OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

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

Case No.: **LCC232/2017**
Magistrate's Court Case Number: **193/2015**

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

22/02/2018 .....
DATE SIGNATURE

Heard: 12 February 2018
Delivered on: 22 February 2018

In the matter between:

GOEDVERDIEND PLASE (PTY) LTD	First Appellant
CHRISTOFFEL SLABBERT VAN WYK N.O.	Second Appellant
BAREND HERMANUS PIETERSE N.O.	Third Appellant
SAREL JAKOBUS PIETERSE N.O.	Fourth Appellant
STEFAN LE ROUX N.O.	Fifth Appellant

and

WILLEM ANDREWS	First Respondent
ESTELLE ANDREWS	Second Respondent

JUDGMENT delivered **22 FEBRUARY 2018**

MEER J.

Introduction

[1] The Appellants appeal against a judgment of the Porterville Magistrate's Court dated 12 June 2017, which dismissed an eviction application brought in terms of the Extension of Security of Tenure Act 62 of 1997 ("ESTA") by the Appellants against the Respondents. The application sought the eviction of the Respondents, a farm worker and his wife, from the farm Onverwacht, in the Tulbagh district, Western Cape ("the farm"), which is owned by the Onverwacht Trust ("the Trust"). The grounds of appeal, in essence, are that the Court *a quo* erred in finding that the evictions would not be just and equitable, regard being had to the specified requirements for an eviction in terms of ESTA.

[2] The Respondents challenge the appeal on the following 3 grounds:

1. Mrs Andrews, the Second Respondent, is an occupier in terms of ESTA and entitled to the protections set out therein. No substantive grounds for the termination of her right of residence were alleged and accordingly her eviction was correctly refused.
2. The Court *a quo* correctly concluded that the termination of the rights of residence of the First and Second Respondents was not just and equitable as required by Section 8(1) of ESTA.
3. The granting of the eviction order without the provision of emergency accommodation would result in the Respondents being rendered homeless, a scenario which is not just and equitable as required by Section 11(2) of ESTA.

Background Facts

[3] The First Respondent, aged 48, and his wife, the Second Respondent, aged 46, live in a house on the farm with their 6 daughters aged 28, 27, 22, 17, 10 and 6, respectively. The Second to Fifth Appellants are the trustees of the

Trust and the First Appellant is the company responsible for the farming activities on the farm.

[4] The First Respondent began working on the farm in October 2005 and he concluded an employment and housing agreement with the previous owner. Flowing therefrom, he was allocated a house on the farm after commencing employment. Shortly thereafter the Second Respondent was employed by the Appellants as a teacher at the crèche on the farm, earning R480.00 per week. She is still so employed. The Respondents' 2 eldest daughters have worked on the farm at some stage as seasonal workers.

[5] The housing agreement concluded between the First Respondent and the previous owner permitted the First and Second Respondents and their children to occupy a house on the farm. Clause 5.1 thereof provided that in the event of the termination of the employment contract of the head of the household the occupants would be obliged to vacate the house within a month of receiving notice to vacate. Clause 5.2 of the housing agreement provides:

> "In die geval van be-eindiging van die huishoof se dienskontrak en een van die ander inwoners van die huis is in diens van die onderneming, moet hierdie inwoner op nuut aansoek doen om behuising."

It is the Appellants' stance that the Second Respondent did not have her own right of occupation and that she and her children resided on the farm under the right and title of the First Respondent.

[6] There is a dispute on the papers as to the reasons for the termination of the First Respondent's employment. The Founding Affidavit averred that the First Respondent's employment was terminated on 31 May 2014 ". . . as 'n direkte gevolg van intimidasie en teistering deur die Respondente van die Eerste Applikant se verteenwoordigers en ander werkers namens die Eerste Applikant."

[7] The First Respondent denied this allegation and in his answering affidavit provided a different version of the circumstances leading to his dismissal. According to the First Respondent in March 2014 he was informed that he was no longer required in his post as assistant manager. He was offered a retrenchment package in respect of his 9 years' service and a further R3 000.00 on condition that he vacated the house within 30 days. Alternatively, he could accept the lower paying position of general worker and continue to reside on the farm. The First Respondent rejected the offer. He was thereafter notified that his employment would terminate on 31 May 2014 and that he would be required to vacate the house on that date. The Replying Affidavit does not engage at all with the First Respondent's version pertaining to the reasons for the termination of his employment. The response thereto is in essence a bare denial. The Appellants do, however, engage with the First Respondent's subsequent referral of a dispute to the CCMA flowing from the termination of his employment, as appears from the chronology of events below.

[8] Following his dismissal, the First Respondent applied to the CCMA for condonation for the late referral of his labour dispute. His application was dismissed in September 2014, but he persisted. On 31 July 2014 a notice terminating his residence was delivered to the First Respondent by the Appellants' attorneys. The notice required him to vacate the farm within 14 days. Condonation for the late referral to the CCMA was ultimately refused in February 2015. Thereafter on 29 July 2015 the Appellants instituted eviction proceedings in the Porterville Magistrate's Court and the First Respondent filed his Answering Affidavit on 13 October 2016.

[9] The labour dispute between the parties had at that stage received further attention from the CCMA. The First Respondent referred an unfair dismissal dispute to the CCMA on 10 October 2016, after he learnt that another person had been appointed to the position previously occupied by him, a position

which, according to the Appellants, had become redundant. On 2 November 2016 the CCMA issued a certificate of outcome recording that this dispute remained unresolved as of that date.

[10] The Appellants' stance is that the second referral to the CCMA was not *bona fide*, as the First Respondent had re-referred the matter to the CCMA under a new case number. Had it always been his intention to take the dispute further, it is contended he would have attempted to re-refer the dispute under the same case number. There is thus, according to the Appellants, no *bona fide* pending labour dispute between the parties. It is contended that the First Respondent has misled the CCMA by referring a dispute that was finalised more than 2 years ago in terms of the Labour Relations Act. The Appellants consider the re-referral to be irregular and have sent a letter to the CCMA requesting that the referral be investigated.

[11] The First Respondent denied that the second referral was irregular, and contended that by virtue of the second referral, the eviction proceedings were premature as his labour dispute remained unresolved.

[12] On 18 November 2016 a meeting was held with the Bergrivier Municipality, where the latter explained that no emergency housing plan was currently in place. The Municipality stated it was unable to accommodate the First and Second Respondents. The eviction application was thereafter heard, and dismissed on 12 June 2017, whereafter the Appellants noted an appeal to this Court on 10 July 2017.

Discussion

[13] I commence by considering the first ground of appeal, namely, the contention by the Appellants that the Second Respondent's eviction was incorrectly refused. This requires a consideration of whether the court a quo

was correct in finding that it was not just and equitable to grant an order for the eviction of the Second Respondent. In so doing, regard must be had to her status and family relationships.

[14] The Appellants' stance, that the Second Respondent and her children did not have any independent right to occupy the property, simply cannot be sustained in the light of the Constitutional Court judgment of *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 Respondent and her children, derive from consent flowing from the combined operation of subsections (4) and (5) of Section 3 of ESTA. Discussing these subsections at paragraph 59, the Court acknowledged:

> "...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."

[15] The Court went on to state that it was demeaning to sub-ordinate 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.

[16] So too in respect of the Second Respondent and her children. 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. See also the unreported judgment of *DJ Wium and Others* LCC 218/2016 delivered on 27 November 2017.

[17] Mr Montzinger, on behalf of the Appellants, in argument contended that *Klaase* was not applicable, on the basis, firstly, that *Klaase* is distinguishable from the facts of the present case, and secondly, by virtue of the fact that the contents of the housing agreement entered into with the First Respondent, limited the application of *Klaase*.

[18] These arguments cannot be sustained. Firstly, with regard to distinguishing these facts from those of *Klaase*, as is pointed out by Mr Magardie, for the Respondents, the central issue in both *Klaase* and the present matter is whether the spouse of a person who has been granted consent by the owner to occupy a farm, is an occupier as defined in ESTA. The principle has been firmly established by the Constitutional Court, that such persons are themselves occupiers under ESTA. In the face of the binding principle, factual differences between this case and Klaase are immaterial, given that in both cases there is consent in terms of Sections 3(4) and 3(5) of ESTA.. The Constitutional Court has with certainty pronounced on the status of persons like the Second Respondent, and her children, and this Court is bound by the principle of *stare decisis* to apply the principle established by *Klaase*.

[19] The second leg of the Appellants' submissions regarding the applicability of *Klaase* is premised on the contention that sanctity of contracts, and the principle of *pacta sunt servanda,* overrides the Second Respondent's attempt to claim a different right outside the housing agreement.

[20] This argument too, cannot be sustained. For, as was pointed out by Mr Magardie, the principle *pacta sunt servanda* is subject to Constitutional control. The rights conferred by ESTA are not subordinate to contractual rights, but are rights which stem from Section 25 of the Constitution. They are in addition real rights in land which cannot be diminished or destroyed by contract.

[21] The assertion that the Second Respondent has waived her rights under the statutory provisions of ESTA can have no application in the light of Section 25 of ESTA, which expressly renders void any waiver by an occupier of her rights in terms of ESTA, unless permitted by the Act or incorporated in a Court order. This is clearly not the case here.

[22] There is no evidence to rebut the presumptions in Sections 3(4) and 3(5) that the Second Respondent resided on the farm with the consent and knowledge of the owner. The failure of the Second Respondent to apply, in terms of the housing agreement, for housing rights to be accorded to her after the termination of the First Respondent's employment, does not detract from her consent to reside in terms of Sections 3(4) and 3(5) of ESTA.

[23] As the Second Respondent's right of residence as an occupier flowed from consent, the termination thereof had to occur in terms of Section 8(1) of ESTA, the section applicable to persons whose right of residence flowed from consent. The section states:

> "**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."

[24] The termination of the Second Respondent's residence could not have been just and equitable in terms of Section 8(1). As a loyal longstanding crèche employee who had committed no misconduct, the Second Respondent ought to have had an opportunity to be heard before her right of residence was terminated. The same applies to her children. Given these circumstances, the Court *a quo* correctly, in my view, found that it would not be just and equitable to grant their eviction. The comparative hardship to the Second Respondent, a loyal employee who has committed no misdemeanour, who would be rendered homeless were she to be evicted, juxtaposed against that of the Appellants, would in my view tip the scales in her favour. This is a scenario which would not be just and equitable as required by Section 11(2) of ESTA.

[25] In view of all of the above an eviction order against the Second Respondent would not have been just and equitable.

The Position of the First Respondent

[26] As occupiers, the Second Respondent and her children are entitled, in terms of Section 6(2)(d) of ESTA, to the right to family life. 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 a family.

[27] 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, unfairness and inequity to the owner of the land, the occupier would be entitled to live with those members of his or her family.

[28] The Second Respondent's right to family life is thus another relevant factor under Section 8(1) to be considered in deciding if the eviction of the First Respondent would be just and equitable. There was no evidence that the First Respondent's continued residence with his wife and children on the farm, would result in any injustice, unfairness and inequity to the Appellants. I note that any potential hardship to the Appellants, of having an ex-employee living with his family, is minimal in comparison to that of the Second Respondent and her children who would be deprived of their spouse and father respectively. The Second Respondent and her children's right to family life under Section 6(2)(d) of ESTA accordingly entitles the First Respondent to reside on the farm with them.

[29] There is a further reason why, in my view, termination of the residence of the First Respondent would not be just and equitable. In terms of Section 9(2)(a) of ESTA, as a person whose right of residence arose from his employment contract, the First Respondent's right of residence had to be terminated in terms of Sections 8(2) and 8(3) of ESTA. In terms of Section 8(3) any dispute over whether his employment has terminated has to be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when the dispute has been determined in accordance with that Act. From the evidence, and in particular the contents of the Supplementary Affidavit filed on behalf of the First Respondent, it is clear that the dispute pertaining to the termination of his employment has not been determined in accordance with that Act. The Appellants themselves have launched an

investigation into this aspect. The fact that a new referral under a different case number was made to the CCMA, pertaining to the circumstances of the termination of the First Respondent's employment, does not detract from this. This being so, the mandatory requirements specified at Section 9(2)(a) of ESTA for the granting of an order of eviction, had not been satisfied.

[30] In view of all of the above the appeal cannot succeed. In keeping with the practice of this Court, not to grant costs (save in exceptional circumstances of which I find none in the present case), this matter being in the genre of social action litigation, there shall be no order as to costs.

[31] I accordingly order as follows:

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

Y S MEER
Acting Judge President of the
Land Claims Court

I agree and it is so ordered.

S POTTERILL
Judge of the Land Claims Court