OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Case No.: **LCC162/2017**

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

22/02/2018
DATE

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SIGNATURE

Heard: 14 February 2018
Delivered on: 22 February 2018

In the matter between:

DAVID JANUARIE	First Appellant
KATRINA JANUARIE	Second Appellant
JO ANNE JANUARIE	Third Appellant

and

JOHAN BOTMA N.O.	Respondent

JUDGMENT delivered **22 FEBRUARY 2018**

MEER J.

Introduction

[1] This is an appeal against the eviction of the First Appellant in terms of the Extension of Security of Tenure Act 62 of 1997 ("ESTA") from a property

known as Shalva farm, Worcester ("the farm"), which is owned by the Botma Family Trust ("the Trust"). The eviction order was granted in the Worcester Magistrate's Court on 28 March 2017.

[2] The Respondent, who is a trustee of the Trust, cross-appeals against the Court *a quo's* dismissal of applications for the eviction of the Second and Third Appellants, being the First Appellant's wife and daughter, for the reason that they were occupiers in their own right.

Background Facts

[3] The First Appellant began working on the farm as a general worker in 2005. In 2009 he was provided with a written employment contract. Annexed to this was a housing agreement which recorded, *inter alia,* that the authorised residents of the housing to be provided to the First Appellant included the Second and Third Appellants. Thereafter on 3 June 2011 the Trust and the First Appellant concluded a separate fixed term lease agreement, regulating the housing provided to the First Appellant and his family on the farm. Clause 4 of the agreement records that the First Appellant and his "onmiddellike familie" would be entitled to use the house for residential purposes.

[4] The Respondent is a trustee of the Trust. His founding affidavit states that the First Appellant handed in his written resignation on 27 January 2015 and goes on to record the reason for his resignation as: "...ek oorweeg beter werk alternatiewe by ander maatskappy". The First Appellant's answering affidavit disputes the voluntariness of his resignation and provides a detailed account of the facts and circumstances giving rise thereto. He explains that he and other workers were called in by the farm owner on 27 December 2014 and required to undergo breath alcohol testing. They had been on holiday during the previous 2 days over the festive period and the First Appellant had indulged in over consumption of alcohol. The First Appellant candidly states he was not

surprised that he was tested to be under the influence of alcohol. He was charged for this transgression, a disciplinary enquiry was held and the First Appellant was found guilty of being under the influence of alcohol.

[5] On 27 January 2015 the Respondent's brother asked the First Appellant to sign a resignation letter. According to the First Appellant he signed the letter involuntarily and under duress. His answering affidavit states that at that stage he had been out of work for 2 weeks and was unable to access his UIF benefits due to the refusal of the Respondent to sign the necessary documentation. He did not legally challenge the termination of his employment, because he did not have the finances to do so. This version of the First Appellant, detailed in his answering affidavit, has simply not been dealt with by the Respondent in his replying affidavit, let alone disputed.

[6] Thereafter on 24 March 2015 the Trust gave the First Appellant notice to vacate the farm by 30 April 2015. Eviction proceedings were instituted in the Worcester Magistrate's Court on 3 July 2015.

Discussion

Was the Court *a quo* correct in finding that the Second and Third Appellants are occupiers and refusing their eviction for this reason?

[7] I note at the outset that whilst the Respondent challenges the finding of the Court *a quo* that the Second and Third Appellants are occupiers as defined in Section 1 of ESTA, the founding affidavit at paragraph 3.2 states:

> ". . .al 3 Respondente is ook okkupeerders soos bedoel in Artikel 1 van die Wet op Uitbreiding van Sekerheid van Verblyfreg, 1997 soos gewysig . . . "

Contrary to this statement, the argument on behalf of the Respondent was that they are residents whose right to reside flows from the status of the First Appellant as occupier.

[8] The question as to whether a spouse and family members who reside with an occupier (who has been granted consent to reside), have the status of occupiers under ESTA, or whether they have the lesser status of mere residents occupying under the household head occupier, has been dealt with comprehensively by the Constitutional Court in *Klaase and Another v Van Der Merwe NO and Others* 2016 (6) SA 131 (CC). *Klaase* recognised that the rights of residence of persons like the Second and Third Appellants derive from consent, flowing from the combined operation of Sections 3(4) and 3(5) of ESTA. At paragraph 59 of *Klaase*, explaining these subsections respectively, the Court said:

> "...ESTA provides that for the purpose of civil proceedings in terms of ESTA, a person who has continuously and openly resided on land for a period of (a) one year shall be presumed to have consent to do so unless the contrary is proved and (b) three years shall be deemed to have done so with the knowledge of the owner or person in charge."

The Court went on to state, at paragraph 66, that it was demeaning to subordinate the rights of Mrs Klaase, the person who had openly and continuously resided on the farm in that case, to those of her husband. The Court found that she was an occupier in her own right entitled to the protection of ESTA.

[9] So too in respect of the Second and Third Appellants who have continuously and openly resided on the farm for over three years. Post *Klaase* they can no longer be regarded as mere residents who occupy under the household head. They are occupiers in terms of Sections 3(4) and 3(5) of ESTA whose rights of residence stemmed from consent.

[10] The stance of the Respondent, that *Klaase* was not applicable on the basis that it is distinguishable from the facts of the present case, cannot be sustained. The central issue in both *Klaase* and the present matter, is whether the spouse and family members of the person who was granted consent by the farm owner

to occupy the farm, were occupiers as defined in ESTA. The Constitutional Court has with certainty pronounced on the status of persons like the Second and Third Appellants and this Court is bound by the principle of *stare decisis* to apply the principle established by *Klaase*. In the face of the binding principle, factual differences between the two cases are immaterial, given that in both cases Sections 3(4) and 3(5) consent under ESTA applies. There is simply no justification for distinguishing *Klaase* from the facts of the present case. See the unreported judgments of *DJ Wium and Others* LCC 218/2016 delivered on 27 November 2017, and *Goedverdiend Plase (Pty) Ltd & Others v W Andrews & Another* at paragraph 18 LCC 232/2017 delivered on 22 February 2018.

[11] As the rights of residence of the Second and Third Appellants stemmed from consent, such rights fell to be terminated in terms of Section 8(1) of ESTA, which provides as follows:

> "**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."

[12] There is no evidence that the rights of residence of the Second and Third Appellants were terminated in accordance with Section 8(1) of ESTA. In the

absence of a lawful termination of their rights of residence in terms of Section 8(1), there was no basis for the granting of an eviction order against them. The fact that accommodation may be available to them on a neighbouring farm, as contended for the first time in the Respondent's replying affidavit, as appears more fully below, did not exempt the Respondent from complying with the requirements of Section 8(1), for the termination of their residence.

The applicability of Section 6(2)(d) of ESTA and the right to family life

[13] Section 6(2)(d) of ESTA recognises the right of an occupier to family life in accordance with the culture of that family. The Section states, *inter alia,* that an occupier shall have, balanced with the rights of the owner or person in charge, the right to family life in accordance with the culture of that family.

[14] In *Hattingh and Others v Juta* 2013 (3) SA 275 (CC), the Constitutional Court at paragraph 35 gave content to this right. There it was stated that the purpose of the conferment of the right, was to ensure that despite living on the land of others, vulnerable persons would be able to live a life as close as possible to the life they would lead if they lived on their own land, having regard to the land owner's rights. At paragraph 37 the Court said that if the occupier were to live with one or more of their children, or other members of the extended family, and this would not result in any injustice or unfairness and inequity to the owner of the land, the occupier would be entitled to live with those members of his or her family.

[15] Applying the principle in *Hattingh*, there is no evidence that if the First Appellant, the spouse of the Second Appellant and father of the Third Appellant, continued living with his family, this would result in an injustice to the Respondent. In contrast, as submitted by Mr Magardie for the Appellants, the eviction of the First Appellant would result in the family being split up and an impairment of the Second Appellants right to human dignity. I am inclined to

agree that the Court *a quo* erred in granting an eviction order against the First Appellant for these reasons.

Were the requirements for the granting of an eviction order against the First Appellant satisfied?

[16] On the Respondent's own version it is clear that the basis for the termination of the First Appellant's right of residence was the lease agreement, which the Respondent maintains was concluded "afsonderlik van enige werksverhouding . . . wat tussen die partye mag bestaan". This being so, the First Appellant's right of residence arose not solely from an employment contract, but from the lease agreement. In the circumstances, the requirements of Section 8(1) of ESTA had to be complied with for the termination of his right of residence and not the requirements of Section 8(2)[1] thereof, on which the Respondent relied. The latter section applies only in respect of an occupier whose right of residence stems solely from an employment contract. This being so, the First Appellant's right of residence could only have been lawfully terminated if such termination was just and equitable, having regard to the factors listed in Section 8(1)(a) to Section 8(1)(e) of ESTA.

[17] **Compliance with Section 8(1)(a):**

17.1 Compliance with this subsection requires a consideration of the fairness of the lease agreement relied upon by the Respondent. This agreement contains a standard termination clause, at paragraph 9, providing for termination of the agreement on seven days' notice, in which event the lessee is required to vacate the property within 30 calendar days. The lease thus contains no provision for the lessee to be heard or to make representations before the lessor cancels the lease in terms of clause 9. Clause 10 moreover purports to exclude the lessor

[1] Section 8(2) states: "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."

from the responsibilities of an employer who has granted consent to an employee to reside on land owned by the employer. Mr Magardie, in my view, correctly submitted that such a clause is arguably a waiver of an occupier's rights, which is prohibited by Section 25(1) of ESTA.

17.2 A lease agreement such as this, which purports to deprive an occupier of the procedural and substantive protections of ESTA, cannot be fair, as is required by Section 8(1)(a) of ESTA.

[18] **Compliance with Section 8(1)(b):**

18.1 Compliance with Section 8(1)(b) requires consideration to be given to the conduct of the parties giving rise to the termination of the right of residence. It is disquieting that the reasons for termination in the answering affidavit of the First Appellant, reasons which played no part whatsoever in the disciplinary enquiry, were not engaged with in reply. The criticism that the Respondent failed in his duty to be candid in his founding affidavit, regarding the conduct of the parties giving rise to the termination of the First Appellant's right of residence, is, in the light hereof, understandable. The Respondent simply failed to disclose any of the undisputed facts pertaining to the First Appellant's version for the termination of his employment as detailed in his founding affidavit.

18.2 I am inclined to agree that these facts demonstrate that the disciplinary hearing which preceded the First Appellant's dismissal, was procedurally and substantively unfair.

[19] **Compliance with Section 8(1)(c) of ESTA:**

19.1 Section 8(1)(c) requires consideration to be given to the interests of the parties and their comparative hardships, if the right of residence were to be terminated. The Respondent states that he requires the house for

other workers and that the business of the farm is being prejudiced due to permanent workers not having access to housing on the farm. A probation officer's report states he was informed by the land owner that he is losing business, as he is renting some of his houses to make business. The probation officer concludes that an eviction order will effectively leave the family homeless.

19.2 As against this an affidavit by one Wiets Botes, in annexure "A" to the Respondents replying affidavit, states that the First and Second Respondents currently work for him on his farm in Worcester. Mr Botes states that he has accommodation for them which he has offered on more than one occasion. The Appellants have, however, not accepted this accommodation. Mr Joubert, for the Respondent, submitted that it is highly opportunistic for the Appellants to want to reside on the Respondent's farm in the circumstances.

19.3 Whilst it is trite that a party cannot make out a case in reply, and the Appellants were not given an opportunity to respond to this averment, they did not apply for it to be struck. Mr Magardie submitted, with reference to the record, that this averment was disputed in argument.

[20] The availability of alternative accommodation for the Appellants (about which I am unable to make a finding from the record), could well have tipped the comparative hardship consideration in favour of the Respondent. I note, however, that even if such alternative accommodation were to have been available, this factor per se would not have rendered the termination of their right of residence just and equitable under Section 8(1) of ESTA, absent compliance with substantial and procedural fairness. For, as was stated by the Constitutional Court in *Snyders and Others v De Jager and Others* 2017 (3) SA 545 (CC) at paragraph 56:

> "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 s 8(1)(e)."

[21] Section 8(1)(d) of ESTA has no application, given the absence of an expectation of the renewal of any agreement

[22] **Compliance with Section 8(1)(e):**

There is no evidence to suggest that the First Appellant was afforded an effective opportunity to make representations before his right of residence was terminated, as is required by Section 8(1)(e) of ESTA. The requirement of procedural fairness alluded to in Snyders supra, was thus not complied with. The disciplinary hearing fell far short of this standard, in my view.

[23] The Respondent thus failed to establish that the termination of the First Appellant's right of residence was just and equitable, as required by Section 8(1) of ESTA.

[24] For all of the above reasons, I come to the view that the Court *a quo* erred in concluding that the granting of an eviction order against the First Appellant was just and equitable. The Court a quo, in view of the reasons stated above, correctly dismissed the application for the eviction of the Second and Third Appellants. The appeal must thus be upheld, and the cross-appeal dismissed.

[25] I grant the following order:

1. The appeal is upheld. The order for the eviction of the First Appellant granted in the Worcester Magistrate's Court on 28 March 2017 is set-aside.

2. The cross-appeal is dismissed.

YS MEER
Acting Judge President
Land Claims Court

I agree and it is so ordered.

S POTTERILL
Judge
Land Claims Court