



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

**CASE NO: LCC25R/2019**

**MAGISTRATES COURT CASE NUMBER: 111/2018**

**In Chambers: Acting Judge President Meer**

**Delivered on: 16 October 2019**

In the review proceedings in the case between:

**IZAK WILHELMUS VAN DER MERWE N.O**

**First Applicant**

In his capacity as trustee of the PRC Trust

**OHNA RENETTE VAN DER MERWE N.O**

**Second Applicant**

In her capacity as trustee of the PRC Trust

**JESSE IRINE VAN DER MERWE N.O**

**Third Applicant**

In her capacity as trustee of the PRC Trust

and

**DINA HANEKOM**

**First Respondent**

**CEDERBERG MUNICIPALITY**

**Second Respondent**

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JUDGMENT

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**MEER AJP**

**Introduction**

- [1] This matter, together with four others<sup>1</sup> comes before me on automatic review in terms of section 19(3) of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”). On 26 August 2019 an order was granted in the Clanwilliam Magistrates Court sitting at Citrusdal evicting the First Respondent and all those residing through her, from Montana Farm, being Portion 5 of farm 614, Cedarberg Municipality, (“the farm”) owned by the PRC Trust of which the Applicants are trustees.
- [2] The First Respondent is an “occupier” as defined in ESTA and she has been residing on the farm since 1977. Her two sons, aged 25 and 20, were born on the farm.
- [3] The Applicants sought and obtained the eviction of the First Respondent and her sons on the grounds that the First Respondent had committed a material breach contemplated in section 10(1) of ESTA in *inter alia* failing to pay rental in terms of a lease agreement; laying unfounded criminal charges against the First Applicant; failing to restrain her dog resulting in the Applicants’ ostriches being killed; trespassing; and illegally gathering and chopping wood. These are general allegations made against all of the Respondents in each of the five cases

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<sup>1</sup> The matter was referred in a batch as Case Nos 110 -114/2008, by the Clanwilliam Magistrates Court on review to this Court. See Judgment in LCC 24R/2019 at paragraphs 1 and 2. The latter judgment was handed down simultaneously with this judgment.

aforementioned sent to this Court on review. In my view, there is not sufficient evidence substantiating why these allegations specifically comply with the requirements of section 10 in relation to the First Respondent in this matter. The Applicants contended also that the termination of the rights of residence was just and equitable in terms of section 8(1) of ESTA. The Court *a quo* did not give reasons for its order. Implicit in its order however is the disquieting and incorrect acceptance notwithstanding the judgment of the Constitutional Court in *Klaase and Another v Van de Merwe N.O and Others* 2016 (6) SA 131 (CC) to the contrary, as referred to below, that the rights of residence of her sons and those living through her on the farm, were dependant on her and that an eviction order against her was competent against them also.

- [4] I am unable to confirm the order for the eviction of the First Respondent on review. Firstly, as aforementioned section 10 of ESTA has not been complied with in relation to the First Respondent. Secondly, there is no evidence on the papers that section 8(1)(e) of ESTA was complied with, in that a fair procedure was followed when terminating her right of residence, including that she was given an opportunity to make representations before the decision was made to terminate her right residence. The section requires the Court to have regard to *“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.”*
- [5] Commenting on section 8(1)(e), the Constitutional Court in *Snyders and Others v De Jager and Others* [2016] ZACC 55 at paragraph 75 held as follows: *“ESTA requires the termination of the right of residence to also comply with the requirement of procedural fairness to enable this person to make representations why his or her right of residence should not be terminated. This is reflected in section 8(1)(e) of ESTA. A failure to afford a person that right will mean that there was no compliance with this requirement of ESTA. This would render the purported termination of the right of*

*residence unlawful and invalid. It would also mean that there is no compliance with the requirement of ESTA that the eviction must be just and equitable.”*

See also *South African National Roads Agency v Jubber and Others*, LCC56/2019, (unreported, delivered 2 October 2019).

- [6] Given the long period that she had resided on the property and the fact that an eviction order would render her homeless and remove her from the farm she had lived on for most of her life, this was clearly a case where there ought to have been an effective opportunity to make representations before the decision was made to terminate the right of residence as envisaged in section 8(1)(e). The allegations of material breaches do not detract from this.
- [7] In view of the above, the failure to comply with section 8(1)(e) does not render the termination of the right of residence just and equitable as required by section 8. On this basis alone the Applicants failed to make out a case for eviction. The eviction order against the First Respondent cannot be confirmed on review.
- [8] In respect of the eviction order against those residing through her, effectively her sons, the Applicants’ stance that they did not have any independent right of residence simply cannot be sustained in the light of the Constitutional Court judgment of *Klaase*. *Klaase* recognised that the rights of residence of persons like the Respondent’s sons derive from consent flowing from the combined operation of section 3(4) and 3(5) 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 the person in charge*”.

- [9] The Court went on to state 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.
- [10] The principle established in *Klaase* applies equally in respect of the Respondent's sons. 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 right of residence stemmed from consent. See also the unreported judgements of *D J Wium and Others* LCC218/2016 delivered on 27 November 2017 and *Goedverdiend Plase (Pty) Ltd and Others v Andrews and Another* [2018] ZALCC 24.
- [11] As their right of residence flowed from consent, the termination thereof had to occur in terms of section 8(1) of ESTA. The Court *a quo* failed to consider any of these factors in relation to them independently of the First Respondent. The order for their eviction accordingly cannot be confirmed.

I order as follows:

1. The order for the eviction of the First Respondent in case number 111/18 by the Clanwilliam Magistrates' Court is set aside.



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**Y S MEER**  
Acting Judge President  
Land Claims Court