. It reads as follows:

Bogenoemde [i.e. the first respondent] is inwoner van [the name of the home].
 Omdat Mnr. Manisi se kinders en kleinkinders werk en daar niemand is om na hom om te sien
 het sy kinders hom in die tehuis geplaas.
 Mnr. Manisi word elke 2de naweek en wanneer van die kinders met verlof is gehaal.
 [signed]
 D. Fortuin
 Bestuurder

[5] There is a dispute on the papers as to how regularly and frequently the first respondent comes to the premises during weekends and holidays, as alleged. In reply the applicants put in evidence certain information extracted from a register maintained at the old age home to show when residents checked out temporarily and returned – a so-called 'In and Out-Book'. That information would on its face suggest that the first

respondent rarely left the old age home. It was evident, however, from the rebutting affidavits put in by the respondents, which I admitted, without objection by the applicants' counsel, that the register was probably not accurately maintained. This was borne out even on the material put in by the applicants, which in some instances recorded details of the first respondent having checked out of the home with no indication as to when he had returned. In the result, applying the well-established rules pertaining to the treatment of evidence on paper for the purposes of determining applications for final relief, I must accept the first respondent's version of the facts.

[6] It was alleged in the applicants' founding papers that the first respondent had 'vacated' the premises and no longer resided there, having voluntarily 'relocated his current place of residence in the town of Worcester'. The applicants alleged that the alleged vacating of the premises by the first respondent constituted an abandonment of his rights of occupation under ESTA. It was conceded, however, that the first respondent was 'in law still in possession of the premises'.

[7] In argument it appeared eventually to be common cause between counsel that the determination of the case turns on whether or not the first respondent is still an 'occupier' of the premises within the meaning of that word as defined in s 1 of ESTA;¹ more particularly, whether, within the ambit of that definition, he qualifies as 'a person residing' on the land. In my judgment that is indeed the determinative question.

[8] Mr *Wilken*, who appeared for the applicants, acknowledged that the words 'reside' and 'residence' were capable of more than one meaning and that, when used in legislation, they fall to be interpreted contextually with reference to the objects of the statute concerned; cf. e.g. *Ex parte Minister of Native Affairs*² and *August and Another v Electoral Commission and Others*.³ He pointed out in this regard that the word 'residing' had already been interpreted by the Supreme Court of Appeal ('SCA')

¹ "occupier" means a person residing on land which belongs to another person, and who has or [sic] on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding-

(a)[deleted by s 6(a) of Act 51 of 2001];

(b) 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

(c) a person who has an income in excess of the prescribed amount [R5 000 per month].

² 1941 AD 53, at 58.

³ 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 at para 24 and note 7.

in the context of the definition of ‘occupier’ in ESTA in *Kiepersol Poultry Farm (Pty) Ltd v Phasiya*.⁴ In that matter, Mpati P, noting that the Court had in an earlier judgment⁵ had found ‘that the main purpose of the Act “is to regulate the eviction process of vulnerable occupiers of land” and that the Act “generally seeks to protect a designated class of poor tenants occupying rural and peri-urban land . . . with the express or tacit consent of the owner against unfair eviction from such land”’, held that the meaning of the word ‘residing’ in the definition of ‘labour tenant’⁶ in the Land Reform (Labour Tenants) Act 3 of 1996 – a statute with very similar objects to those of ESTA – adopted by the Land Claims Court⁷ was equally applicable to the meaning of that word in the definition of ‘occupier’ in ESTA. The Land Claims Court had adopted the definition applied by Baker J in *Barrie NO v Ferris*,⁸ namely:

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

[9] The applicants’ counsel further submitted that the *Kiepersol* case was ‘substantively indistinguishable’ from the current case. The issue in *Kiepersol* concerned whether a person, who spent most of his time living at the homes of his children, and only visited the premises in issue occasionally, but kept his furniture and belongings there, qualified as an ‘occupier’ as defined in ESTA. It was held by the SCA that he did not. In my view, however, the facts of the *Kiepersol* matter differed materially from those in the current case. Moreover, *Kiepersol* was decided on the basis of oral evidence, which culminated in the rejection of the respondent’s factual allegations in that matter.

⁴ 2010 (3) SA 152 (SCA).

⁵ *Lebowa Platinum Mines Ltd v Viljoen* 2009 (3) SA 511 (SCA) at para 9.

⁶ ‘**“labour tenant”** means a person-

(a) who is residing or has the right to reside on a farm;
 (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and
 (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm,
 including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3 (4) and (5), but excluding a farmworker’.

⁷ In *Mkwanazi v Bivane Bosbou (Pty) Ltd and Another and Three Similar Cases* 1999 (1) SA 765 (LCC).

⁸ 1987 (2) SA 709 (C) at 714F.

[10] On the facts found to have been proven in *Kiepersol*, Sam, the alleged occupier under whom the respondent in that matter claimed to be entitled to ESTA rights, had left the premises in issue in February 2004 while he was still working as an employee on the farm in question. He had left voluntarily to live in the more comfortable accommodation that had become available to him at the house acquired elsewhere by one of his sons, Martin. Sam had subsequently been injured in a motor vehicle accident in September 2004 and had thereafter been pensioned off. Before that, however, the person in charge of the land had given his son, Gideon, who remained in occupation of the premises in which Sam had lived, notice to vacate them. Notice had been given by reason of Sam having ceased to live at the premises in February 2004. Gideon, who was employed by an attorney, had not rejected the notice to quit on the basis of asserting that he lived there under his father who was still in occupation - as the SCA considered might have been expected had his father been considered to be still residing at the premises. He had instead, through the offices of his attorney-employer, prevailed on the person in charge of the property to extend the period of notice allowed to him to vacate. The SCA also pointed out, in concluding that the court of first instance should have held that Sam no longer resided at the premises, that evidence that Sam's wife had informed the person in charge of the property that Sam did not sleep on the premises, but 'only comes and visits from time to time' had not been challenged. In addition, there was evidence from a former work colleague of Sam that a farm vehicle that he was required to hand over to Sam on a regular basis used, after February 2004, to be taken to him at Martin's house instead of to the address of the premises, to which it had previously apparently been his habit to take it. Thus, in *Kiepersol*, it was proven that Sam had not resided at the premises since about February 2004. His furniture remained at the premises because he had no need for it and it was required there to keep the house habitable for the other family members who continued to reside there.

[11] The evidence in the current matter is that the first respondent spends most of his time at the old age home. The reason for this is not because he has chosen to make it his home, but because of his need for personal care. He does not regard the institution where he is obliged to stay for most of the time as his home. He is only there because of the exigencies of his health and it is evident from the content of his

answering affidavit that it remains important to his sense of dignity, freedom and security, freedom of association and freedom of movement that he is able to go back regularly to the premises to live with his family and enjoy his home comforts. The premises are where he keeps his furniture and most of personal possessions because that is the place to which he returns whenever possible to be in his own place. On the basis of the first respondent's evidence, which I must accept for present purposes, it is at the premises that he enjoys the sense of 'permanence' that is integral to the concept of residence expressed in the interpretation given in *Barrie*. The word 'home', with its connotation of the place where one lives with one's family,⁹ lies at the heart of the definition of 'residing' given in *Barrie*. (It was for that reason that I emphasised the word by underlining it in the quotation from *Barrie* set out earlier.)

[12] The meaning of 'residing' in the relevant sense does not fall to be determined on the basis of an arithmetical calculation of where a person spends most of his time, or where he sleeps most nights. During argument various examples were postulated, which seemed to me to illustrate the point. Take the terminally ill cancer patient who has to spend Monday to Friday in a hospice because the family members who live with him go out to work and consequently are unable to give him the care that he needs, but who comes home at weekends when the family is available to look after him. Has he given up his home because he sleeps at the hospice on most nights of the week? I do not think so. Take the company employee who lives in Cape Town, where he has a family home, but whose work requires him to spend most of his time in Johannesburg, where he stays every Monday to Friday in a bachelor flat provided by his employer. Is his home in Cape Town or Johannesburg? In my view the answer is Cape Town. If the applicant's case depends, as it appears to do, on the relinquishment by the first respondent of his rights under ESTA – that is on an acceptance of the allegation that he has given up his home on Groenvlei - I do not think that that has been established on the papers.

[13] The object of ESTA is to address the vulnerability of persons like the first respondent to eviction from places that have been their homes; to afford security of tenure; to avoid the great hardships that attended the eviction of workers from farms

⁹ In the Oxford Dictionary of English, the primary meaning of 'home' is given as '*the place where one lives permanently, especially as a member of a family or a household*'.

when their labour was no longer required and the social instability to which such evictions contributed historically. The legislation, which is founded upon the provisions of s 25(6) of the Constitution, is expressly informed by the need to uphold and promote certain fundamental rights. Thus, s 5 of ESTA reiterates the fundamental rights that everyone has to human dignity, freedom and security of the person, privacy and freedom of movement.¹⁰ In addition, as the SCA noted in *Lebowa Platinum Mines*,¹¹ the provisions of s 26(3) of the Constitution, which express the constitutional significance of every person's home as part of the enshrined framework of basic human rights, also fall to be considered when a court interprets and applies the provisions of ESTA.

[14] In my judgment there is no doubt that the aforementioned basic rights of the first respondent would be adversely affected were he to be prevented from being able to return to the premises on the weekends and holidays when his family members are available to care for him there. The applicant's counsel submitted that there would be nothing preventing the first respondent from spending his weekends and holidays at the houses of those of his adult children who live elsewhere in the area. In my view, it is misconceived to try to equate the opportunity to stay with those children with his current ability to return frequently and regularly to the place where he lived permanently for the best part of half of a century, to sleep in his own bed in his own bedroom, and to enjoy the garden that he was used to tending and over which he still exercises a supervisory role. The postulate instead goes to highlight the difference between the character of the premises as *the first respondent's* home and that of the alternative places to which counsel suggests he should go as *his children's* homes.

¹⁰ Section 5 provides:

‘Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to-

- (a) human dignity;
- (b) freedom and security of the person;
- (c) privacy;
- (d) freedom of religion, belief and opinion and of expression;
- (e) freedom of association; and
- (f) freedom of movement,

with due regard to the objects of the Constitution and this Act.’

¹¹ Note 5, above, at para 13. *Lebowa Platinum Mines* was also a case in which the meaning of the word ‘occupier’ in ESTA was the central issue in point.

[15] To sum up, I am not persuaded in the given circumstances that the fact that the first respondent is obliged by the exigencies of his physical health to spend the greater part of his time staying in an old age home entails that he has given up his home on the farm. The evidence that I have to accept on the papers establishes that the first respondent has continued to use the premises as his home and that he therefore continues to qualify as an ‘occupier’ within the meaning defined in s 1 of ESTA by virtue of his still residing there.

[16] The rights of an occupier under ESTA include the right to family life as an incidence of residence on the land concerned. The extent of the right depends on the given circumstances of the case and falls to be determined in a way that strikes a fair balance between those of the occupier, on the one side, and those of the owner or person in charge of the land, on the other; see s 6(2)(d) of ESTA¹² and the Constitutional Court’s judgment in *Hattingh and Others v Juta*.¹³ In my view, the occupation of the cottage by three of his adult daughters, who were born and raised on the property, and a grandson are an incidence of the first respondent’s family life. Their presence at the premises provides the support without which the first respondent would not be able to exercise his right to reside there and in large measure gives content to many of the first respondent’s rights acknowledged in s 5 of ESTA.¹⁴ It does not impinge on the first applicant’s rights in any significant way. The first applicant would like to give the use of the cottage to a labourer currently in its employ – in the replying affidavit the question was addressed in the following general terms: ‘The house in which Second to Nine (sic) Respondents reside...is earmarked for labourer’s housing’. There was no suggestion, however, that the first applicant would be able to use the cottage for the earmarked purpose while the first respondent continues to reside there. The current case thus differs in this respect from that of *Hattingh*, in which it was the landowner’s wish to use part of the premises occupied

¹² Section 6(2)(d) provides:

‘Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right-
(d) to family life in accordance with the culture of that family: Provided that this right shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997’.

¹³ 2013 (3) SA 275 (CC), 2013 (5) BCLR 509, especially at para 31-40.

¹⁴ See note 10, above.

by Mrs Hattingh and her adult family members to accommodate a particular worker who otherwise had to cycle 16km every day to get to work.

[17] In the result the application is dismissed with costs.

A.G. BINNS-WARD
Judge of the High Court