



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

CASE NO: LCC 26R/2019

MAGISTRATES COURT CASE NUMBER: 112/2018

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

GERTRUIDA LEWIES

First Respondent

CEDERBERG MUNICIPALITY

Second Respondent

**DEPARTMENT OF RURAL DEVELOPMENT
AND LAND REFORM**

Third Respondent

JUDGMENT

MEER AJP

Introduction

[1] This matter comes before me on automatic review together with four others¹ 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 those residing through her from Montana Farm, being Portion 5 of farm 614, Cedarberg Municipality, owned by the PRC Trust of which the Applicants are trustees.

[2] The First Respondent is an occupier as defined in ESTA and she was born on the farm and has lived there since. Her minor children resides with her on the farm.

¹ 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.

- [3] As in the case with the Respondents in LCC24R-28R/2019, the Applicants sought and obtained the eviction of the First Respondent and her children on the grounds that the First Respondent had committed a material breach as contemplated in section 10(1) of ESTA in *inter alia* failing to pay rental in terms of a lease agreement; aggressive conduct pertaining to water supply leading to criminal complaint; trespassing; cutting trees and unruly dogs. The Applicants contended 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 those living with her were dependant on that of the First Respondent 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. This is firstly because independently of the standard general allegations made against all the Respondents in the batch of cases sent to me on review with her case, there is insufficient evidence that a breach as contemplated at section 10 of ESTA existed specifically in relation to her. Secondly, I am not satisfied that section 8(1)(e) of ESTA was complied with. The subsection 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 the First Respondent 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 therefore be confirmed on review.
- [8] In respect of the eviction order against those residing through her, 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 supra*. *Klaase* recognised that the rights of residence of persons like the First Respondent’s children 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 those residing with the First Respondent. 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 112/18 by the Clanwilliam Magistrates' Court is set aside.



Y S MEER
Acting Judge President
Land Claims Court