Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 12299/2014

APPLETHWAITE FARM (PTY) LTD **Applicant**

v

PATRICK TSHONGWENI **First Respondent**

THEEWATERSKLOOF MUNICIPALITY **Second Respondent**

Court: Judge J I Cloete

Heard: 27 November 2014

Delivered: 12 December 2014

JUDGMENT

CLOETE J:

[1] This matter concerns an application in terms of s 4 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act No 19 of 1998 (*'PIE*) to evict the first respondent, and all who hold title under him, from certain land owned by the applicant in Grabouw, Western Cape. The second respondent does not oppose and for sake of convenience I will thus refer to the first respondent as *'the respondent'.*

[2] The application is opposed on the grounds that: (a) the respondent is protected from eviction in terms of the Extension of Security of Tenure Act 62 of 1997 (*'ESTA'*); alternatively (b) if it is found that ESTA does not apply, and PIE applies, he is not in unlawful occupation because the termination of his employment resulting in the termination of his occupation was discriminatory and unlawful and falls to be set aside. Insofar as those persons who hold title under him are concerned, he contends that both his wife and son have independent rights to occupy the property under ESTA. It is common cause that in addition to his wife and son, various other family members also occupy the property.

[3] The applicant is the registered owner of three portions of agricultural land in the Grabouw area which abut one another and are farmed as a single unit, commonly known as Applethwaite Farm (*'the property'*).

[4] The respondent was employed by the applicant on 1 January 1978, and remained employed, ultimately as a team leader, until his retrenchment in November 2013. The

respondent (and over time, his family) had thus lived on the farm for 35 years when he was retrenched along with a number of other employees. According to the applicant, the retrenchment was for operational reasons. The respondent's tenure is directly dependent upon his continued employment by the applicant. This much is evident from clause 11.1 of his employment contract which reads as follows:

> *'Die werkgewer onderneem om, onderworpe aan beskikbaarheid, gratis huisvesting aan die werknemer te voorsien.'*

[5] The applicant launched these eviction proceedings on 14 July 2014. A special service order was granted on 30 September 2014 and was duly executed. Although there was initially short service, this was effectively cured when the parties agreed to a postponement of the hearing on 7 October 2014 until 27 November 2014, i.e. the date when it came before me: see *inter alia Ngobeni v Unknown Occupier and Others* (an unreported judgment of Dlodlo J in this division under case no 20525/2013 handed down on 19 June 2014) at paras [23] – [25]). The applicant relies on s 4(1) of PIE in support of its *locus standi* to bring the application.

[6] Section 4(1) of PIE confers *locus standi* on an owner or person in charge of land to institute proceedings for the eviction of an unlawful occupier. There is no dispute that the applicant is the registered owner of its own property. S 2 of PIE makes its provisions applicable to all land situated within the Republic of South Africa.

[7] The respondent claimed protection under ESTA on the basis that his income at the time of his retrenchment was R2 766 per month. An *'occupier'* is defined in ESTA as excluding a person using the land in question for his own farming or similar commercial enterprise (which the respondent does not suggest) or a person who has an income *'in excess of the prescribed amount'.* The prescribed amount is defined in regulation 2 of the ESTA regulations (GN R1632 in GG 19587 of 18 December 1998) as:

> *'**Qualifying income***
>
> *2.(1) The prescribed amount for the purposes of paragraph (c) of the definition of "occupier" in section 1(1) of the Act shall be an income of R5 000 per month.*
> *(2) For the purposes of subregulation (1) "income" means –*
> *a. a person's gross monthly cash wage or salary; or*
> *b. where a person earns money –*
> *i. other than in the form of a monthly cash wage or salary, the average monthly amount of such person's gross earnings during the immediately preceding year; or*
> *ii. in addition to a monthly cash wage or salary, such person's gross monthly cash wage or salary together with the average monthly amount of such person's additional gross earnings during the immediately preceding year:*
>
> *provided that remuneration in kind shall not be taken into account.'*

[8] Section 8(2) of ESTA provides that:

> *'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.'

[*"Dismissal"* includes retrenchment in terms of s 189 and s 189A of the Labour Relations Act 66 of 1995].

[9] In *Lebowa Platinum Mines Ltd v Viljoen* 2009 (3) SA 511 (SCA) at para [17] the Supreme Court of Appeal held that the date of determination for ascertaining an occupier's income is:

'…when lawful occupation ceases, i.e. when the permission or right to occupy is withdrawn or ceases (or, if coincident, when the eviction proceedings are instituted).'

[10] In the present matter, it is common cause that, following upon the respondent's retrenchment in November 2013, he was permitted to remain in occupation until 31 March 2014.

[11] Despite the respondent's initial allegation that he earned R2 766 per month, the applicant, in its replying affidavit, demonstrated that this was patently untrue. In a supplementary affidavit the respondent conceded that at the time of his retrenchment he was in fact earning an average of double that amount, i.e. R5 552 per month, excluding any additional earnings or remuneration in kind such as his free accommodation. It is also common cause that on 15 and 16 January 2014 the respondent was paid the full amount of his retrenchment package in the sum of

R340 488, comprised of six weeks notice pay of R8 298, severance pay of R48 407, leave pay of R2 766 and the balance being his accrued pension fund entitlement.

[12] Applying the formula referred to in regulation 2(2)(b)(ii) of the ESTA regulations, the gross amount earned by the respondent during the period 1 April 2013 until 31 March 2014 was thus R103 887 calculated as follows:

Salary April to November 2013	
(R 5 552 x 8 months)	44 416
Severance payment excluding	
pension benefits	59 471
	103 887

[13] This amount of R103 887 divided over 12 months is R8 657 per month. If the pension benefit payment is added the amount is even greater, although I am not inclined to regard the pension payment as gross earnings. The net result is thus that during the year immediately preceding the date upon which the respondent's lawful occupation ceased, i.e. 31 March 2014, his average gross monthly earnings fell above the threshold of R5 000 per month and he is accordingly not an occupier for purposes of ESTA.

[14] I now turn to consider the PIE defence. In a nutshell, the respondent claims that he was forced by the applicant to agree to a retrenchment package which included him

having to vacate the property. He does not take issue with the fairness of the process itself. However he alleges that he was not a member of the representative union, FAWU, at the time and as such it was not authorised to negotiate or conclude any agreement on his behalf.

[15] It is significant that in his initial answering affidavit the respondent made no such allegation. On the contrary, he claimed that FAWU had in fact negotiated the retrenchment deal on his behalf but that he (and certain other employees) were dissatisfied therewith. The relevant paragraphs read as follows:

> *'13. Prior to my retrenchment in September 2013 a meeting was called by "the Union" (The Food and Allied Workers Union FAWU), informing us that they escalated a retrenchment dispute on our behalf to the CCMA for conciliation and arbitration. This was the first time we (the workers) heard of the retrenchment.*
>
> *14. The Union further informed us that the Applicant had no other option but to retrench us, but that they were in the middle of negotiations with the Applicant to mediate a good retrenchment package.*
>
> *15. During October 2013 the Applicants met with all the workers during which they presented a slide show on an overhead projector. In the slide show it was shown that the farm was not making any profit, and many workers had to be retrenched.*
>
> *16. Later during this period another meeting was convened with the Union, where it was explained that the dispute would be finalized at the end of October 2013.*

The Union further informed us that the Commissioner for the CCMA applauded both the Union and the Applicant for their cordial relations.

17. *At the end of October 2013 we were informed by the Union that the CCMA matter was finalized and that the Applicant won the case. The workers were all very angry and stormed out of the meeting. We were not happy with the outcome of the CCMA case as explained to us by the Union, despite this however the Union signed an agreement between themselves and the Applicant on our behalf……...*

22. *I explained to the attorney that all the workers were dissatisfied with the Union agreement for our retrenchment and that I had been living on the farm for 3 decades (35 years) and have refused to sign the letter…….*

50. *It is denied that I entered into an engagement process in respect of my retrenchment with the Applicant; such was initiated on our behalf (workers), and agreed on our behalf.'*

[emphasis supplied]

[16] It was only after the applicant demonstrated that the respondent's initial allegations concerning his monthly gross earnings were incorrect that the respondent, in a supplementary affidavit, alleged that:

'26. The Applicant avers that I was a member of the Union during July 2013, however it is respectfully submitted that during February 2013, I approached Mrs Brown in the office and advised her that I no longer wished to be a member of the Union (FAWU).

> *27. …my* [initial] *refusal to sign* [the retrenchment agreement] *signalled my discontentedness with both the Applicant and the Union.'*
>
> [emphasis supplied. Mrs M Brown is employed as the Payroll Administrative and Support Officer of the applicant.]

[17] The applicant denies that FAWU was not authorised to represent the respondent during the retrenchment process. Further, on the respondent's version, he continued to attend all union meetings after his membership purportedly terminated and, as demonstrated above, was content to allege in his founding affidavit that FAWU had negotiated on his behalf, irrespective of whether he had paid his membership subscription. Although obviously open to him to have done so, he failed to provide details of any communications which he might have had with FAWU regarding the alleged withdrawal of his membership. The only independent evidence is that, as from February 2013, his union subscription was not deducted from his monthly earnings. There is nothing on the papers to indicate that he has taken any steps against FAWU for allegedly misrepresenting him, and his own referral to the CCMA, which was lodged on 9 January 2014 and withdrawn on 13 January 2014, made no mention of this. That referral was in respect of a purported dispute with the applicant, namely that it was withholding payment of his severance package because he did not consent to leave the property and that he was protected under ESTA. The complaint that payment was being withheld can mean nothing other than the respondent believed, and accepted, that the retrenchment package was due to him. He has not repaid the applicant any portion thereof, nor has he tendered payment. A plain reading of his

referral to the CCMA in January 2014 shows that, while he had no difficulty in accepting the severance package, he was not prepared to vacate the property because he believed that he was protected under ESTA.

[18] During argument I was informed that the respondent had again referred the dispute concerning the termination of his employment to the CCMA and that the application for condonation for the late filing thereof (given that such referral was way out of time in terms of s 191(1) of the Labour Relations Act) was set down for hearing on 2 December 2014. I thus arranged with the parties to inform me of the outcome, as both counsel were in agreement that if condonation was refused, that would put an end to the defence of unfair dismissal. On 10 December 2014 I was provided with the CCMA ruling refusing to entertain the condonation application.

[19] The respondent contends that his wife and adult son enjoy independent rights to occupy the property. This was raised for the first time in his supplementary answering affidavit. The respondent's wife, Mrs Veronica Tshongweni, was only ever employed on a temporary basis during the 2005/2006, 2008/2009 and 2010/2011 packing seasons. The applicant has produced these temporary employment contracts. Clauses 14, 15 and 16 respectively each stipulate in terms that *'U sal nie vir behuising op die Plaas kwalifiseer soos uiteengesit in die beleid van die Plaas nie'.* Accordingly, her occupation of the property was solely linked to the fact that she held title under the respondent, whose right of occupation was terminated in terms of the retrenchment agreement concluded.

[20] The applicant has also demonstrated that the respondent's adult son, Mr Sipho Tshongweni, who was employed by the applicant as a spray operator from 5 October 2009 to 6 December 2012, was not only never afforded an independent right of occupation in terms of his employment contract, but was dismissed from the applicant's employment for *inter alia* absenteeism and insubordination. He referred his dispute over his dismissal to the CCMA but on 21 February 2013 entered into a CCMA settlement agreement with the applicant in terms of which the referral was withdrawn. From 10 February 2014 until approximately 10 May 2014 he was temporarily employed by the applicant as a general worker during the harvest season. Clause 30 of his temporary employment contract stipulates that the provision of free accommodation lies within the sole discretion of the applicant. It is not suggested that any agreement relating to the provision of free accommodation was concluded. During this temporary employment he was given a written warning for under performance. Accordingly, Mr Sipho Tshongweni's occupation of the property was also solely linked to the respondent's employment.

[21] It is common cause that in addition to the respondent's wife and son, the following family members also reside on the property, namely his adult daughter Patricia (20 years old), her daughter Cherlin (2 years old), his minor daughter Jessica (17 years old), and his minor granddaughter Ericia (8 years old). Residing in the outbuilding on the portion of the property occupied by the respondent are his adult son, his wife Jenine (33 years old) and their two children, Jade (11 years old) and Emily (2 years

old). It is also common cause that, apart from the respondent's wife and adult son, none of these individuals have any independent right to occupy the property.

[22] During argument it was contended by counsel for the respondent that, the aforegoing notwithstanding, the respondent's wife and adult son must nonetheless be dealt with under ESTA. As I understand the argument, the fact of their former employment, coupled with their residence along with the respondent, means that they can only be evicted by the applicant in terms of ESTA.

[23] In *Van der Merwe and Another v Klaase; Klaase v Van Der Merwe and Others* (case no LCC 09R/2014, an unreported judgment delivered on 7 October 2014) the unlawful occupier's wife, Mrs Klaase, relied on ESTA to avoid her eviction. She claimed that she was a general farm labourer who lived on the farm in question with the owners' consent and was consequently an occupier in her own right. The owners denied that independent consent was ever given to Mrs Klaase to reside on the farm. According to them, her presence on the farm was because she first lived there with her mother and thereafter because she was married to the unlawful occupier, who had the right to occupy the farm as the owners' fulltime employee. The court found that her allegations of permanent employment and of consent being granted to her personally to occupy the premises were not supported by the facts (as is the case in the present matter).

[24] At paras [22] to [25] the court held that:

'[22] There are different classes of persons who can occupy the property of another in terms of ESTA. First, there are those who are granted consent to occupy the property and thus enjoy protection under ESTA as occupiers. Secondly, in terms of the provisions of section 6(2)(d) of ESTA, there are those persons who, although not occupiers in terms of ESTA, are entitled to reside on the property by virtue of being entitled to family life in accordance with the culture of that family.

[23] The term "occupier" in ESTA is used in a narrow and wide sense. The narrow one being applicable only to persons who have the consent of the owner or person in charge of the property or have another right in law to reside thereon. The wide sense refers to those who derive their right of residence through or under occupiers in the narrow sense. The persons falling within the latter group are not occupiers in terms of ESTA. It is probably easier to distinguish between the two classes of occupiers by using the term "occupiers in their own right" for persons to whom the eviction procedures of ESTA apply, and to the others as "residents". The right of an "occupier in his own right" to stay on a farm derives from consent given by the owner or person in charge of the farm, whilst the right given to a "resident" to stay on the farm derives from a different source, usually a family relationship with an "occupier in his or her own right". See Landbounavorsingsraad v Klaasen *2005 (3) SA 410 (LCC) at 425A-B and* Simonsig Landgoed (Edms) Bpk v Vers *2007 (5) SA 103 (C) at paragraph 18.*

[24] In the circumstances, I am persuaded by the argument put up by Mr Wilkin and find that Mrs Klaase is a "resident" and not an "occupier in her own right".

[25] I also find that Mr Hathorn appears to have misconstrued Sterklewies *by arguing that a person residing on property with consent* ipso facto *becomes an ESTA occupier. Wallis JA in* Sterklewies *found that ESTA does not require consent to be an agreement or contract strictly construed. I consequently agree with Mr Wilkin that a person claiming ESTA occupation must be residing on the property without any other right to do so and with the apparent consent of the owner thereof or the person in charge of the land. Mrs Klaase's presence on the property was due, initially, to her living there with her mother and subsequently as a result of her marriage to the respondent. ESTA*

and the Constitution barred the first and second applicant from denying her access to the property by virtue of the respondent's right to family life.' [emphasis supplied.]

[The full reference of the *Sterklewies* case is: *Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga and Others* 2012 (5) SA 392 (SCA) at para [3].]

[25] Given that his lawful occupation has been terminated, the respondent and all who hold title under him have no right in law to occupy the property, and are unlawful occupiers within the meaning of PIE. Since the respondent had been in occupation of the property for more than six months at the time when the eviction proceedings were instituted in July 2014, the application falls to be determined in terms of s 4(7) of PIE, which reads as follows:

'If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a Court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.'

[emphasis supplied]

[26] During argument counsel were *ad idem* that the duty to place all relevant circumstances before the court rests upon both of them to the extent that they are able to do so, although in *F H P Management (Pty) Ltd v Theron NO and Another* 2004 (3)

SA 392 (C) at 404I-405B Van Heerden J (as she then was) said:

> *'As regards the effect of section 26(3) of the Constitution (as quoted above), read together with section 4(7) of PIE, it would appear from the judgment of Harms JA in Ndlovu v Ngcobo; Bekker & another v Jika (supra) at paras [17]–[19] that it is not necessary for an applicant, in proceedings to evict an unlawful occupier from such applicant's property, to place more before the Court by way of evidence than the facts that such applicant is the owner of the property in question and that the respondent is in unlawful occupation of such property. It is then up to the occupier to disclose to the Court "relevant circumstances" to show why the owner should not be granted an order for the eviction of the occupier (see also Ellis v Viljoen 2001 (4) SA 795 (C) at 805C–D; Ridgway v Janse van Rensburg 2002 (4) SA 186 (C) at 191I–192A; Brisley v Drotsky 2002 (4) SA 1 (SCA) at paragraphs [41]–[43]).'*

[27] Be that as it may, the applicant has taken the trouble to also place information before the court as to the respondent's circumstances, and there can be no harm in considering these as well. As to the meaning of *'relevant circumstances'*, in *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants* 2002 (1) SA 125 (T) at para [32] Rabie J said:

> *' The main thrust of both ss 4 and 6 is that the court should be satisfied that it is 'just and equitable' that the eviction be granted. However, the sections enjoin the court, prior to coming to a finding thereon, to consider all the relevant circumstances. The Legislator did not limit the circumstances which the court should consider and neither did it arrange the circumstances in order of priority. It referred to 'all the relevant circumstances' and left it to the court to determine which circumstances are relevant and to consider all those in conjunction. The fact that the Legislature referred specifically to the rights and needs of the elderly, the children, the disabled and households headed by women and, in certain instances, also the availability of*

alternative land does not mean that the Legislature intended to elevate these circumstances to absolute prerequisites which have to be met before an order may be granted. If the Legislator intended such a consequence, it would have said so specifically. To do so would, in any event, in many instances, including the present case, probably have the effect that the private owner of property has the obligation to provide housing to the general public and is burdened to 'carry the can of [their] claim to "housing" (cf Betta Eiendomme *(*supra *at 473A)). Such a situation would wreak havoc with pre-determined housing procedures. It would wreak havoc with ownership and possessionary rights.'*

[emphasis supplied]

[28] See also *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) at paras [30] to [31] where Harms JA said the following:

'[30] To an extent, the State did comply with its s 165(4) duties. There are the provisions of PIE which create a mechanism, although sometimes burdensome, to evict unlawful occupiers. There is a Sheriff who has to execute court orders. The SAPS, to prevent lawlessness, is prepared to police the execution of the eviction order. But the State does not serve as insurer of litigants and, if an order is unenforceable because of practical considerations, the loss is usually that of the litigant. However, in a material respect, the State failed in its constitutional duty to protect the rights of Modderklip: it did not provide the occupiers with land which would have enable Modderklip (had it been able) to enforce the eviction order. Instead, it allowed the burden of the occupiers' need for land to fall on an individual, which leads to the next point, namely, s 9 of the Bill of Rights.

> *[31] Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law, while s 9(2) states that equality includes the full and equal enjoyment of all rights and freedoms. As appears from para 1.6.4 of the order, De Villiers J found that Modderklip was not treated equally because, as an individual, it has to bear the heavy burden, which rests on the State, to provide land to some 40 000 people. That this finding is correct cannot be doubted. Marais J, in the eviction case, said that the "right" of access to adequate housing is not one enforceable at common law or in terms of the Constitution against an individual land owner and in no legislation has the State transferred this obligation to such owner. As to the second point, he is, no doubt, correct, but I would qualify the first. Circumstances can indeed be envisaged where the right would be enforceable horizontally, but the present is not such a case.'*
>
> [emphasis supplied]

[29] The relevant circumstances set out by the applicant are as follows. The respondent is 55 years old. He and those holding title under him are all in good health, and none suffer from any disability or mental impairment. Given that the respondent has resided in the Grabouw area for a period of more than 36 years, he should have friends and/or family within the immediate area who would be able to provide accommodation, even if only on an emergency or short term basis.

[30] Enquiries which the applicant has made show that there are properties available for rent in Grabouw and nearby Botrivier ranging from 2 bedroomed homes at R3 300 per month to 3 bedroomed homes at R6 500 per month. In January 2014 the respondent received payment of R340 000 as his retrenchment package from which *inter alia* he purchased a vehicle for just under R50 000. From his bank statements it appears that

of the amount paid to him, the respondent has invested approximately R150 000 in a separate account. In addition, he was employed on a neighbouring farm during the harvest season from January to May 2014. That his average cash withdrawals from the balance of the funds in his account during the period February to May 2014 were R13 000 per month cannot be laid at the applicant's door. The respondent should have been cautious in his spending, given that he must have been aware that an application for his eviction was likely to follow.

[31] The only accommodation which the applicant has available on its property is for those individuals who are employed by it, along with their families who hold title under them. There is no alternative accommodation on the applicant's property and the individual who has replaced the respondent is waiting to move into the premises currently occupied by him and his family. Although under no obligation, the applicant afforded the respondent an extra three months after his lawful occupation ceased at the end of March 2014 to vacate, and only launched the eviction proceedings in July 2014.

[32] The respondent initially agreed that Mr Sipho Tshongweni (along with his immediate family) resides in an outbuilding on his premises and that *'it is merely provisional till he may find alternative accommodation'.* However in a supplementary affidavit he contended that his son *'lives next door'*; that he was placed in the outbuilding by the applicant; and that he (i.e. the respondent) had never given permission for his son and immediate family to reside there.

[33] The outbuilding is geographically located on the premises occupied by the respondent. The applicant denies having placed Mr Sipho Tshongweni there. If his occupation (allegedly without the respondent's consent) was a problem for the respondent, it is hard to understand why he has never taken this up with the applicant.

[34] The respondent does not take issue with any other of the applicant's allegations relating to his relevant circumstances. He merely claims that he and his family can ill afford to rent elsewhere, and that friends in the immediate area cannot accommodate them. That he cannot afford to rent elsewhere is not supported by the objective facts. In addition to the funds at his disposal, on his own version he has used a portion of his retrenchment package to purchase a vehicle (and thus has transport) and various household necessities such as a stove, fridge and bed (and can therefore furnish alternative accommodation). He has also repaid debt and is now by all accounts virtually debt free. He qualifies for UIF payments of about R3 500 per month, which is an additional source of income, albeit in the short term. He was employed on a neighbouring farm during the harvest season from January to May 2014. There is no reason to believe (and the respondent does not suggest otherwise) that he cannot again be employed in this capacity during the 2015 season, as could his able-bodied son.

[35] Furthermore, the respondent does not deny that during the course of the retrenchment process he was offered what the applicant refers to as a *'preferred alternative'* in order to continue with his employment; he merely takes issue with the terms thereof.

Significantly, he cannot meaningfully refute the applicant's allegation that the preferred alternative would have enabled him to continue residing on the property. He simply contends that because this option would have guaranteed his employment (albeit at a reduced salary) for only nine months per annum *'then the decision to grant housing is clearly an arbitrary process, at the employer's discretion and not linked to employment'.* Not a single piece of evidence was placed before the court in support of this interpretation.

[36] Insofar as the children residing at the property are concerned, the obligation to provide them with housing would not rest in the first instance with the applicant, but with their parents or grandparents: see *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at paras [77] to [79]. The respondent does not suggest that the children in his care should be provided with shelter apart from their parents or grandparents.

[37] Having regard to all of these considerations, I am persuaded that there are no relevant circumstances which would militate against the granting of the eviction order sought by the applicant and that an eviction order is both just and equitable. This is also not a case where other land should be made available by the applicant, as was alluded to in *Modderfontein Squatters*. The applicant has complied with all of the requirements of s 4 of PIE. No valid defence has been raised by the respondent as an unlawful occupier. Accordingly, in terms of s 4(8) of PIE, I must grant an order for the eviction of the respondent and all those holding title under him and determine: (a) a just and

equitable date by which they must vacate the property; and (b) the date on which an eviction order may be carried out if they do not vacate.

[38] In terms of s 4(9) of PIE, in determining a just and equitable date, I must again have regard to all relevant factors, including the period that the respondent has resided on the applicant's property.

[39] The applicant submits that the respondent and those holding title under him should be evicted by the end of the forthcoming school holiday, i.e. by 21 January 2015. Whilst the applicant correctly says that the respondent has frustrated finalisation of his departure from the property for an extended period, I do not believe that it would be just and equitable to order that he and those holding title under him must vacate by that date. Christmas is a few weeks away. The respondent and his family have resided on the property for a very long time. In these circumstances, and given that they will have to secure alternative accommodation over a very busy period, it is my view that it would be just and equitable to order the respondent (and all who hold title under him) to vacate the applicant's property by not later than Friday, 27 February 2015.

[40] The parties have pointed fingers at each other to place the blame for all of the costs that have been incurred. The applicant has also sought to place blame squarely on the shoulders of the respondent's attorney. To my mind, and in the exercise of my discretion, this is one of those cases where equity must prevail. In any event, a costs

order against the respondent will simply deplete his resources which can be far better spent on accommodating himself and his family elsewhere.

[41] **In the result the following order is made:**

1. **The first respondent and all those holding title under him who are occupying the property known as Paradise Lane No 7 situated on Applethwaite Farm, Grabouw, Western Cape including all outbuildings thereon, (*'the property'*) and including Mr Sipho Tshongweni, are hereby evicted from the property.**
2. **The persons referred to in paragraph [1] above shall vacate the property by not later than 27 February 2015, failing which the applicant shall be entitled to evict them in accordance with this order, and the Sheriff and/or members of the South African Police Service are authorised to assist the applicant in such eviction to the extent reasonably required.**
3. **Each party shall pay their own costs, including those of all reserved costs orders.**

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J I CLOETE