IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED ~~YES~~ / NO

13 April 2021 PP
DATE SIGNATURE

Case Number: LCC 123/2018

In the matter between:

FIRST REALTY (KRUGERSDORP) (PTY) LTD	Applicant
and	
GERTJIE MITCHELL	First Respondent
BETTIE MITCHELL	Second Respondent
MICHELLE HAARVOOR	Third Respondent
GERHARD MITCHELL	Fourth Respondent
WILLEM JANUARIE	Fifth Respondent
DOLFINA JANUARIE	Sixth Respondent
ANNA-MARIE VAN WYK	Seventh Respondent
JEREMY JANUARIE	Eighth Respondent

NAZEEM LENNERTS	Ninth Respondent
MARY LENNERTS	Tenth Respondent
KAYLA GOOSEN	Eleventh Respondent
HENNIE BAILEY	Twelfth Respondent
KATRINA BAILEY	Thirteenth Respondent
FAIZA BAILEY	Fourteenth Respondent
ABSOLON VAN WYK	Fifteenth Respondent
TRUITJIE GOOSEN	Sixteenth Respondent
SHIRLEY GOOSEN	Seventeenth Respondent
JEROME ARENDSE	Eighteenth Respondent
SARA ARENDSE	Nineteenth Respondent
LEE-HANO JONATHAN	Twentieth Respondent
WILLEM JANUARIE	Twenty First Respondent
ANNA JANUARIE	Twenty Second Respondent
ALETSEA MITCHELL	Twenty Third Respondent
WELMARIE MITCHELL	Twenty Fourth Respondent
FRANKLIN MITCHELL	Twenty Fifth Respondent
ALL THOSE HOLDING TITLE THROUGH	
FIRST TO TWENTY SIXTH RESPONDENTS	
OR OCCUPYING COTTAGES 1, 3, 5, 7, 8, 9 &10	
FARM HAMMANSDANS, PORTION 6 OF FARM	
NO 191, DIVISION PAARL, WESTERN CAPE	Twenty Sixth Respondent
DRAKENSTEIN MUNICIPALITY	Twenty Seventh Respondent
HEAD: WESTERN CAPE PROVINCIAL DEPARTMENT	

OF RURAL DEVELOPMENT AND LAND AFFAIRS Twenty Eighth Respondent

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JUDGMENT

Carelse J

Introduction

[1] This is an application for the eviction of the 1st to 26th Respondents from the property known as the farm Hammansdans, R44, Hermon Road, Wellington, Western Cape, also known as portion 6 of the farm 191, Paarl Registration Division, Western Cape ("the farm"). The farm has been owned by the Applicant, First Realty (Krugersdorp) (Pty) Ltd, since 2011.

[2] The 1st to 26th Respondents, save for the 2nd and 3rd Respondents, are represented by Mr Mohamed. The Respondents counter-claim for an order *inter alia* in the following terms –

(i) Declaring that the Applicant (in the main application) has failed to comply with its constitutional and statutory obligations –

> "1.1 by imposing an unreasonable, unjustifiable and iniquitous limitation on their right to family life, demanding that the children of the Respondents, that have reached the age of majority but are no longer either at school or engaged in some form of tertiary education , relocate elsewhere to a place that is unknown or undefined;
>
> 1.2 to ensure that relevant circumstances following section 26(3) of the Constitution and the passage of the Extension of Security of Tenure Act 62 of 1997, are properly placed before this honourable court and that a socio-economic survey report is filed

with the Registrar and the Respondent's attorney within 2 months of the date of this order;

1.3 to engage meaningfully with Respondents, 27th and 28th Respondents and including all the residents residing on the property that are the subject of eviction proceedings;"

and for an order –

2. Declaring that the Respondents and all the affected residents on the property enjoy rights to land tenure security and housing in respect of sections 25, 26, and 28(1)(b) and (c) of the Constitution and sections 1, 2, 3, 5, 6, 9, 10, 11, 12, and 13 of the Extension of Security of Tenure Act 62 of 1997, and that the removal of their rights constitutes an invalid deprivation or expropriation in terms of section 25 of the Constitution;" and

(ii) Directing –

"3. the Applicant (in the main Application) to enter into negotiations with all the Respondents and affected residents, as well as the 27th and 28th Respondents, for the purpose of developing a framework for meaningful engagement and the provision of suitable alternative accommodation, and to report back to this Court on the progress made in these negotiations within 4 months of the date of this order;

4. the 27th and 28th Respondents (in the main Application) to take the necessary steps to facilitate the appointment of a mediator or mediators to resolve the dispute between the principle parties in terms of the Extension of Security of Tenure Act 62 of 1997;

5. the South African Human Rights Commission (SAHRC), as a monitoring agency constitutionally mandated to protect and promote human rights, to join these proceedings in order to monitor all aspects of the proceedings, convene the meaningful engagement process with all the parties , undertake the socio- economic survey and file

a report with the Registrar and the parties' attorneys within 2 months of the date of this order;

6. the Applicant as well as the 27th and 28th Respondents (in the Main Application), until such time that the Counter Application has been finalised, each file a sworn report with the Registrar and the Respondent's attorney, on or before the first day of every month, detailing the steps taken by each of them respectively in the preceding month to obtain suitable alternative accommodation for the Respondents and all the affected residents;"

and

7. Granting a stay of eviction against the Respondents and all the affected residents (in the Main Application) until suitable alternative accommodation is obtained."

[3] The Respondents further seek the striking out of unidentified paragraphs in the founding affidavit and the replying affidavit on the basis that they amount to hearsay and are thus inadmissible, and the striking out of identified paragraphs on the basis that they constitute new material. Pertinently the Respondents contend that in motion proceedings an Applicant must make out its case in the founding affidavit.

[4] At the outset of the hearing, counsel for the Applicant sought leave to hand in a supplementary affidavit with a notice of termination of residence dated 30 April 2018 and a return of service attached. I will return to this issue later in my judgment.

[5] The Applicant relies on sections 10 and 11 of the Extension of Security of Tenure Act, 62 of 1997 ("ESTA") in seeking the eviction of the Respondents from the farm. In determining

whether the evictions would be just and equitable, compliance with the requirements set out in section 8 (termination of right of residence), section 9 (limitation on eviction) and sections 10 and 11 of ESTA (where applicable) must be met.

Background

[6] A reference to Respondents in the affidavits is a reference to the 1st to 26th Respondents, who all reside on the farm. It is necessary to set out a brief description of the living arrangements of the Respondents on the farm. There are seven households each made up of employees or former employees of the Applicant, or its predecessor in title, their spouses or partners, adult children and minor children. The right to reside on the property was granted to the employees or ex-employees by the Applicant or its predecessor in title.

[7] The Respondents reside in cottages 1, 3, 5, 7, 8, 9, and 10. When the Applicant purchased the farm, the aforementioned cottages were allocated to the 1st, 5th, 9th, 12th, 15th, 18th and the 21st Respondents, being the current or former employees. The Applicant alleges that through the effluxion of time, there are now 60 occupiers. Although this number is disputed by the Respondents, it is not necessary to deal with this issue for the purposes of this judgment.

[8] The 1st Respondent is employed by the Applicant and lives in cottage 1 with his wife, the 2nd Respondent, and their adult non-dependent children, the 3rd and 4th Respondents. The 5th Respondent is employed by the Applicant and has lived on the farm for 26 years. He is married to the 6th Respondent and lives with her, their adult non–dependent children, the 7th and 8th Respondents, and three minor children in cottage 3. The 9th Respondent is employed by the Applicant and lives in cottage 5 with his wife, the 10th Respondent, their adult non-dependant daughter, the 11th Respondent, and her three minor children.

[9] During argument, counsel for the Respondents informed this Court that the 12th Respondent (Mr Hennie Bailey) passed away. The 12th Respondent was 61 years' old and was never employed by the Applicant. He lived on the farm with his wife, the 13th Respondent, their adult non – dependent daughter, the 14th Respondent, and two minor children in cottage 7. I pause to mention that it is not alleged in the founding affidavit that he is a long-term occupier who enjoys special protection under ESTA.

[10] The 15th Respondent is 66 years' old and was previously employed by the Applicant. He lives in cottage 8 with his wife, the 16th Respondent, their adult non- dependant daughter, the 17th Respondent, her partner and two minor children. The Applicant has not alleged that the 15th Respondent is a protected occupier under ESTA.

[11] The 18th Respondent was previously employed by the Applicant and is currently employed elsewhere. He lives in cottage 9 with the 19th Respondent and their two minor children. The 20th Respondent is an adult male person who also resides with the 18th Respondent in cottage 9. There is no evidence of the nature of his relationship with the 18th or 19th Respondent.

[12] The 21st Respondent is employed by the Applicant. He lives in cottage 10 with his wife, the 22nd Respondent, their adult non - dependent daughters, the 23rd and 24th Respondents, their adult dependant son who is a student at a tertiary institution, the 25th Respondent, and two minor children. The 26th Respondent is all other persons who might be occupying through the Respondents.

[13] In its founding affidavit, the Applicant alleges each employee or ex-employees' right to occupy was limited to the extent that each employee and ex-employee was only permitted to extend their rights of occupation to their spouses and/or minor and/ or dependent children.[1] Dependent children includes minor children and children who no longer attend school but a tertiary educational institution. The Applicant submits that this limitation is a fair and material term of the employment agreement between the Applicant and its employees. This limitation, it is argued, is linked to the limited size of the property, being 25 hectares, the resultant burden on the residential infrastructure, and the operation of the Applicant's small commercial enterprise.

[14] The employee and ex-employee respondents are occupiers within the meaning of ESTA and their spouses and adult non-dependent children occupy through them. The Respondents submit that the limitation on their right to family life, which is provided in section 6(2)(d) of ESTA, is unreasonable and unjustifiable.

[15] Because the rights and duties of the employees and erstwhile employer (and owner) were not in writing, the Applicant prepared written agreements regulating the relationship between it and its employees. The Applicant submits that in October 2012, each employee was presented with a written agreement, which they duly signed.[2] The employment contract entered into by and between the Applicant and the 1st Respondent is annexed to the founding affidavit marked "FA 7", which the Applicant avers is identical to the employment agreements entered into with all other employees.

[1] Founding affidavit at para 10.2 and 10.3, page 27.
[2] Founding affidavit at Annexure "FA 7", page 77.

[16] The employment contract, loosely translated from Afrikaans, provides at clause 10.3 that –

> "the employee will be entitled to have relatives live on the premises, subject to the employer's prior consent."

At the time, it was an express or tacit term of the employment agreements that spouses and minor and/or dependent children were entitled to live on the property, although the employment agreements do not directly provide for this, so the Applicant contends.

[17] New employment agreements were concluded in October 2015,[3] and although only the 1st Respondent's employment agreement is attached as a standard form, the Applicant submits that all the employees signed identical contracts on the same day. It is argued that an express or tacit term of this agreement was that the employee acknowledged the employee policy (and any other policy which may be announced from time to time) and other related employment policies.

[18] In the same year, the Applicant undertook a process of requesting each employee to take all necessary steps to ensure that the housing rules were complied with and that once their children reach the age of majority and/or become self-supporting that those children vacated the property, or that steps were taken to ensure this happened. In summary, the Applicant alleges that it was not only the housing policy, nor the custom of the land, but also the employee's and ex–employees' agreement in writing which established that their occupation is limited to their spouses and minor and/or dependent children.

[3] Founding affidavit at Annexure "FA8", page 87.

[19] When the adult and/or non-dependent children of the employees and ex-employees did not comply, the Applicant held meetings to discuss this aspect of the housing policy. The Applicant details three meetings held with the employee and ex-employees and their spouses as follows –

19.1 On 29 June 2016, Ms Brand, a labour law legal adviser from SEESA, attended the farm to explain the housing policy and the nature of the rights that each employee and ex-employee had.

19.2 On 29 September 2016, the Applicant extended an invitation to 'everyone' to attend a meeting to discuss the housing policy.[4] The attendance register reveals that each of the employees and ex-employees attended the meeting.[5] At this meeting, each employee or ex-employee was invited to make representations on the continued residence of their adult non-dependent children. It was also stated that non-compliance with the agreement could lead to the termination of the rights of occupation of the employee and each person who occupies through the employee. A further meeting was scheduled for 2 months later to allow the employees with adult non-dependent children to make representations and consider their position. The Applicant did not receive any representations or feedback following this meeting.

19.3 On 5 December 2016 a follow-up meeting was held to discuss the housing policy once again. At this meeting, each employee and ex-employee was handed a copy of the "Housing Agreement with Permanent Occupiers".[6] Identical agreements were handed to each employee and ex-employee. None of these agreements were signed and returned

[4] Annexure "FA 9"at page 101 of the Founding Affidavit.
[5] Annexure "FA 10" at page 102 of the Founding Affidavit.
[6] Annexure "FA 11" at page 103 of the Founding Affidavit.

to the Applicant. The Applicant avers that at that meeting, the employees and ex-employees were told that –

> " . . . any right that that their adult non -dependent children might have to be present on the property was there and then terminated subject to each employee respondent making representations to discuss the possibility of the applicant assisting their adult non-dependent children in relocating elsewhere"[7] (my underlining)

No such representations were made. It appears that the Applicant, at this meeting, terminated the adult non-dependents children's right to occupy through their parents. This is impermissible.

[20] Following a period of engagement over the next few months, the Applicant alleges that it delivered notices on 11 April 2007 to each employee and ex-employee and their spouses, as well as adult non-dependent children of the employees and ex-employees (except the 25th Respondent, who was a student).

[21] The Applicant attached a copy of the notice which was delivered to the 1st and 2nd Respondents marked as annexure "FA12"[8] to the founding affidavit as an example of the identical notices sent to each employee or ex-employee. The content of the notices reiterated what was relayed at the previous meetings and requested that the employees and ex-employees make representations or settlement proposals regarding the relocation of their adult non-dependent children. Further, that the Applicant reserves the right to bring eviction proceedings. As no settlement proposals were received, the Applicant informed the employees and ex-

[7] Annexure "FA 11" at para 18.5, page 38 of the Founding Affidavit.
[8] Annexure "FA 12" at page 109 of the Founding Affidavit.

employees that any right their adult non-dependent children had, if any, to occupy is terminated and that these adult non-dependent children were to vacate the farm within 30 days.

[22] The notice also stated that the adult non-dependents did not acquire an independent right to occupy the property, and that their conduct had led to a complete breakdown in the relationship with the Applicant. How the relationship broke down was not explained by the Applicant. It appears that this is the reason for 'terminating' the adult non- dependent children's right to occupy.

[23] In the Applicant's founding affidavit it alleges that notices were also delivered to the 3rd and 4th Respondents. The Applicant does not state what type of notice was delivered. This notice is attached to the founding affidavit marked "FA13"[9] and is an example of identical notices sent to each adult non-dependent (barring the 25th Respondent).

[24] In this notice, the Applicant reiterates that the adult non–dependent children did not have an independent right to occupy. It was recorded that the adult non-dependents, as well as their parents, were aware that they were to vacate the property and find alternative accommodation. This position had been discussed at meetings where the adult non-dependents were invited to make representations or settlement proposals. The adult non-dependents were called upon to vacate the property within 30 days, failing which eviction proceedings would be instituted. It is only when one reads the notice in its entirety does it become apparent that it is a notice of termination of the 3rd and 4th Respondents' right to occupy. There is no allegation in the founding affidavit that the adult non–dependent children's right to occupy has been

[9] Annexure "FA 13" at page 113 of the Founding Affidavit.

terminated. This allegation is found in the notice annexed to the founding affidavit and not in the founding affidavit itself.

[25] On scrutiny of the returns of service in respect of the 3rd and 4th Respondents, the Sheriff records that when he went to deliver the notice, the 3rd and 4th Respondents had already vacated the farm. There is nothing to gainsay this. Notwithstanding this, the Applicant still seeks the eviction of the 3rd and 4th Respondents who, it appears, have vacated. I pause to mention that the notice of termination of residence was not served on the 7th and 8th Respondents according to the Sheriff's return of service in which he stated "gepoog moet regstel".[10]

[26] After further discussions on an ongoing basis, which the Applicant avers were unsuccessful, on 30 January 2018, notices were delivered to the employees and ex-employees, annexed marked as "FA15" to the founding affidavit. The notice sent to the 1st Respondent is used as an example of the notices sent to the other employees and ex-employees. The letters that were addressed to the employees and ex-employees dated 30 January 2018 are not notices of termination of residence, yet the Sheriff's return of service records that on 31 January 2018 he served the notices of termination. In fact, from the content of the letter, it was a breach letter and not a notice to terminate.

[27] This notice contained information previously conveyed regarding the right to occupy of the adult non-dependent children. It recorded that on 11 April 2017, notices were sent to the adult non-dependent children (in this case, the 3rd and 4th Respondents) requiring them to vacate the property. According to the Applicant, the 3rd and 4th Respondents failed to vacate, and as

[10] Loosely translated from Afrikaans, this means "attempted to rectify".

a result, the 1st Respondent was in breach of the agreement with the Applicant by allowing the 3rd and 4th Respondents to occupy the property with their minor children. The 1st Respondent was given a period of one month to make arrangements for the 3rd and 4th Respondents to vacate within a period of one month, failing which, the Applicant may terminate the 1st Respondent's right of occupation and bring an application for the eviction of the 1st Respondent and anyone else claiming title through him. This notice reiterated that the adult non-dependent children did not have an independent right to occupy and occupied through the employees and ex-employees. This conflicts with the Sheriff's return of service that the 3rd and 4th Respondents had vacated.

[28] After delivery of these notices, none of the adult non-dependent children vacated the property, so the Applicant submits. On 6 March 2018, notices were delivered to each employee and ex-employee and their spouse. The Applicant attaches a copy of the identical notice as "FA16" and "FA17" to the founding affidavit, being the notices sent to the 1st and 2nd Respondents, which are used as an example of the notices sent to the other employees and ex-employees and their spouses.

[29] The content of this notice mirrors the information conveyed previously and, in relevant part, states that the 1st Respondent is in breach of a fair and material term of the agreement by which he occupies the property, despite being afforded a period of one month to remedy the breach. It also reiterates that the relationship between the Applicant and Respondents had completely broken down. The 1st Respondent is given an opportunity to make representations as to why his right of occupation should not be terminated within 14 days,[11] as " our client is

[11] Annexure "FA16" at page 121 of the Founding Affidavit.

in the circumstances set out above considering terminating your rights of occupation of the property"(my underlining). There is no indication that any of the adult non-dependent children were requested to make representations. All requests for representations were to the employees and ex-employees. I am not surprised because the adult non-dependent children were never regarded as occupiers in their own right. Instead, the Applicant repeatedly submitted that the adult non-dependent children occupied through their parent, the employees, and ex-employees.

[30] The Applicant has stated repeatedly that it made several attempts to engage with the Respondents. A reference to "Respondents" is reference to the 1st to 26th Respondents. This is not borne out by the various notices. All engagements, requests for meetings and representations were directed to the employees and ex-employees and their spouses.

[31] On 4 April 2018, the Applicant called a further meeting with each employee and ex-employee and their spouse to discuss the process taken and notices sent, where the Applicant reiterated the assistance offered in the relocation process and the issues with multigenerational households. None of the adult non-dependent children were invited to this meeting. This is borne out by "FA18",[12] the minutes of the meeting, which records that the employees and ex-employees and their spouses were in attendance, except the 18th Respondent. The minutes of the meeting marked "FA 18" records that the eviction process in terms of ESTA was explained to the attendees. The occupiers in attendance submitted that their children have nowhere else to go and that the Municipality is obliged to provide accommodation. There is no evidence that

[12] Annexure "FA18" at page 125 of the Founding Affidavit.

the adult non – dependent children were invited to make any representations prior to the alleged termination of the right to occupy.

[32] On 23 May 2018 another meeting was held with the Applicant, the employees and ex-employees and their spouses to discuss the same issues. Present at the meeting and relevant to these proceedings was the 1st, 5th, 9th, 10th, 13th, 15th, 16th, 19th, 21st and 22nd Respondents. The 2nd and the 18th Respondents were absent. The adult children were not at this meeting. No suggestions to resolve the issue were received from the occupiers in attendance and the Applicant avers that it was simply anticipated that an eviction application must be launched.

[33] The minutes of this meeting, attached as annexure "FA 19"[13] to the founding affidavit, allude to the contents of a "final notice" dated 30 April 2018. This notice provides, as recorded in the minutes of the meeting, that "you are in the circumstances informed that your rights to occupy the property, as well as all such persons who might occupy the property through you, are herewith cancelled. You are further called upon to vacate the property by no later than 31 May 2018". The "final notice" was the notice of termination dated the 30 April 2018 and was not attached to the founding affidavit. I will return to this issue when I deal with the supplementary affidavit which was handed in by the Applicant at the outset of the hearing.

[34] At this meeting, the attendees acknowledged that they understood the meaning of the notice, but that they are not willing to vacate by 31 May 2018 unless they find suitable alternative accommodation. It is recorded that should the Respondents fail to vacate by 31 May

[13] Annexure "FA19" at par 34, page 127 of the Founding Affidavit.

2018, the Applicant may proceed with an eviction application. A representative for the Respondents noted that the occupiers cannot approach the Department of Rural Development and Land Reform until they receive a copy of the eviction notice, and noted that some of the Respondents have been on the Municipality's waiting list for housing for many years.

[35] The Applicant avers that there has been a breakdown of the relationship due to the Respondents' conduct. The Applicant avers that it has informed all parties with whom it has an agreement that they are in breach of these agreements and they failed to remedy the breach, despite being given an opportunity to do so.

[36] In amplification, the Applicant details the circumstances on the property. These are, briefly, that the property is small and is not an expanse of vast land; that the cottages which are occupied are suitable only for a single family unit; that the Applicant believed that the cottages were unsuitable for occupation on taking transfer of the property; that the cottages are in a state of disrepair; that the sewerage system on the cottages is inadequate for the amount of people occupying these structures; that it has to bear an increasing financial burden for services and maintenance; that the occupiers disregard access routes and as a result of uncontrolled access, there have been issues with theft and damage to property on the farm; that there is habitual abuse of alcohol which has led to public violence; that the circumstances on the farm directly impacts on the Applicant's business and that the Applicant is in danger of losing its trade sector accreditation.

Compliance with ESTA

[37] In determining whether to grant an application for the eviction of occupiers in terms of ESTA, there must be compliance with section 9(2) of ESTA. This section provides as follows –

> "(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—
>
> (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."

[38] Relevantly, the Applicant must therefore prove that (i) the occupier's right of residence has been terminated in terms of section 8; (ii) the conditions for an eviction in terms of section

10 or 11 (depending on the date on which the occupier became such in terms of ESTA) are met; and (iii) the section 9(2)(d) notice was served on the relevant parties within the prescribed time period. I will deal with compliance with these requirements in turn.

Termination of residence

[39] Section 8(1) of ESTA provides that –

> "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."

[40] At the outset of this enquiry, it must first be established whether all the occupiers' rights of residence were, in fact, terminated. Amidst the Applicant's detailed accounts of several

meetings and notices held to discuss the housing agreements, there is no allegation in the founding affidavit that the occupiers' right of residence was formally terminated.

[41] The only reference to the formal termination of the right of residence is a castaway in annexure "FA 19", being the minutes of a meeting held on 23 May 2018 with the Applicant, the employees and ex-employees and their spouses. [14] It is only in this meeting that reference is made to a "final notice" dated 30 April 2018, which cancels the right of occupation of unidentified occupiers and "all such persons who might occupy the property through them".

[42] Throughout the founding affidavit, the attached notices, letters and minutes of meetings, the adult non-dependent children were not regarded as occupiers in their own right, instead, they occupied through their occupier parent. In argument, counsel for the Applicant correctly conceded that the adult non-dependent children are occupiers in their own right, in accordance with section 3(4) of ESTA. They have "continuously and openly resided on land for a period of one year" and are presumed to have consent unless the contrary is proven.

[43] The Applicant erroneously seems to regard only the employees and ex-employees as occupiers in terms of ESTA. It is unclear from the founding affidavit whether the Applicant considers the spouses of the employees and ex-employees as occupiers in their own right in terms of ESTA, which they indeed are.[15] The Applicant therefore erroneously argues that the

[14] Annexure "FA19" at page 128 of the Founding Affidavit. "6. Legal representative of the owner emphasises that the final notice dated 30 April 2018 states as follows: " You are in the circumstances informed that your rights to occupy the property, as well as all such persons who might occupy the property through you, are herewith cancelled . You are further called upon to vacate the property by no later than 31 May 2018".
[15] See a full discussion on this issue in *Klaase and Another v van der Merwe N.O. and Others* [2016] ZACC 17.

right of all other occupiers to occupy are derived from the employees' or ex-employees' right to occupy. This is incorrect. The adult non-dependent children are occupiers in their own right and cannot have their right of residence terminated by proxy through their parent(s). Their right of residence must be terminated separately and directly in accordance with section 8 of ESTA.

[44] The Applicant failed to make a direct averment in its founding affidavit and attached annexures that the occupiers' rights of residence were terminated in accordance with section 8(1) of ESTA.

[45] I turn to the supplementary affidavit that was handed in at the outset of the hearing. The deponent to the supplementary affidavit was the Applicant's attorney, Mr Martin Oosthuizen. The reason for the filing of the supplementary affidavit at the hearing proffered by counsel for the Applicant from the bar is "the document that was not attached to the founding affidavit, M'Ladies, was the notice of termination. It was the call for representations that had been attached but then the subsequent notice of termination dated 30 April 2018 was not." Counsel for the Respondents had no objection to the handing in of the supplementary affidavits.

[46] In the supplementary affidavit the following is stated: "Regarding annexures 'A' and 'B', to the Supplementary Affidavit of Martin Oosthuizen, dated 30 April 2018, please find attached hereto, marked as annexure 'MO4', English and Afrikaans notices dated 30 April 2018 and their respective corresponding sheriff's proof of service dated 30 April 2018. Said notices were delivered to the employee Respondent and the spouses of said employee

Respondents." [16] The Applicant further submitted that throughout these proceedings it has only attached exemplars of each document in order to avoid prolixity and to avoid the record becoming overburdened.

[47] The termination of an occupier's right of residence in accordance with section 8 of ESTA is an important procedural requirement and a failure to do so would be dispositive of a matter. It is trite that an Applicant must make out its case in the founding affidavit (*National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*)[17]. The case in the founding affidavit is the case which the respondent is called upon to meet. An applicant must stand or fall by its petition and the facts alleged therein (*Director of Hospital Services v Mistry*)[18]. It is important to bear in mind the principle set out in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*[19]

> "Regard being had to the function of affidavits; it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof." (my underlining)

[48] The supplementary affidavit must be read with paragraph 34 of the founding affidavit where the Applicant states:

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[16] Supplementary affidavit at para 5.4.
[17] 2008 (5) SA 339 (SCA) at 349 A – B.
[18] 1979 (1) SA 626 (A) at 635H – 636D.
[19] 1999 (2) SA 279 (T) at 324F-G.

"34. Thereafter a further meeting was called by the Applicant's attorneys and was held on the 23 May 2018. A copy of the minute of this meeting is attached hereto marked "FA19".

'34.1 As is apparent, all the employee respondents and their spouses were present with the exception of the second respondent and the nineteenth respondent [eighteen respondent], although the spouse of each parties was indeed in attendance.

34.2 Also in attendance were four persons from the Drakenstein Civics who were there on behalf of the respondents.

34.3 There was once again a discussion of the process and notices to date and the Act in general.

34.4 The respondents were urged to obtain legal representation.

34.5 Afrikaans copies of the Act [ESTA] were handed out.

34.6 It was apparently noted by a representative of the respondents that there were having difficulty approaching the twenty-Ninth respondent until an eviction application was actually received.

35. I was present at the meeting referred to above and confirm the correctness of the minutes.

36. Once again, at this second meeting, no constructive suggestions were received from the respondents and essentially it seemed to be simply anticipated that an eviction application must be launched in due course whereafter the respondents would seek the assistance of the relevant organs of state.

37. It is accordingly submitted that the applicant has gone well beyond what could possibly be expected of it either in law or even simple humanity in attempting to engage with and assist the respondents in resolving this impasse. Unfortunately, the same cannot be said of the respondents. The attitude of the respondents is and remains that they can only be made to relocate from the property once they are evicted from same by order of court, leaving the applicant with no alternative but to ask for such relief."[20]

[20] Founding affidavit at pages 51 and 52.

[49] Nowhere in the founding affidavit is any allegation made that the employee and ex-employee and their spouses rights of residence were terminated. Similarly, no allegation was made in the founding affidavit that the adult non-dependent children's right of residence was terminated. Paragraph 34 references annexure "FA19"[21], being the minutes of a meeting held on 23 May 2018 with employees and ex-employees and their spouses, except the 2nd and 18th Respondents. In this minute there is a reference to a final notice dated 30 April 2018 and an extract from the letter dated 30 April 2018 in which it is stated that "your rights to occupy the property, as well all such persons who might occupy the property through you, are herewith cancelled." The reference to "FA19" in the founding affidavit was in relation to the attempts the Applicant had made to engage with the employee and ex-employee Respondents and their spouses and a call for them to make representations. There is no allegation in the founding affidavit that the Applicant terminated the employee and ex-employee occupiers' right to reside and in support thereof omitted to attach the annexure dated 30 April 2018. Counsel for the Applicant rightly saw this difficulty and attempted to cure same by filing a supplementary affidavit. The difficulty for the Applicant is that there is no allegation in the founding affidavit to support the annexures attached to the supplementary affidavit. There is no reference in the founding affidavit to the notice on 30 April 2018. This notice can only be gleaned from the minutes of the meeting of 23 May 2018. Having regard to the *Swissborough* decision I am satisfied that, in so far as the employee and ex-employee occupiers and their spouses are concerned, the Applicant has not made out its case in the founding affidavit. Similarly, there is no allegation in the founding affidavit that the adult non-dependent children's right to occupy was terminated.

[21] Founding affidavit at page 127.

[50] Turning to two factors set out in section 8(1) of ESTA as to whether the termination is just and equitable, I consider sections 8(1)(a) and 8(1)(e) particularly. They provide as follows –

> "(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;…
>
> (*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."

[51] The Applicant, in great detail and repeatedly, sets out the content of the housing agreement entered into by and between the Applicant and the employee and ex-employee occupiers. This agreement, which prohibits adult non-dependents from occupying the property, is the agreement on which the Applicant relies and which it claims was breached by the employee and ex-employee occupiers.

[52] This housing agreement, the Applicant appears to aver, is applicable to all occupiers, including the adult non-dependents. It is clear that the adult non-dependents are occupiers in their own right, in accordance with section 3(4) of ESTA.

[53] As occupiers in their own right, the adult non-dependent children enjoy full protection under ESTA. The terms of an agreement entered into only by the adult non-dependent children's parents cannot stretch to include the adult non-dependent children.

[54] From the Applicant's detailed accounts of several meetings held and notices sent regarding the housing agreement, it is clear that the adult non-dependents were not present at most of those meetings, nor were most of the notices sent to the employee, ex-employee, their spouses and the adult non-dependants. Apart from a meeting on 29 September 2016, where the Applicant "invited all occupiers", it is unclear whether the adult non-dependents were invited to the other meetings. In my view it is clear that the adult non-dependent occupiers were not granted an effective opportunity to make representations before the decision was made to terminate their right of residence. They were not given the direct opportunity to make representations as occupiers. There is therefore no compliance with section 8(1)(e) of ESTA.

[55] A separate issue in terms of section 8 which the Applicant fails to deal with in its founding affidavit is the circumstances of the 12th and 15th Respondents, who are 61 and 66 years old, respectively. Section 8(4) of ESTA provides as follows –

> "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."

Section 10(1)(a) of ESTA provides that –

"(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."

Section 6(3) of ESTA provides that –

"(3) An occupier may not—

(*a*) intentionally and unlawfully harm any other person occupying the land;

(*b*) intentionally and unlawfully cause material damage to the property of the owner or person in charge;

(*c*) engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or

(*d*) enable or assist unauthorised persons to establish new dwellings on the land in question."

[56] The Applicant fails to set out which of the section 6(3) factors apply to the 12th and 15th Respondents. During argument, counsel for the Applicant submitted that the Applicant was no longer proceeding with the evictions of the 12th and 15th Respondent. It must follow, based on the Applicant's case, that the 12th Respondent's spouse, and adult non-dependents, i.e. the 13th and 14th Respondents, occupy through the 12th Respondent. If the Applicant is not pursuing the

eviction of the 12th Respondent, it should not do so against the 13th and 14th Respondents. Similarly, this applies to the 16th and 17th Respondents equally. But if I am wrong, the Applicant has not afforded the 13th, 14th, 16th and 17th Respondents the opportunity to make representations. This applies to all the adult non-dependent children.

Compliance with sections 10 and 11 of ESTA

[57] The Applicant fails to set out which occupiers are section 10 occupiers (occupier on 4 February 1997) and which are section 11 occupiers (occupier after 4 February 1997). The Applicant appears to rely on section 10(1)(b) and 10(1)(c) in seeking the eviction of the occupiers. Although this is not directly stated in the founding affidavit, it would appear that the averments made tend toward this section. It provides as follows –

> "(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if—
>
> > (*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".

[58] The Applicant cannot simply rely on the same provisions of ESTA, or the same argument, when seeking the eviction of occupiers in terms of section 11. The requirements for eviction in each section are particular and must be met even if overlapping considerations may

arise in a given cases. There cannot be a 'one-size-fits-all' approach, which the Applicants appear to take in seeking the eviction under section 10 and section 11.

Striking out application

[59] I turn to the striking out application. The application to strike out is devoid of any particularity. The Respondents have not identified any of the relevant paragraphs it relies on in support of its application to strike out. In my view there is no case made out by the Respondents and the application to strike out must fail.

Conclusion

[60] The Applicant has failed to comply with the provisions of section 9(2) of ESTA and an eviction order cannot be granted. For this reason there is no need to deal with the counterclaim because I did not deal with the merits on which the declarators are sought.

[61] In the result I make the following order:

1. The application for eviction is dismissed.
2. The application to strike out is dismissed.
3. No order for costs is made in line with the usual practice of this Court.

PP

CARELSE J

Judge

Land Claims Court

APPEARANCES

For the Applicant:

Adv L F Wilkin SC instructed by Oosthuizen & Co

For the First to Twenty Sixth Respondent: (Save for the Second and Third Respondents)

Mr A Mahomed, Ashraf Mahomed Attorneys

For the Twenty Seventh and Twenty Eighth Respondent:

Adv K Pillay SC instructed by Van der Spuy and Partners