IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 23/15

In the matter between

JAN KLAASE First Applicant

ELSIE KLAASE Second Applicant

and

JOZIA JOHANNES VAN DER MERWE (N.O. OF THE NOORDHOEK TRUST) First Respondent

JOZIA JOHANNES VAN DER MERWE Second Respondent

APPLICANTS' WRITTEN SUBMISSIONS

INTRODUCTION

1. This is an application for leave to appeal against two judgments and orders handed down by the Land Claims Court ("LCC") at Cape Town, by the Honourable Mr Acting Justice Canca as follows: -

1.1. On 28 March 2014[1] in which the LCC, on automatic review in terms of ss 19(3) of the Extension of Security of Tenure Act, Act 62 of 1997 ("*ESTA*"), under case number LCC 09R/2014 ("*the review proceedings*"), confirmed an order granted in the Magistrate's Court for the District of Clanwilliam for the eviction of Mr Klaase (the first applicant) "*and all persons who occupy through him*" from the premises which they occupy on the farm known as Noordhoek ("*the farm*");[2]

1.2. On 7 October 2014 ("*the LCC judgment*")[3] in which the LCC refused:

1.2.1. Mr Klaase's application for leave to appeal against the review judgment;

1.2.2. Applications brought by Mr Klaase's wife, Mrs Klaase, (the second applicant) in which she sought to be joined in the review proceedings, that those proceedings, including the execution of the eviction order against Mr Klaase, be suspended pending the determination of Mrs Klaase's rights in terms of ESTA and that Mrs Klaase's application, in which she contended that she is an occupier in her own right under ESTA, be consolidated with the review proceedings; and

[1] The judgment is JM 2 at record pp. 43- 52 and the order is at record pp. 52. This judgment is referred to as *"the review judgment"*.
[2] The LCC varied the date by which Mr Klaase, and the people occupying under him, had to vacate the farm and the date for the execution of the eviction order.
[3] The judgment is JM 3 at record pp. 53-66 and the order is at record pp. 64-65.

1.2.3. Mr Klaase's application seeking an order suspending the execution of the eviction order against him pending the determination of Mrs Klaase's rights under ESTA.

2. On 26 January 2015 the Supreme Court of Appeal dismissed, with costs, the applicants' application for leave to appeal.[4]

3. On 11 March 2015 the Chief Justice issued directions that the applicants lodge written argument, including argument on the merits of the appeal, on or before 1 April 2015.

CONSTITUTIONAL ISSUE

4. The primary issue in this matter is the interpretation of the definition of an *"occupier"* in s 1 of ESTA. ESTA was enacted to give effect to the constitutional right entrenched in s 25(6) of the Constitution. As the interpretation of ESTA is a constitutional matter,[5] it follows that this application for leave to appeal raises a constitutional issue.

5. The other constitutional issues, or matters connected to constitutional issues, raised in this application are whether:

5.1. the LCC erred in concluding, on the evidence before it, that the requirements for the eviction of Mr Klaase in terms of ss 10(1)(c) of ESTA had been satisfied; and

[4] JM4 at record p. 67 is a copy of the order of the SCA.
[5] *Hattingh and Others v Juta* 2013 (3) SA 275 (CC) [24].

5.2. it is in the interests of justice that the procedure to be followed in appeals against orders made by the LCC on review in terms of ss 19(3) of ESTA, be authoritatively determined.

INTERESTS OF JUSTICE

6. In *Hattingh*[6] this Court found that the issue raised in that matter concerning the interpretation of ESTA affected a vulnerable and yet significant section of our society, namely people who live on other people's land, and that as the appeal had reasonable prospects of success, it was in the interests of justice that leave to be appeal be granted.

7. In the present matter, whether the definition of an ESTA occupier is given a restrictive or more generous interpretation has significant implications for the security of tenure of not only Mrs Klaase, but also many other similarly situated rural women. Applying the principles stated in *Hattingh*, it is submitted that it is in the interests of justice for leave to appeal to be granted.

MRS KLAASE'S APPLICATION

8. The respondents oppose the application for leave to appeal in respect of Mrs Klaase on the merits and on a procedural basis. We deal with the merits first.

[6] [25].

The relevant provisions in ESTA

9. ESTA confers a right of security of tenure on an occupier.[7] An "*occupier*" is defined as *"a person residing on land which belongs to another person, and who has or [sic] on 4 February 1997 or thereafter had consent or another right in law to do so . . . ".* [8]

10. "*Consent*" is also defined. The relevant portion of the definition is that it means the express or tacit consent of the owner or person in charge of the land in question. For the purposes of civil proceedings in terms of ESTA, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent to do so unless the contrary is proved.[9]

Factual background

11. Mrs Klaase was born on 20 January 1965.[10] She is a farmworker and housekeeper and is married to Mr Klaase. They got married in 1988.[11] According to Mrs Klaase she has been living on the farm for thirty years or more.[12] Their three children and two grandchildren live with them on the farm.[13]

12. The respondents brought an eviction application against Mr Klaase. The eviction order granted by the magistrate's court includes all those occupying "*under him*".[14] Mrs Klaase launched an application in the LCC in which she sought various orders based on

[7] Sub-sections 6(1) and 6(2)(a).
[8] In s 1 of ESTA.
[9] Subsection 3(4).
[10] Founding affidavit para 4, record p. 8.
[11] LCC judgment at [14], record p. 57.
[12] LCC judgment at [17], record p. 57.
[13] LCC judgment at [13], record p. 56.
[14] JM 1 record p. 42.

the contention that she is an ESTA occupier in her own right and that her husband and children are entitled to live with her on the basis of her right to family life.[15]

13. In her application before the LCC Mrs Klaase stated that she is an ESTA occupier on two grounds, firstly that she was an employee (as a general farm labourer) on the farm and, secondly, that she was living on the farm with the consent of the owner.[16] She also attached to her affidavit salary slips dated 31 May 2007, 3 April 2008 and 23 July 2009 in support of this evidence.[17]

14. The respondents in their answering affidavit before the LCC:

    14.1. denied that Mrs Klaase had been born on the farm, claiming that for the first years of her life she resided with her mother on a neighbouring property;[18] and

    14.2. stated that Mrs Klaase only relocated to the farm as a consequence of her relationship with Mr Klaase. They alleged that she never asked for, nor was she given, any independent right to occupy the property and came to live with her prospective husband in a house that had been made available to him in his capacity as a permanent employee.[19]

15. The respondents admitted that Mrs Klaase has, over the years, worked on a seasonal basis on the farm, for three to four months during the picking season.[20] But they contended that although some permanent employees had been given rights of

[15] LCC record p. 131 para 24.
[16] LCC record p. 130 para 14.
[17] LCC record p. 130 para 18.
[18] LCC record p.165 para 16. This allegation was effectively admitted by Mrs Klaase in reply.
[19] LCC record p. 68 para 16.11.
[20] LCC record p. 170 para's 17.8 and 17.10.

occupation on the property, no such rights had been granted to any of the seasonal or temporary employees.[21]

16. In Mrs Klaase's replying affidavit it is admitted that she was a seasonal employee,[22] but it was stated that she was employed as a seasonal worker for so many consecutive years (estimated at 26) that she regarded herself as a permanent worker, with a right or legitimate expectation to be employed during the harvesting season.[23]

17. In the application for leave to appeal to this Court the respondents seek to downplay the extent of Mrs Klaase's employment, for example, by stating that Mrs Klaase would "*on occasion*" work on the farm,[24] and alleging that she was "*employed intermittently over a period of 26 years working during the harvest season in some years and others not working at all or finding employment elsewhere*."[25]

18. These allegations represent a shift from the position adopted in the affidavit of Mr van Der Merwe, filed on behalf of the respondents, before the LCC. In that affidavit he stated that during the high season, approximately the period May to September of every year, a large number of seasonal employees are employed for purposes of picking and packaging fruit and thereafter pruning trees[26] and that, as is the nature of things, the day to day employment frequently extends over the entire season.[27] He also stated that Mrs Klaase has *"over the years, as have many of the spouses and other family members of*

[21] LCC record p. 172 para 18.
[22] In the founding affidavit it was stated that she was a permanent employee.
[23] LCC record p. 199 para 23.4.
[24] Answering affidavit para 6.10 record p. 107.
[25] Answering affidavit para 9.2 record p. 112.
[26] LCC record p. 169 para 17.5
[27] LCC record p. 169 para 17.6.

permanent employees on the farm, worked on a seasonal basis on the farm".[28] In the context of denying Mrs Klaase's allegations in respect of the termination of her employment, Mr van Der Merwe referred to her employment coming to an end "*as it has done every August or September for the several years gone by that the applicant has been employed on a seasonal basis*".[29]

19. In dismissing Mrs Klaase's application, the LCC distinguished between two classes of people who occupy the property of another in terms of ESTA:

19.1. those who are granted consent to occupy and thus enjoy protection under ESTA; and

19.2. those who, although not occupiers in terms of ESTA, are entitled to reside on the property by virtue of the right to family life, as provided for in terms of ss 6(2)(d) of ESTA.[30]

20. The LCC referred to the first category of persons as '*occupiers in their own right'* and the second category as '*residents'*. The right of an '*occupier in his own right'* to stay on a farm is derived from the consent given by the owner or person in charge, while the right of a '*resident*' to stay on the farm is usually derived from a family relationship with an '*occupier in his or her own right'*.[31]

[28] LCC record p. 170 para 17.8.
[29] LCC record p. 173 para 18.5
[30] LCC judgment [22], record p. 59.
[31] LCC judgment [23], record p. 60.

21. In order to understand the basis for LCC's finding that Mrs Klaase is not an ESTA occupier, it is helpful to consider previous judgments dealing with the scope of the ESTA definition of the term *"occupier"*.

The ESTA jurisprudence on consent

22. The key element in the definition of an ESTA *"occupier"* is the term *"consent"*. The development of our jurisprudence in respect of the requirement of consent in terms of ESTA has been inconsistent.

23. In *Rademeyer and Others v Western District Council and Others*[32] the first respondent, a local authority, owned a property on which the further respondents had built informal housing structures. Neighbouring land-owners and residents had sought the eviction of the informal settlers on the grounds that they constituted a nuisance. The Court held that the conduct of the local authority in permitting the further respondents to remain on its property and providing them with water and sanitation constituted, at the very least, tacit consent to their occupation of the property.[33] It followed that they qualified as ESTA occupiers and, as the applicants had not complied with the provisions of the Act,

[32] 1998 (3) SA 1011 (SE). *Rademeyer* was considered by this Court in *Residents of Joe Slovo Community v Thubelisha Homes* 2010 (3) 454 (CC), in the context of whether informal residents occupied land with *"consent"* and accordingly fell outside the definition of an *"unlawful occupier"* in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). *Rademeyer* was distinguished in the judgment of Yacoob J (at [82]) and O'Regan J held (at [276] – [278]) that local governments which comply with their constitutional obligations to indigent people living in informal settlements by providing them with basic services do not, as a matter of fact, thereby consent to the presence of the residents, but as the City of Cape Town had gone far beyond providing basic services, it had consented to the occupation of the land. *Rademeyer* was approved in the judgment of Sachs J (at [357]). The judgments of Moseneke DCJ (at [149] – [156]) and Ngcobo J (at [208]) adopt a similar approach to that of Sachs J with regard to consent.

[33] At 1017B – C.

they were not entitled to an interdict compelling the local authority to remove the informal residents.[34]

24. In *Atkinson v van Wyk*[35] the owner of a farm sought the ejectment of Mr Van Wyk and Ms Dina Natus, without regard to ESTA, on the common law grounds that they were in unlawful occupation. A certificate filed by the owner's attorney, upon request by the Magistrate (who was concerned that ESTA might apply) reflected that Ms Natus originally occupied the premises with the consent of Mr Van Wyk, who in turn had the consent of the owner to occupy premises in terms of an employment contract. The certificate stated that Ms Natus "*despite never having had any right to occupy the premises and despite never having gained any right <u>or consent</u> to occupy the premises, remained on the premises.*" [Emphasis added][36]

25. On review in terms of ss 19(3) of ESTA Dodson J pointed out that the certificate did not say that Ms Natus had the consent of the owner at the time that she occupied the premises but held that, in the absence of any explanation to the contrary, the probability is that the owner would have been aware of a person who occupied one of his cottages with the consent of the employee (i.e. Mr Van Wyk) and that if the owner was aware of her occupation and *"did not object to it when the employment contract still subsisted, that would have been sufficient to constitute tacit consent."*[37]

26. The LCC held that Ms Natus' position was strengthened by the presumption in ss 3(4) of ESTA. As Ms Natus had resided continuously and openly on the land for over a

[34] At 1017C.
[35] 1999 (1) SA 1080 (LCC).
[36] At [4].
[37] At [9].

year, the presumption was applicable and the land-owner had failed to adduce sufficient evidence to disprove consent.[38]

27. *Atkinson* is significant as it established that although Ms Natus' rights were derivative, in that she occupied through or under Mr Van Wyk, this did not prevent the land-owner from tacitly consenting to her residing on the farm, nor did it preclude the presumption in ss 3(4) from operating. The LCC also held that Ms Natus was an ESTA occupier without there being any question of a direct contractual nexus between her and the owner or person in charge.

28. *Atkinson* was followed by *Conradie v Hanekom*,[39] in which a Magistrate had granted an eviction order against a husband and wife, both of whom were ESTA occupiers.[40] They had initially both been employed on the farm. When the husband's employment had been terminated due to misconduct, the owner sought to evict both of them. The owner averred that it was an express condition of their contracts that they could only continue living in the house for as long as both of them were employed on the farm.[41]

29. The LCC found that as Mrs Hanekom was an occupier in her own right, independent of her husband, the fairness of the agreement that provided that she could lose her right of residence as a result of the conduct of her husband was *"questionable"*[42] and that the grounds for terminating her occupation could not be equated with grounds for terminating the occupation of her spouse.[43] The LCC also found that the failure to distinguish between the circumstances pertaining to the two respondents was

[38] At [10].
[39] *Conradie v Hanekom and Another* 1999 (4) SA 491 (LCC).
[40] At [5].
[41] At [6].
[42] At [16].
[43] At [20].

prejudicial to Mrs Conradie's constitutional rights and the rights conferred on her by statute. The eviction order granted against Mrs Conradie was set aside and, as she was entitled to family life as a component of her right of residence on the farm,[44] the eviction order against her husband was replaced with one declaring that he was no longer an ESTA occupier, but only entitled to use the residence on the farm by virtue of his family relationship with his spouse.[45]

30. In *Venter NO v Claasen en Andere*[46] the applicant was the trustee of the insolvent estate of the first respondent. The second respondent was the first respondent's wife and the third and fourth respondents were members of his family. The first respondent was the owner of a farm and the second respondent claimed that she was an ESTA occupier by virtue of the *'consent'* or *'other right in law'* which she had acquired by reason of her marriage to the first respondent and that the other respondents were entitled to continue residing on the farm as members of her family.

31. The LCC held that ESTA distinguished between inhabitants of a property in terms of the definition of *'occupier'* and family members of occupiers, who could reside on the property as a result of their familial bond with the occupier.[47] The Court concluded that the second respondent had derived her consent or other right to continue residing on the farm from the first respondent, not in his capacity as owner or person in charge, but in his capacity as marriage partner. This was not the kind of *'consent'* or *'right in law'* that ESTA had intended to protect. The protections conferred by ESTA flowed from the weighing of the interests of occupiers against the interest of property owners in their

[44] At [21].
[45] At [22].
[46] 2001 (1) SA 720 (LCC).
[47] At [9].

capacities as such and had nothing to do with consents or rights derived from marriage relationships.[48]

32. In *Landbounavorsingsraad* v *Klaasen*,[49] the LCC substantially narrowed the scope of the definition of an *"occupier"* in terms of ESTA. Mr Klaasen was dismissed by the applicant who subsequently instituted proceedings to evict him and the other members of his household. Gildenhuys AJ held that the primary meaning of *"consent"* is *"voluntary agreement to"*,[50] and that in the context of ESTA it means that "*the person concerned must be or must have been a party to a consent agreement with the owner of the land*".[51] It follows, so the LCC reasoned, that a person residing on land will not be an ESTA occupier unless there is a legal nexus between him or her and the owner or person in charge.[52]

33. The LCC concluded that a family member who considers himself or herself entitled to live with a labourer on a farm (such as a spouse wanting to share a matrimonial home) must enforce that right against the labourer, not the owner.[53] Only if the farm owner gives consent to live in the house directly to a wife (i.e. if there is a consent agreement with the wife) will the wife be an occupier "*in her own right*" with the "*same entitlements under the Tenure Act as her husband*."[54]

34. Gildenhuys AJ did not refer to *Atkinson*, although his interpretation of the term *"occupier"* was inconsistent with that adopted in the earlier case, as on his approach

[48] At [11]. A similar conclusion was reached in *Dique NO v Van Der Merwe en Andere* 2001 (2) SA 1006 (T).
[49] 2005 (3) SA 410 (LCC).
[50] At [20].
[51] At [21].
[52] At [23].
[53] At [25].
[54] At [24].

Ms Natus could not have qualified as an ESTA occupier, as there was no legal nexus between her and the owner or person in charge.

35. In *Simonsig Landgoed (Edms) Bpk v Vers and Others*[55] the first respondent had been in a permanent conjugal relationship with one of the appellant's employees, who had since passed away. The second respondent was the widow of another employee who had died. The two employees (and the members of their families) had been entitled to occupy cottages on the appellant's farm in terms of their employment contracts. After the deaths of the employees, the appellant had given the respondents notice in terms of ss 8(5) of ESTA to vacate their cottages within 12 months. When the respondents failed to comply with the notices, the appellant launched an application in the Magistrates' Court for their eviction in terms of PIE, on the grounds that they were unlawful occupiers.

36. The appellant's allegation that the respondents had never had consent to occupy the cottages was not disputed and had to be accepted as correct.[56] Applying *Klaasen* and *Venter* the Court found that the respondents' entitlement to reside in their cottages was derived from their partners, who were employees of the appellant, and *"not from consent originating in any agreement entered into by them with the appellant or by operation of law"*. It followed that the respondents were not *"occupiers"* as defined in ESTA.[57]

37. For the duration of the 12 month period after they had been given notice to vacate in terms of ss 8(5) of ESTA, the respondents occupied under *"another right in law"* in

[55] 2007 (5) SA 103 (C).
[56] At [16] - [17].
[57] At [19].

terms of the definition of an occupier in ESTA.[58] However, as the Court held that former ESTA occupiers were excluded from the PIE definition of an unlawful occupier, it dismissed the application for the respondents' eviction.

38. In *Randfontein Municipality v Grobler and Others*[59] the owner of a farm, Mr Grobler, sought to evict informal settlers from his farm in terms of PIE. The local authority and the residents contended that the dispute stood to be determined in terms of ESTA, not PIE, as the residents had consent to occupy the land and the High Court accordingly lacked jurisdiction.[60]

39. The Supreme Court of Appeal ("SCA") referred to this Court's judgments in *Joe Slovo* in relation to *Rademeyer*[61] and concluded that the lengthy period for which residents had been occupying the land, the circumstances in which owner had bought the property, coupled with the municipality's provision of basic municipal services, gave credence to the occupiers' claims that they had consent to occupy the land.[62] The land-owner bore the onus to establish the jurisdiction of the High Court and had failed to address the issue of consent in his founding affidavit.[63] As *"ESTA clearly recognises tacit consent which may be in the form of prior consent by other owners or people in charge"* there was a genuine dispute of fact with regard to the issue of consent and the matter was referred to oral evidence.[64]

[58] At [23] – [27].
[59] [2010] 2 All SA 40 (SCA).
[60] At [1].
[61] At [10].
[62] At [20].
[63] At [15].
[64] At [14].

40. In *Sterklewies v Msimanga*[65] the SCA overturned the LCC's narrow reading of the definition of consent in *Klaasen*:

> "*The Act does not describe an occupier as a person occupying land in terms of an agreement or contract, but as a person occupying with the consent of the owner. One can readily imagine circumstances in which in the rural areas of South Africa people may come to reside on the land of another and the owner, for one or other reason, takes no steps to prevent them from doing so or to evict them. That situation will ordinarily mean that they are occupying with the tacit consent of the owner and will be occupiers for the purpose of the Act. Accordingly, when in Landbounavorsingsraad v Klaasen 2005 (3) SA 410 (LCC) para 35 it was said that 'consent must originate from an agreement, or exist by operation of law', I think that an unnecessarily restrictive view of the provisions of the Act arose. It suffices that persons claiming the Act's protection show that the owner of the land has consented to their being in occupation, irrespective of whether that occupation flows from any agreement or has its source elsewhere. Whatever its origins it is the right of residence flowing from that consent that must be terminated in terms of s 8 before an eviction order can be obtained."*[66] [Emphasis added]

41. In *Hattingh and Others v Juta*[67] this Court was called upon to decide whether an ESTA occupier's right to family life in terms of ss 6(2)(d) of ESTA encompassed two of her adult sons and her daughter-in-law living with her. The interpretation of *"consent"* under ESTA was not an issue in the appeal before this Court.[68] This Court held that the there was no justification for limiting the term *"family"* in ss 6(2)(d) to the nuclear family[69] and the purpose of conferring the right to family life on occupiers was to ensure that, despite living on other people's land, this vulnerable group of people would

[65] 2012 (5) SA 392 (SCA).
[66] At [3].
[67] 2013 (3) SA 275 (CC).
[68] See [12] and [14].
[69] At [34]. This had been the interpretation adopted by the LCC.

be able to live a life that approximated as closely as possible the kind of life that they would live on their own land. The object of ESTA was to give members of this section of our society the human dignity which had been denied to them under apartheid.[70]

42. This Court concluded that an occupier may not reside on a landowner's property with more family members than is justified *"by considerations of justice and equity when the occupier's right to family life is balanced with the rights of the landowner."*[71] It concluded, after balancing the relevant considerations, that the appellants were not entitled to remain in occupation of the property by virtue of ss 6(2)(d).

43. In *Applethwaite Farm (Pty) Ltd v Tshongweni and Another*[72] the Western Cape High Court applied the judgment of the LCC in this matter in concluding that the wife and son of a former farm employee were not occupiers as defined in ESTA.[73]

44. We turn now to re-consider the LCC's findings in respect of Mrs Klaase in light of the principles discussed above.

The proper interpretation of "occupier"

45. We submit that the LCC erred in its interpretation of the rights of occupation of seasonal women workers in the position of Mrs Klaase. The LCC failed to take into account the impact of *Sterklewies* on the restrictive interpretation of an *"occupier"* adopted in earlier decisions such as *Klaasen*.

[70] At [35].
[71] At [39].
[72] (12299/2014) [2014] ZAWCHC 193 (12 December 2014).
[73] At [22] – [25].

46. The finding in *Klaasen* that consent must be derived from an agreement or exist by operation of law has been over-ruled by the SCA. The narrow interpretation of an ESTA *"occupier"*, based on an agreement with the owner, previously adopted by the LCC, has been replaced with a broader definition of the term.

47. The *Sterklewies* approach is in accordance with a purposive interpretation of ESTA. In enacting ESTA the legislature was complying with ss 25(6) and (9) of the Constitution by seeking to provide security of tenure for occupiers by giving them comprehensive protection against eviction.[74] Reading the provisions of ESTA as a whole, the justification for granting occupiers security of tenure is that they occupy the land with the owner's consent.[75]

48. ESTA, like the Restitution of Land Rights Act 22 of 1994 is *"remedial legislation umbilically linked to the Constitution".* It follows that in construing its provisions we are required to avoid a *"blinkered peering"* at its language and to adopt the approach set out by this Court in *Department of Land Affairs v Goedgelegen Tropical Foods (Pty) Ltd*:[76]

> *"we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the*

[74] *Mkangeli and Others v Joubert and Others* 2002 (4) SA 36 (SCA) [17].
[75] *Mkangeli and Others v Joubert and Others* 2002 (4) SA 36 (SCA) [19].
[76] 2007 (6) SA 199 (CC).

context of the grid, if any, of related provisions and of the statute as a whole, including its underlying values."[77]

49. In *Brown v Mbhense*[78] the SCA held that the principles of interpretation articulated by Moseneke DCJ in *Goedgelegen* also apply to the interpretation of the Land Reform (Labour Tenants) Act 3 of 1996.[79] It is submitted that similar considerations arise with regard to ESTA and that the *Goedgelegen* principles are equally applicable in the present matter.

50. Academic commentators have noted that, despite having been on the statute books for over a decade, ESTA has had little impact on the insecure tenure conditions experienced by farm workers.[80] This is of particular significance when one has regard to the historical context against which the legislation was enacted.[81]

51. We submit that in finding that Mrs Klaase is not an ESTA occupier, the LCC failed to have regard to the objects of the Bill of Rights and ESTA, the mischief or problems which ESTA seeks to remedy, the historical context against which the statute was enacted and the evidence before it.

52. The basis for LCC's finding that Mrs Klaase is not an ESTA occupier, but rather a '*resident'*, is to be found in the following paragraph of its judgment:

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[77] At [53].
[78] 2008 (5) SA 489 (SCA).
[79] At [23] – [25].
[80] J Pienaar and K Geyser *"Occupier" for purposes of the Security of Tenure Act: The plight of female spouses and widows" THRHR*, issue 73, vol 2, May 2010, 248 at 249 and the research referred to in footnote 8 of the article.
[81] See *Hattingh* at [35].

> *"[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."*[82]

53. In *Sterklewies* the SCA stated that where in rural areas people reside on the land of another and the owner takes no steps to prevent them from doing so or to evict them, they will *"ordinarily"* be occupying with the tacit consent of the owner and accordingly qualify as ESTA occupiers. This is consistent with the approach of the LCC in *Atkinson*, in which it was held that knowledge of occupation (on the part of the owner), coupled with a failure to object to it, was sufficient to constitute tacit consent.[83]

54. The LCC's finding that an ESTA occupier must be residing with *"apparent consent"* and *"without any other right to do so"* is not supported by authority or the wording of the Act, which requires only that an occupier reside *"with consent or another right in law to do so".*

55. The LCC also focused on the reasons for Mrs Klaase coming to live on the farm, rather than whether she lived there with the respondents' consent. It's finding that her

[82] LCC judgment [25], record, p. 60.
[83] *Atkinson*, [9].

presence was due initially to *"her living there with her mother"* is inconsistent with the evidence. The respondents' evidence, which was not disputed by Mrs Klaase in her replying affidavit before the LCC, was that she grew up with her mother on a neighbouring farm. The LCC was also wrong in its finding that ESTA and the Constitution prevented the respondents from denying Mrs Klaase access to the farm *"by virtue of* [Mr Klaase's] *right to family life"*. Mrs Klaase started living together with her husband on the farm in the early 1980's, many years before ESTA and the Constitution were enacted.[84]

56. The respondents did not deal with whether Mrs Klaase had '*consent'* to live on the farm in their answering affidavit in the LCC. Instead, they contended that:

56.1. Mrs Klaase was a seasonal worker on the farm and '*never obtained an independent right of occupation on the property'*; and

56.2. she occupied the property solely by virtue of her relationship with her husband.[85]

57. The respondents' reliance on the fact that they had not granted Mrs Klaase a right to occupy the property does not assist them: as was pointed out by the SCA in *Sterklewies*, a contract between the owner and occupier is not a requirement for consent. The claim that Mrs Klaase occupied the property solely by virtue of her relationship with her husband is irreconcilable with the common cause fact that she worked on the farm over a period of many years: her presence on the farm is attributable, at least in part, to her

[84] Founding affidavit, para 25 record pp. 11 – 12. These allegations were not disputed by the respondents in their answering affidavit, para 13, record pp. 114 – 120.
[85] LCC record pp.162 – 163, para's 11.4 and 11.5.

working there. In any event, even if she had not worked on the farm, the key issue would still not be the reason for her presence there, but rather whether she lived there with the consent of the respondents.

58. It is not in dispute that Mrs Klaase resided on the farm '*continuously and openly'* for many years. It follows that in terms of ss 3(4) of ESTA, it is presumed that she had consent to reside on the land.

59. We submit that there is no evidence to rebut the presumption that the respondents consented to Mrs Klaase residing on the farm. The respondents' failure to object to Mrs Klaase residing on the farm or to take any steps to evict her, implies tacit consent in terms of the test stated in *Sterklewies* and *Atkinson.* In addition, the fact that she was employed on the farm as a seasonal worker for many years is, at the very least, a strong indication that the respondents expressly consented to her living there and that she accordingly qualifies as an *"occupier"*, even in terms of the narrow definition of the term adopted in *Klaasen*.

60. In addition, the LCC's finding that Mrs Klaase is not an ESTA occupier is inconsistent with Mrs Klaase's rights to equality and dignity in sections 9 and 10 of the Constitution. The finding that she only occupies the property *"under"* her husband, when she has worked on the farm over a period of many years is demeaning, and is irreconcilable with our constitutional values.[86]

[86]*Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) [21].

61. In the light of the above, it is respectfully submitted that there is at least a *prima facie* case that Mrs Klaase is an ESTA occupier and the LCC erred in failing to suspend the eviction order pending the final determination of her rights under ESTA.

Mrs Klaase's failure to apply to the LCC for leave to appeal

62. We now turn to deal with the respondents' objection that Mrs Klaase did not apply for leave to appeal to the LCC against the dismissal of her application to be joined in the review proceedings.[87]

63. Section 38 of the Constitution empowers a competent Court to grant *"appropriate relief"* where a right in the Bill of Rights has been infringed or threatened. Both Mr and Mrs Klaase brought applications in terms of, amongst other things, ss 12(5) of ESTA, for the suspension of the eviction order granted against Mr Klaase, pending the determination of Mrs Klaase's rights. Both Mr and Mrs Klaase's applications for the suspension of the eviction order were based on essentially the same evidence. Both of these applications were of an interlocutory nature, but as they raise a constitutional matter and Mr and Mrs Klaase and their family will be rendered homeless and suffer irreparable harm if the eviction order is carried out, the LCC's orders dismissing them are appealable in terms of the principles established in *Machele and Others v Mailula and Others.*[88] The circumstances are similar to those considered by this Court in *Machele* and it is submitted that, having regard to the reasons set out in that judgment, it is in the interests of justice that the eviction order be suspended.

[87] Answering affidavit para 15 record pp. 121 – 122.
[88] 2010 (2) SA 257 (CC) [18] to [38].

64. The respondents contend that Mrs Klaase brought a separate and distinct application for joinder in which the LCC was sitting as a Court of first instance. This submission overlooks: (i) the applications for leave to appeal and the suspension of the order were inextricably intertwined and were dealt with by the LCC in a single judgment under one case number; (ii) the interlocutory nature of the relief sought in the suspension applications; (iii) Mrs Klaase's application for the suspension of the eviction order was based on the same grounds as her husband's suspension application, in respect of which it has not been contended that a separate application for leave to appeal is required; and (iv) the LCC found that the prospects of another Court finding Mrs Klaase to be an occupier in terms of ESTA are remote.[89] Given these circumstances, it is submitted that to require Mrs Klaase to bring a separate application for leave to appeal would be an empty (and unnecessary) formality.

65. In the alternative, the applicants request that this Court condone Mrs Klaase's failure to bring an application for leave to appeal in the LCC, in light of the circumstances set out above, and given that it was not unreasonable for her legal representatives to take the view that a further application for leave to appeal was not necessary.

MR KLAASE

66. We now turn to deal with Mr Klaase's ground of appeal, namely that the LCC misdirected itself in finding in terms of ss 10(1)(c) that Mr Klaase committed a fundamental breach of the relationship between him and the respondents which it is not practically possible to remedy.

[89] LCC judgment, [26], record p. 61.

The applicable provisions of ESTA

67. Section 9(2) of ESTA sets out the requirements for an eviction order under the Act. These may be summarised as follows:

67.1. the right of residence of the occupier must have been terminated justly and equitably in accordance with s 8 (ss 9(2)(a));

67.2. the occupier must have failed to vacate the land within the notice period given by the owner or person in charge (ss 9(2)(b));

67.3. there must have been compliance with the provisions of s 10 or s 11 (the former is applicable in the present matter as Mr Klaase was an occupier on 4 February 1997) (ss 9(2)(c)); and

67.4. the owner or person in charge of the land must have given no less than two calendar months' notice of his or her intention to obtain an eviction order to the occupier, the relevant municipality and the Department of Rural Development and Land Reform (ss 9(2)(d)).

68. The requirements of ss 9(2) of ESTA are peremptory.[90]

69. In relation to s 10 of ESTA, the respondents pleaded that they had complied with ss 10(1)(c).[91]

[90] See, for example, *Holdengarde v Zondi & Another* 2000(4) SA 910 (LCC) [3].
[91] LCC record pp. 9 – 10, paras 7.2 – 7.2.6.

70. Subsection 10(1)(c) states that an eviction order may be granted against a person who was an "*occupier"* on 4 February 1997 if:

> "*The occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship . . ."*

71. The LCC in its review judgment stated that the owners relied upon the following facts as evidence of the breakdown in their relationship with Mr Klaase: (i) his absconding from work; (ii) his non-attendance at a disciplinary hearing; (iii) his bad temper, rudeness and failure to respect authority; and (iv) Mr van der Merwe requires workers whom he can trust.[92]

72. The LCC noted that: (i) Mr Klaase had worked for Mr van der Merwe and his father for close to 37 years; (ii) there is '*sufficient evidence to show that the Respondent had difficulty working with other employees on the farm'*; and (iii) matters took a turn for the worse when a farm manager was employed in late 2009.[93] It found that although Mr van der Merwe attempted to accommodate Mr Klaase's '*idiosyncrasies'* by counselling him and letting him work on his own, '*it would appear that the respondent's breach of the settlement agreement was the fatal blow to the already strained relationship'*.[94] In addition, Mr Klaase continuing to live on the farm while apparently working on another has '*only served to aggravate matters*'. His failure to comply with the settlement agreement and then continuing to live on the farm rent-free,

[92] Review Judgment [18], record p. 49.
[93] Review Judgment [19], record p. 49.
[94] Review Judgment [20], record p. 49.

while working elsewhere '*could, on its own, comprise a fundamental breach of the relationship'*.[95]

73. The LCC concluded that Mr Klaase's actions, taken as a whole, resulted in a fundamental breach of the relationship between him and Mr van der Merwe, which it was not practically possible to remedy.[96]

74. The LCC then set out the *Sterklewies* test[97] for a just and equitable termination of a worker's right of residence and concluded that, as Mr Klaase had failed to adduce sufficient evidence to comply with the test, the conditions for an order in terms of s 10 of ESTA had been satisfied.[98]

75. It is submitted that the LCC committed three material errors in reaching the conclusion that the requirements of s 10 of ESTA had been satisfied:

    75.1. In finding that Mr Klaase had failed to adduce sufficient evidence to comply with the *Sterklewies* test, it placed the *onus* on Mr Klaase. A party who seeks to evict an ESTA occupier bears the *onus* to allege and prove its case in respect of every element of its cause of action.[99] There can accordingly be no *onus* on Mr Klaase to adduce any evidence in order to disprove that the respondents had complied with s 10 of ESTA;

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[95] Review Judgment [20], record p. 50.
[96] Review Judgment [21], record p. 50.
[97] 2012(5) SA 392 (SCA) at [14].
[98] Review Judgment [24], record p. 51.
[99] *De Kock v Juggels* 1999(4) SA 43 (LCC) [13], approved in *Land en Landbouontwikkelingsbank van Suid Afrika v Conradie* 2005 (4) SA 506 (SCA) [15].

75.2. It applied the *Sterklewies* test for determining whether an occupier's right of residence was terminated in a just and equitable fashion in terms of s 8 of ESTA. This (s 8) test should play no role in the s 10 inquiry; and

75.3. It erred in finding, on the evidence before it, that the requirements of ss 10(1)(c) of ESTA had been satisfied.

76. The first two mis-directions are apparent from the LCC review judgment and require no further elaboration, save to note that in placing the onus on Mr Klaase, the Court was undermining the purpose of ESTA, which is to *"extend the rights of occupiers"*[100] by providing them with comprehensive protection against eviction.

77. Subsection 10(1)(c) of ESTA requires both that Mr Klaase commit a fundamental breach of the relationship between him and the owners and that it is not practically possible to remedy the breach. With regard to the former requirement, the LCC concluded that Mr Klaase had breached the relationship on grounds which were fundamentally different to those relied upon by the owners.

78. It is trite that in motion proceedings the parties' affidavits constitute both the pleadings and the evidence.[101] In *Sterklewies* Wallis JA reiterated the principle that courts are bound by the issues formulated by the parties to the litigation and it is not open to them to deal with, and determine, cases on different grounds. This is particularly so where the court is exercising review powers in terms of ss 19(3) of ESTA.[102] The only

[100] As stated in the preamble to ESTA.
[101] *Minister of Land Affairs & Agriculture & Others v D & F Wevell Trust & Others* 2008 (2) SA 184 (SCA) [43].
[102] *Sterklewies*, at [26].

exception to this principle is with regard to pure points of law that properly arise on the facts.

79. Mr Klaase's failure to comply with the settlement agreement, which the LCC found was '*the fatal blow to the already strained relationship*',[103] was not one of the grounds pleaded by the owners for the breakdown in the relationship. Nor was Mr Klaase's continued occupation of the property for a period of four years while working elsewhere, which the LCC found, could, on its own, constitute a fundamental breach of the relationship.[104] These mis-directions, which amounted to the LCC making out a case for the respondents which they had not made out themselves, compounded the LCC's error in placing the onus on Mr Klaase.

80. We turn now to consider whether, on the evidence before the LCC, it should have found that the requirements of ss 10(1)(c) had been satisfied.

Did Mr Klaase commit a breach of the relationship?

81. The owners in their founding affidavit relied on three grounds in support of their claim that Mr Klaase had committed a fundamental breach of their relationship: (i) he had absconded from work and failed to attend a disciplinary hearing; (ii) he had a history of being ill-tempered and disrespectful; and (iii) he had allowed Elroy Mentor to move into his house without permission.

82. The circumstances surrounding Mr Klaase's failure to return to work in January 2010 are the subject of substantial factual disputes on the papers. Mr Klaase's evidence was

[103] Review Judgment [20], record p. 49.
[104] Review Judgment [20], record p. 50.

that two factors led to him not returning to work: (i) tension between him and Mr Giepie Burger, a new foreman who was appointed in 2009; and (ii) the deduction of money from his salary in December 2009.

83. Mr Klaase stated in his answering affidavit[105] that the workers on the farm had problems with Mr Burger as a result of several incidents in which he had threatened workers with violence and this led to much dissatisfaction. He had complained to Mr van der Merwe about his foreman's conduct, but Mr van der Merwe did nothing about it. On one occasion Mr Burger wanted to assault Mr Klaase in the presence of Mr van der Merwe, who had to restrain him from doing so. Subsequently, Mr Klaase complained to Mr van der Merwe about Mr Burger, but to no avail. Mr Klaase was upset because he had worked for Mr van der Merwe and his father for 37 years, but Mr Burger, who was newly appointed, was allowed to treat him in such a fashion. Late in 2009 Mr Klaase told Mr van der Merwe that he could not continue to work in such circumstances.[106]

84. Mr van der Merwe in his replying affidavit denied the above allegations in general terms and put Mr Klaase to the proof thereof. In support of his general denial he referred to the following facts: (i) Mr Burger, who is a manager on another farm, had to speak to Mr Klaase concerning work which he was supposed to perform on that farm with a trench digger. Mr Klaase responded by swearing at Mr Burger and telling him to go and farm on his own farm and to leave him alone; (ii) Mr Klaase usually works on

[105] Para 14, LCC record p. 47.
[106] The relevant page from Mr Klaase's answering affidavit is JM 6, record p. 74 para 14.

his own under Mr van der Merwe as he is short tempered and struggles to get on with others; and (iii) one of his farm workers could confirm Mr Klaase's personality.[107]

85. Mr van der Merwe's replying affidavit is conspicuous by its failure to deal with, or explain (apart from a generalised denial), the following evidence:

85.1. there were several incidents in which Mr Burger threatened farm workers with violence, leading to considerable dissatisfaction;

85.2. Mr Burger attempted to assault Mr Klaase in the presence of Mr van der Merwe and had to be restrained from doing so;

85.3. Mr Klaase raised Mr Burger's conduct with Mr van der Merwe, who refused to condemn his foreman's actions, resulting in Mr Klaase stating that he would not be able to continue working in such circumstances.

86. Mr Burger also deposed to an affidavit in which he confirmed the content of Mr van der Merwe's replying affidavit, to the extent that it applied to him. Mr Burger also failed to deal with, or deny, the contents of paragraph 14 of Mr Klaase's answering affidavit. In the circumstances, Mr van der Merwe's denial is insufficient to generate a genuine or

[107] The relevant page of Mr van der Merwe's replying affidavit is JM7, record p. 75.

real dispute of fact on the papers in relation to the three issues referred to in the previous paragraph.[108]

87. With regard to the second reason for Mr Klaase not returning to work, he stated that his dissatisfaction reached a high point when Mr van der Merwe unlawfully withheld his salary at the end of 2009. Another worker "*het die trok se wiel pap gery"* and wrongly accused him of having done this. Mr van der Merwe did not believe Mr Klaase and his witnesses and said that they had lied. As a result Mr Klaase had no money for the Christmas period and referred a constructive dismissal claim to the CCMA.

88. In his replying affidavit, Mr van der Merwe alleged that: (i) Mr Klaase was responsible for the trench digging machine; (ii) in October 2009 the cap for this machine's diesel tank disappeared; (iii) on being questioned about this he blamed one of the other workers. A farm manager held an "*informele vergardering"* in order to establish precisely what happened and as Mr Klaase was the person responsible for the machine, the cost of the cap, approximately R900,00, was withheld from his year-end bonus and the rest of his bonus as well as his salary were paid over to him.

89. In terms of the test in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd*[109] the factual disputes surrounding the reasons for Mr Klaase not returning to work should have been determined on the basis of Mr Klaase's evidence.

90. The LCC accordingly should not have found that Mr Klaase had committed a fundamental breach of the relationship between him and the owners. The LCC implicitly rejected Mr Klaase's version on the papers without explaining why it did so,

[108] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) [13].
[109] 1984(3) SA 623 (A) at 634 H – 635 C.

in circumstances where there was no basis for such a finding.[110] The Court did not find that Mr Klaase's evidence was so far-fetched or untenable that it could be rejected on the papers and such a finding would, in any event, not be sustainable. In the circumstances, the LCC should have resolved the disputes of fact in Mr Klaase's favour or, at best for the respondents, referred them to oral evidence.

91. In this application, the respondents deny that the alleged abusive conduct took place, dismiss the allegations as being raised to present the respondents in a negative light and state that the relevance of these assertions is uncertain because it is not dispute in that the circumstances giving rise to the termination and accommodation agreement were settled by agreement.[111] These contentions miss the point: in order to establish their cause of action the respondents were required to demonstrate that Mr Klaase committed a fundamental breach of the relationship between him and them. Mr Klaase stated that one of the crucial factors in him not returning to work was the manner in which he was treated by Mr Giepie Burger. This was dealt with unsatisfactorily by the respondents in their replying affidavit before the LCC and only by way of broad denials in the application for leave to appeal. In their answering affidavit in this Court the respondents fail to deal at all with Mr Klaase's evidence in respect of the deduction of money from his salary in December 2009.

92. The LCC was required to determine whether Mr Klaase breached the relationship between him and the respondents, the precise nature of that breach and whether it was not practically possible to remedy it.[112] We submit that the evidence before the LCC with regard to the reasons for Mr Klaase not returning to work was so clouded in

[110] *Wightman*, at [12] – [13].
[111] Answering affidavit para 20 record pp.127-129.
[112] *Conradie v Hanekom and Another* 1999 (4) SA 491 (LCC) [19].

factual disputes that it was not possible to draw any firm conclusions from the affidavit evidence.

History of ill-temper

93. The second claim, that Mr Klaase has a history of ill-temper and disrespect, is also disputed on the papers and the same principles set out above with regard to factual disputes in motion proceedings are applicable. In any event, the respondents do not suggest that Mr Klaase's temperament had changed since he commenced working on the farm in 1972, and, this factor could not constitute a fundamental breach of the relationship between the parties, as it would always have been an element of that relationship dating back over a period of almost 40 years.[113]

Elroy Mentor

94. The third claim, that Mr Klaase had breached the relationship by allowing Elroy Mentor to stay on the property is similarly devoid of any merit. Elroy Mentor is Mr Klaase's son and it is not in dispute that he was born on the farm and grew up there. There is no suggestion on the papers that he caused any problems on the farm or that he constitutes a security risk.[114]

95. In summary, we submit that given the factual disputes surrounding Mr Klaase's failure to return to work and his alleged ill temper, the LCC was in no position to draw any firm conclusions with regard to whether he had committed a fundamental breach of his

[113] Founding affidavit, para 59, record p. 27. This issue is not dealt with by the respondents in their answering affidavit, para 21 – 21.7, record pp. 129 – 131.
[114] Founding affidavit, para 60, record p. 27, read together with answering affidavit, para 21.7, record p. 131.

relationship with the respondents. In relation to Mr Mentoor's occupation of the premises, the evidence does not justify the conclusion that Mr Klaase committed a fundamental breach of the relationship which it was not possible to remedy. We accordingly contend that LCC erred in finding that the requirements of ss 10(1)(c) of ESTA had been satisfied and that the eviction order granted against Mr Klaase should be set aside.

THE APPEAL FORUM

96. After the application for leave to appeal was argued, the LCC requested the parties to make written submissions on whether the appeal should have been directed to it rather than the SCA, in light of the decisions in *Kuilders and Others v Pharo's Properties and Others*[115] and *Magodi & Others v Janse van Rensburg.*[116]

97. In the LCC judgment it held that Moloto AJ in *Magodi* made it clear that an order from a Magistrate's Court confirmed on automatic review in terms of ss 19(3) remained an order of the Magistrate's Court.[117] The LCC also found that when the *Magodi* judgment was taken on appeal,[118] a full bench (Gildenhuys and Meer JJ) held that the LCC is tasked with hearing an appeal against a decision of a Magistrate's Court confirmed on review[119] and that an eviction order confirmed on review remains a Magistrate's Court order.[120]

[115] 2001 (2) SA 1180 (LCC).
[116] [2001] JOL 9145 (LCC).
[117] LCC judgment at [32], record p. 62. Moloto AJ's judgment in Magodi is annexure JM8, record pp. 76 – 82.
[118] *Magodi and Others v Van Rensburg* 2002 (2) SA 738 (LCC).
[119] LCC Judgment at [33], record p. 62.
[120] LCC Judgment at [35], record p. 63.

98. The LCC found[121] that it was bound by the full bench decision in *Magodi* and *Rashavha v Van Rensburg*[122] and that the application for leave to appeal was accordingly defective. It also declined the request that Mr Klaase (in the alternative) be permitted to lodge an appeal to the LCC, on the grounds that the law in regard to the Court to which the appeal should be directed was clear and that he had no prospects of success on appeal.[123]

99. However, in *Magodi* Moloto AJ considered the possibility of: (i) an appeal lying to the SCA when a Magistrate's order is overturned by the LCC on review in terms of ss 19(3) of ESTA; and (ii) when a Magistrate's order is confirmed on review, it remains an order of the Magistrate's Court, which should be appealed to the LCC.[124] Moloto AJ rejected this possibility on the grounds that it:

> *"is confusing and unacceptable. It is inappropriate that under similar circumstances an appeal must lie to either of two possible fora, dependent only on whether an order was confirmed or not. It is necessary that there must be consistency and certainty about the forum to which the appeal should lie irrespective of the outcome in the case."*[125]

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[121] LCC judgment at [36], record p. 63.
[122] 2004 (2) SA 421 (SCA) [5]. In this case the SCA did not decide the question of the appropriate forum for an appeal against an order confirmed in terms of ss 19(3), but merely noted the following:

> *"[5] The appellant and her co-workers who had been ordered to vacate the farm applied for leave to appeal against this order. The application came before Moloto AJ, who held that the proper Court to hear the appeal was the Land Claims Court. His finding in this regard was upheld in the decision of the Court (per Gildenhuys AJ, Meer AJ concurring) now under appeal before this Court. There was no argument that this decision as to jurisdiction was incorrect either before the Court a quo or this Court. The Land Claims Court dismissed the appeals of all four appellants before it, and gave leave only to the appellant to appeal further to this Court."* [emphasis added]

[123] LCC judgment at [42], record, p. 64.
[124] At [8], record, p. 79.
[125] At [9], record, p. 80.

100. Moloto AJ went on to hold that whether a Magistrate's order is confirmed or reversed on automatic review, the order made on review remains an order of the Magistrate's Court and an appeal against such an order has to be directed to the LCC.[126]

101. In the *Magodi* full bench appeal,[127] Gildenhuys and Meer JJ recorded that the parties had agreed that if it was possible to disentangle the appeal against the eviction order granted by the Magistrate from the confirmation thereof by Moloto AJ, the full bench should do so.[128] The full bench had no difficulty in *"disentangling"* the issues and explicitly refrained from considering any appeal against Moloto AJ's confirmation order or commenting on whether the LCC has jurisdiction to determine such an appeal.[129]

102. It follows that the full bench decision in *Magodi* was not authority for the proposition that an eviction order confirmed on review remains an order of the Magistrate's Court. This issue was not argued or decided in *Rashavha.* We accordingly submit that the LCC erred in considering itself to be bound by these two cases on this point.

103. The issue of the appropriate appeal forum is clouded by the fact that, notwithstanding Moloto AJ's decision in *Magodi* to the effect that an appeal against a ss 19(3) review order lies to the LCC, he appears to have subsequently been persuaded that the contrary position applies, and that an appeal lies to the SCA. This is apparent from the

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[126] At [12], record, pp. 81 - 82.
[127] This judgment is *Magodi and Others v Van Rensburg* (LCC29R/01) [2001] ZALCC 50 (29 November 2001), not (as stated by the LCC in para [33] of its judgment on the application for leave to appeal, at record 62) *Magodi and Others v Van Rensburg* 2002 (2) SA 738 (LCC). The full bench decision is annexure JM9, at record 83 – 99.
[128] At [33], record p. 97.
[129] At [33], record p. 97.

unanimous judgment of the SCA in *Land & Landbouontwikkelingsbank van Suid-Afrika v Conradie*[130] in which the following was stated:

> *"[1] On 19 March 2003 the magistrate of Ceres in the Western Cape granted the appellant an order of eviction against the respondent. The order, inter alia, required the respondent to vacate the property (the house on the farm Klein Pruise, Ceres) he had leased from the appellant by 31 May 2003. In terms of s 19(3) of the Extension of Security of Tenure Act 62 of 1997 (the Act) such order is subject to automatic review by the Land Claims Court, which may, inter alia, confirm or set it aside in whole or in part.*
>
> *[2] On 12 May 2003 the Land Claims Court (Moloto J) set aside the eviction order and substituted it with one dismissing the application for eviction and made no order as to costs. (The magistrate had ordered the respondent to pay the costs of the application.) <u>The appellant is before us with leave of the court a quo.</u>"* [Emphasis added]

104. Moloto J's decision to grant leave to appeal to the SCA in *Conradie* is in direct conflict with his earlier decision in *Magodi*. In addition, on 4 August 2014 in the matter of *De Jager v Snyders*,[131] the LCC (per Matojane J), having been referred to *Conradie*, granted leave to appeal to the SCA against an order made by it in terms of ss 19(3) confirming an eviction order.

105. The stance of the LCC with regard to the appropriate forum for an appeal against an order made on review in terms of ss 19(3) is confusing and contradictory. In order to

[130] 2005(4) SA 506 (SCA).
[131] LCC 08R/2013.

determine the correct appeal forum, it is necessary to consider the relevant statutory framework.

The statutory framework

106. The automatic review procedure is regulated by ss 19(3) to (5) of ESTA:

> *"(3) Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in the Gazette, shall be subject to automatic review by the Land Claims Court, which may—*
>
> *(a) confirm such order in whole or in part;*
>
> *(b) set aside such order in whole or in part;*
>
> *(c) substitute such order in whole or in part; or*
>
> *(d) remit the case to the magistrate's court with directions to deal with any matter in such manner as the Land Claims Court may think fit.*
>
> *(4) The provisions of subsection (3) shall not apply to a case in which an appeal has been noted by an occupier.*
>
> *(5) Any order for eviction contemplated in subsection (3) shall be suspended pending the review thereof by the Land Claims Court."* [Emphasis added]

107. The wording of ss 19(3) clearly suggests that an order made on automatic review is that of the LCC rather than the Magistrate's Court. This conclusion is supported by Rule 35A of the Rules of the LCC, the relevant part of which reads as follows:

> *"(2) Before deciding a matter coming before it on automatic review, the Court may –*
>
> *(a) seek further information from the magistrate;*
>
> *(b) afford any party an opportunity to deliver submissions or further submissions on specific issues; or*
>
> *(c) set the matter down for oral argument before the Court.*
>
> *(3) After a review has been decided, the Registrar must return the record of the proceedings to the magistrate."* [Emphasis added]

108. Rule 35A is unambiguous. The LCC must "*decide*" a matter on automatic review. Once a matter has been decided by the LCC, it is anomalous to suggest that the order made by it is a Magistrate's Courts order.

109. Rule 69 of the LCC rules provides for appeals to the SCA or this Court against an order of the LCC. Subsection 19(2) of ESTA states that civil appeals from Magistrates' Courts in terms of the Act shall lie to the LCC. Rule 71(1) of the LCC rules provides for appeals against decisions of Magistrates' Courts to be prosecuted in the LCC in the same manner as civil appeals from Magistrates' Courts to the High Court. The rules of the LCC make no provision for an appeal to a *"full Court"* from a decision on review in terms of ss 19(3).

110. The Superior Courts Act 10 of 2013 defines a *"Superior Court"* as *"the Constitutional Court, the Supreme Court of Appeal, the High Court and any court of a status similar to the High Court"*. The LCC clearly falls within the terms of the definition of a Superior Court. The relevant parts of ss 16 and 17 of this Act, dealing with appeals from Superior Courts, read as follows:

> ***"16. Appeals generally.***—*(1) Subject to section 15 (1), the Constitution and any other law— …*
>
> *(c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with the changes required by the context.*
>
> ***17. Leave to appeal***
>
> **…**
>
> *(6) (a) If leave is granted under subsection (2) (a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider—*
>
> *(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or*
>
> *(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of*

> *Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal…"*

111. As the LCC does not sit as a Court of first instance in ss 19(3) review proceedings, an appeal to a full bench of the LCC in terms of ss 17(6) of the Superior Courts Act would not be competent in such circumstances.

112. It is submitted that the LCC's finding that an eviction order confirmed by the LCC on automatic review in terms of ss 19(3) remains an order of the Magistrate's Court is irreconcilable with the statutory framework outlined above. Subsection 19(3) of ESTA confers extensive review powers on the LCC. Rule 35A of the LCC rules require the LCC to consider the record of the proceedings in the Magistrate's Court together with the Magistrate's reasons before exercising its review powers. The rules require it to "*decide"* a matter coming before it on automatic review. Our submission that the LCC determines all cases coming on automatic review before it, and does not merely *"rubber-stamp"* a Magistrate's order which is confirmed on review, is supported by the cases dealing with the nature of the LCC's jurisdiction in terms of ss 19(3).

113. The LCC has adopted a generous approach to the ambit of its ss 19(3) jurisdiction.[132] In *Skhosana and Others v Roos t/a Roos se Oord and Others*[133] the Court held as follows:

> *'Where, in an action for eviction under common law, the defendant raises a defence based on ESTA and the magistrate finds that ESTA is not applicable and grants the eviction order, must the magistrate send the order to the Land Claims Court for automatic review? On a narrow interpretation of "in terms*

[132] *Khuzwayo v Dludla* 2001 (1) SA 714 (LCC) [6].
[133] 2000 (4) SA 561 (LCC).

> *of this Act" it will not be necessary because the eviction order was made under common law. However, the Legislature in providing for the automatic review of ESTA cases clearly intended that the Land Claims Court must scrutinise the records of those cases to ensure that the provisions of ESTA were correctly applied. It would be absurd if, on the one hand, an eviction order made under the provisions of ESTA has to be reviewed by this Court while, on the other hand, an eviction order under common law consequent upon a decision that ESTA does not apply, is not subject to such review.'* [134]

114. The LCC concluded that where the phrase *"in terms of"* is used in ss 19(3), and in other provisions in ESTA from which it derives its jurisdiction, the words must be interpreted *"in a manner which will entitle this Court to adjudicate a case where the provisions of ESTA are at issue"* (Emphasis added).[135]

115. In *Lategan v Koopman and Others*[136] the LCC held that, because of the lack of precedent for automatic review in civil cases, the LCC is entitled to take cognisance of the automatic review system applied in criminal cases which is unique to South Africa.[137] It expressly held that automatic review is not limited to an investigation of irregularities. In that regard, the LCC relied upon a quote from Professor Skeen's chapter in The Law of South Africa that "*Although the procedure is called a review, it is really a review and an appeal rolled into one, because any point on which the proceedings can be faulted will be taken into account, whether it is an irregularity or not*."[138] The LCC held that it must, as a starting point, determine whether justice was

[134] At [12]. This paragraph was approved by the LCC in its subsequent decision in *Mahlangu and Another v Van Eeden and Another* LCC 53/99 [2000] ZALCC 17 (2 June 2000) at [47].
[135] *Skhosana*, at [18].
[136] 1998 (3) SA 457 (LCC).
[137] At [11].
[138] As above.

done and, accordingly, that the court will follow a wide approach and not scrutinise the Magistrate's findings as narrowly as may be the case on an appeal.[139]

116. The LCC has also held that new evidence may, in certain circumstances, be admitted at the automatic review proceedings stage where the interests of justice require it and where its admission will not prejudice any of the parties.[140]

117. When regard is had to ss 19(4) it is apparent that an appeal from the Magistrate's Court and a ss 19(3) review are alternative courses of action. The legislature set out to ensure that eviction orders made under ESTA must come to the LCC either on appeal or on automatic review in terms of ss 19(3). The legislature intended that the LCC scrutinise the records of those cases in which a Magistrate's Court has granted an eviction order *"to ensure that the provisions of ESTA were correctly applied.*[141] Just as an order made by the LCC on appeal would be an order of the LCC and not the Magistrate's Court, the same is true of an order made on review in terms of ss 19(3).

118. The above conclusion is supported by the SCA's decision in *Agrico Masjinerie ((Edms) Bpk v Swiers,*[142] where the following was stated:

> *"[20] It seems to me that the proper approach to the 'exclusive jurisdiction' for which s 20(2) provides is defined by the terms of s 20(1), ie <u>if a party whether as applicant or respondent claims performance of any of the functions of a court in terms of ESTA, only the Land Claims Court has the power</u>, including the exercise*

[139] As above.
[140] See *City of Council Springs v Occupants of the Farm Kwa-Thema* 2000 (1) SA 476 (LCC) at [18] - [19]; *De Kock v Juggels and Another* 1999 (4) SA 43 (LCC) at [17] and *Mahlangu and Another v Van Eeden and Another* LCC 53/99 [2000] ZALCC 17 (2 June 2000) at [49].
[141] *Skhosana and Others v Roos t/a Roos se Oord and Others* 2000 (4) SA 561 (LCC) [12].
[142] 2007(5) SA 305.

> *of the powers specified in subparas (a) to (d) of s 20(1), to order or implement such performance. This power of the Land Claims Court is subject to s 17(2), which provides that proceedings under ESTA may be instituted in the relevant division of the High Court if all the parties consent to this, and to s 19(1), which gives the magistrates' courts jurisdiction in respect of certain proceedings under ESTA."* [Emphasis added]

119. Subsections 19(3) and (5) of ESTA have the effect that only the LCC has the power to *"order"* or *"implement"* an eviction in terms of the Act. The LCC's role is decisive and the Magistrates' Courts play a subordinate, preliminary part. The LCC's judgment in this matter, which seeks to reverse these roles, is inconsistent with the legislative scheme.

120. Subsections 19(a), (b), (c) and (d) of ESTA confer upon the LCC a wide range of review powers. We submit that once the LCC is seized with jurisdiction, considers the evidence before it, together with any submissions from the parties or the Magistrate, and then makes an order determining the case, it is anomalous to suggest that certain of the orders it makes at the conclusion of the process are orders of the LCC and other orders are orders of the Magistrates' Courts. The implication of this is that the LCC has failed to adjudicate or determine a review in which it confirms an eviction order granted by a Magistrate. The logical alternative is that once the LCC is seized with a matter and adjudicates it, the order which it makes at the conclusion of the process is an order of the LCC, regardless of whether it confirms, sets aside or substitutes the order of the court *a quo.*

121. We accordingly submit that Mr Klaase was correct in directing his application for leave to appeal to the SCA. In any event, in view of the conflicting positions adopted by the LCC,[143] it is submitted that it is in the interests of justice for this Court to determine authoritatively the procedure to be followed in appeals against orders made on review in terms of ss 19(3).

CONCLUSION

122. In the circumstances, we submit that:

122.1. the appeal has a reasonable prospect of success; (ii) the application raises a number of important constitutional issues; and (iii) it is in the interests of justice that leave to appeal be granted; and

122.2. the appeal should be upheld with costs, including the costs of two counsel.

P HATHORN

C DE VILLIERS

Counsel for applicants

Chambers

Cape Town

27 March 2015

[143] See founding affidavit, para 82.3, record pp. 36 – 37.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/15

In the matter between

JAN KLAASE **First Applicant**

ELSIE KLAASE **Second Applicant**

and

JOZIA JOHANNES VAN DER MERWE AS N.O.

OF THE NOORDHOEK TRUST **First Respondent**

JOZIA JOHANNES VAN DER MERWE **Second Respondent**

First and Second Respondents' Written Submissions

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Introduction

1. The history of this matter and the factual material giving rise to same is fully set out in the papers of record[1] and elegantly summarised in the heads of argument filed on behalf of the applicants. In short however this is an application for leave to appeal against the confirmation of an eviction order on review to the Land Claims Court pursuant to the grant of such an order in the

[1] At date of settling of these heads of argument no index to the bundle of papers before the above honourable court has been received from the applicants. In the circumstances references to the record will of necessity referred to the various affidavits will the annexures thereto.

Clanwilliam Magistrates' Court after an application for such relief was instituted by the respondents in their capacity as owners and persons in charge of the property known as Noordhoek Farm : Portion 15 (a portion of portion 4) of the farm Misgunt Number 512, District of Clanwilliam ("the farm" alternatively "the property").

Issues for determination

2. As can be gleaned from the application for leave to appeal and the applicants' heads of argument there are three issues which this honourable court is called upon to determine namely;

2.1. Is the second applicant an occupier as defined in section 1 of Act 62 of 1997 ("Esta" alternatively "the Act");

2.2. Whether the Land Claims Court ("LCC"), sitting as a court of review, erred in holding that the eviction of the first applicant was in compliance with the provisions of section 10 of Esta;

2.3. Whether an appeal against an eviction order granted by the Magistrates' Court and confirmed by the LCC sitting as a court of review is properly directed against the Magistrates' Court granting the order or the confirmatory order of the LCC.

2.3.1. As regards the applicants' heads of argument, extensive references are made therein to the record of proceedings before the LCC. It is uncertain on what basis the applicants have referred to papers not before this honourable court. Argument in this matter will be limited to the application for leave to appeal saving in the event the court indeed calls for the earlier records of proceedings to be placed before it.

Constitutional Matter

3. It is trite that for leave to appeal to be granted a constitutional issue must be raised.

3.1. The entirety of applicant's argument in this regard[2] appears to be that as this matter relates to Esta, which statute was purportedly enacted to give effect to section 25(6)[3] of the Constitution, any consideration of same is *ipso facto* a constitutional question. This is with respect erroneous[4]. See in this regard the matter of *Loureiro v Imvula Quality Protection (Pty) Ltd 2014 (3) SA 394 (CC)* at paragraph [33], which principle it is submitted applies equally to statute.[5]

"*However, the mere fact that a matter is located in an area of the common law that can give effect to fundamental rights does not necessarily raise a constitutional issue."*

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[2] Applicants' heads of argument at paragraph 4-5

[3] *25(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*

[4] Section 167 of the Constitution at subsection (7) holding that : "*A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution*."

[5] In all instances where case law is quoted herein it is quoted without the inclusion of footnotes save insofar as same are specifically referred to.

3.2. Absolutely no allegation is made in the papers or in argument of facts that could give rise to an inference that the eviction application against the first, and through him the second, applicant was as a result of a past discriminatory practice. It is not disputed that the first applicant was granted a right to occupy the property by the owner thereof, that the second applicant was entitled to occupy the property with him, and that upon the termination of the employer/employee relationship between the respondents and the first applicant, the first applicant and those holding under him were called upon and agreed to vacate the property.

3.3. While this court has of course not limited itself to any narrow interpretation of what constitutes a constitutional matter, the so-called “Fraser list” gives at least a guideline in this regard, the relevant portion of *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae) 2007 (3) SA 484 (CC)* appearing at [38] thereof:

“*This Court has held that a constitutional matter is presented where a claim involves: (a) the interpretation, application or*

upholding of the Constitution itself, including issues concerning the status, powers or functions of an organ of State and disputes between organs of State; (b) the development of (or the failure to develop) the common law in accordance with the spirit, purport and objects of the Bill of Rights; (c) a statute that conflicts with a requirement or restriction imposed by the Constitution; (d) the interpretation of a statute in accordance with the spirit, purport and objects of the Bill of Rights (or the failure to do so); (e) the erroneous interpretation or application of legislation that has been enacted to give effect to a constitutional right or in compliance with the Legislature's constitutional responsibilities; or (f) executive or administrative action that conflicts with a requirement or restriction imposed by the Constitution."

3.4. This will be expanded upon further hereunder when each ground of appeal is separately dealt with but in short:

3.4.1. The question of the second applicant's status as an occupier is a question of fact;

3.4.2. The question of which forum an appeal pursuant to Esta should be directed is a question of procedure; and

3.4.3. Whether or not there was indeed a substantial and irreparable breakdown in the relationship between the first applicant and the respondents[6] is solely a question of fact.

3.4.4. Nowhere on the papers or argument is it argued how factual and procedural issues are brought within the ambit of “constitutional matter”. It is incumbent upon a party claiming relief in proceedings such as these to stipulate on the papers the facts that it relies upon to support the relief that it seeks. See in this regard *South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC) at paragraph [210]:*

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[6] It appears that the municipality having jurisdiction has acceded to a direction that it be joined herein. That being said a reference to "respondents" may be deemed to be a reference to the first and second respondents save insofar as the context may indicate otherwise.

"In our system it is not permissible for a party to raise a constitutional complaint that was not pleaded. Recently, the Supreme Court of Appeal affirmed this principle in Fischer v Ramahlele:

'Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for it is impermissible for a party to rely on a constitutional complaint that was not pleaded. There are cases where the parties may expand those issues by the way in which they conduct proceedings.'."

3.4.5. See also *Sterklewies (infra) at paragraph [26]:*

"*'It cannot be emphasised too often that courts are, generally speaking, bound by the issues that the parties to*

litigation have formulated and it is not open to them to deal with and determine cases on a different basis. That is particularly the case where the court is a court of review of what has transpired in a lower court, as is the position with the land claims court when exercising its jurisdiction under s 19(3) of the Act.'[7]

3.4.6. As regards the above quoted authority it is further noted and as is apparent from the judgments of the Magistrates Court and the LCC, not once during the course of these proceedings has it been alleged in the papers filed by the applicants that the issues raised in this matter to date constitute constitutional matter.

3.5. It is accordingly submitted that the application for leave to appeal should be dismissed on this ground alone.

[7] Noted with approval by this honourable court in the matter of *Head of Dept, Dept of Education, FS Prov v Welkom High School 2014 (2) SA 228 (CC)*

Second Applicant's Right of Occupation

4. It was not seriously disputed in the second applicant's application for leave to intervene before the LCC that she had in fact been born and grown up on a neighbouring property and had thereafter moved onto the respondents' property as a result of her relationship with and eventual marriage to the first applicant.

4.1. In the application for leave to intervene the case of second applicant was premised solely thereon that she had in fact been granted express consent[8] to occupy the property. The LCC found as a question of fact that she had presented no evidence to support the grant of such a right.[9] It appears that it is no longer argued that such express consent was in fact given.

[8] Answering affidavit at paragraph 13.5.1

[9] LCC judgment (annexure "JW 3") at paragraph [26]

5. Contrary to the rule that a case must be properly presented and pleaded, the case of the second applicant has since segued between three differing and mutually exclusive versions.

6. After the conclusion of the LCC proceedings it was for the first time contended that: (a) the second applicant obtained a right to occupy by virtue of seasonal employment on the property; (b) she had presumed[10], alternatively tacit consent to occupy or; (c) her status as a family member of the first respondent afforded her also the status of occupier as defined in Act. In argument it appears that the applicants are proceeding with this shotgun approach, seeming to allege three versions in the alternative as opposed to pinning their colours to the mast as to a version of events.

   6.1. It is noted, as is alleged by the applicants, that in considering applications for ejectment in terms of Esta the courts do not unduly tax themselves with issues of onus.

[10] As per sections 3(4) & (5) of Esta

6.2. That being said, it is trite that in the event a person alleges that he or she is indeed an occupier as defined in the Act, there is an onus on such person to prove such status. Reference is made in this regard to the authorities referred to at paragraph 13.6 of the respondents' answering affidavit[11], with which assertion the applicants have not taken issue.

7. Much is made by the applicants of various authorities from which it was deemed that occupiers of land have tacit consent to occupy same.

7.1. An Esta occupier's right of occupation is not one afforded to them by common law, the Constitution or the Act. The right is one afforded by consent. It is submitted that it is essential that before there can be consent it be actual and informed as to the terms and conditions of the right of occupation[12], as

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[11] *Khuzwayo v Dludla 2001 (1) SA 714 (LCC) at 717 E-F, Esterhuyse v Khamadi 2001 (1) SA 1024 (LCC) at 1029 B-F* and *Ntuli and Others v Smit and Another 1999 (2) SA 540 (LCC) at 549 C-D*

[12] *Lanbounavorsingsraad infra at paragraph 21*

read with the rights and duties as set out in the Act, failing which there can be no question of actual consent. The consent in question can of course be express or tacit, but must be actual.

7.2. This was confirmed in *Residents of Joe Slovo Community, WC v Thubelisha Homes 2010 (3) SA 454 (CC)* at paragraph 50, where the question of tacit consent was dealt with in the context of the PIE Act.

"*[50] There is no question of ostensible consent in this case. There must be actual consent. In the circumstances, it does not matter if the municipality created the impression that it consented to occupation of its property by the applicants and the applicants were prejudiced as a result; the municipality cannot be precluded from denying the absence consent. There are two reasons for this. First, the PIE Act speaks of tacit consent which is a species of actual consent and has nothing to do with ostensible consent. If the purpose of the lawmaker were to confer a right of occupation consequent upon ostensible consent it would certainly have said so.*

Secondly, the applicants do not rely upon estoppel. In the circumstances, even if the PIE Act could be understood to refer to ostensible consent, the applicants have not begun to make out any case on that basis."

7.2.1. It is as an aside noted that the respondents do not contend that consent must be in the form of a contract or an agreement as alluded to in the applicants' heads of argument. That being said however consent must be something actually given. In all the cases that the applicants have referred to in their heads of argument (*Thubelisha, Sterklewies*[13] etc.) it is apparent that tacit consent is only assumed when an owner allows a third party to occupy the property <u>without their being any other cause for that person to be so present</u>.

7.2.2. It is accordingly submitted that the LCC correctly held that there was a perfectly reasonable explanation for second

[13] *Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga 2012 (5) SA 392 (SCA)*

applicant's presence on the property, namely the familial relationship with the first applicant.[14]

8. Applicants then seek to argue that as second applicant occupied the property as a family member of first applicant, and without any other right in law, she too became an occupier in terms of Esta.

8.1. It has for some 15 years been trite that the spouse/dependant/family members of a person who has in fact been granted consent do not themselves qualify as occupiers as defined in the Esta but are rather persons holding under such occupier with (*mutatis mutandis*) all the rights and duties of an occupier.

8.2. Section 8(1) of ESTA defines occupier as:

"*a person residing on land which belongs to another person, and who has on 4 February 1997 or thereafter <u>had consent</u> or another right in law to do so…"*

[14] LCC judgment (annexure "JW 3") at paragraph 25

8.3. In *Venter NO v Claasen en Andere*,[15] the LCC distinguished between two types of occupiers and held;

"*Die Verblyfregwet onderskei tussen bewoners van 'n eiendom wat okkupeerders is ingevolge die definisie "okkupeerder", en bewoners wat gesinsverband van okkupeerders is en wat op die eiendom mag woon vanweë hul gesinsverband met 'n okkupeerder. Laasgenoemde groep bewoners is nie okkupeerders (soos gedefinieer) nie.*"

8.4. In *Dique NO v Van der Merwe & Another*[16] the court considered whether a spouse can be included in the definition of "occupier", it held:

"*The right which one spouse has to reside on the property of the other during the subsistence of a marriage relationship is a sui generis right. It is a personal right and not a real right in land because it is not enforceable against bona fide third parties…*

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[15] 2001 (1) SA 720 (LCC) at 726A

[16] 2001 (2) SA 1006 (T) and see *Simonsig Landgoed (EDMS) BPK v Vers and Others* 2007 (5) SA 103 at 109E

Although a strictly literal interpretation of the definition of occupier in the Act could lead to the conclusion that the sui generis right of a spouse is incorporated in the concept of 'another right in law', it is clear from the provisions of the Act that the legislature did not intend to afford such a spouse the status of occupier."

8.5. See also in this regard the LCC judgment in the second applicant's application to intervene, at paragraphs [22] - [24] thereof.[17]

8.6. While this issue was not expressly visited by this Honourable Court, it was touched upon by it in the matter of *Hattingh and Others v Juta 2013 (3) SA 275 (CC).*

8.6.1. In *Hattingh* it was argued that there are two types of occupiers contemplated in Esta, as set out above, with which contention this honourable court did not take issue.

[17] Annexure "JW 3"

8.6.2. In that matter it was held that the adult sons and daughter-in-law of Mrs Hattingh occupied the property by virtue of Mrs Hattingh's right to family life, having done so openly for over 6 years, and that a balancing of the rights of the owner of the property as against those of Mrs Hattingh was sufficient for the grant of an eviction order against them. This court did not in that matter visit the requirements of sections 8, 9 and 11 of the Act as it would have been obliged to do had it taken the view that Mrs Hattingh's descendants were occupiers in terms of the Act.

9. Further there is then the question of reading the Act in context. It is submitted that if it is held that spouses/dependents/family members who occupy are occupiers as defined in the Act, *inter-alia* the following sections of Esta will become utterly meaningless[18]:

[18] The sections listed hereunder or in no way an exhaustive list and are given simply as illustrations of the distinction in the Act between occupiers as defined and those holding title under them

9.1. Section 1, defining an occupier as a person holding with consent and the person in charge as the person with authority to give consent;

9.1.1. Section 1 insofar as it contemplates considering the circumstances of the entire household and not just the person having consent to occupy;

9.1.2. Section 6(2)(d) which affords the ‘occupier’ a right to family life.

9.1.3. Section 6(2)(dA) which affords an ‘occupier’ the right to bury deceased family members who at the time death were “*residing on the land on which the occupier is residing*”;

9.1.4. Section 6(5) which affords the “*family members*” of an ‘occupier’ the right to bury the ‘occupier’ on his passing;

9.1.5. Section 8(1)(a) which at the termination of a right of residence considers “*the fairness of any agreement,*

provision in an agreement, or provision of law on which the owner or person in charge relies;";

9.1.6. Section 8(5) : "*on the death of an occupier contemplated in subsection (4), the right of residence of an occupier who was his or her spouse or dependent may be terminated only on 12 calendar months written notice to leave the land";*

9.1.7. Section 12(4) which stipulates that an eviction order shall be on reasonable terms "*which may be determined by the court, having regard to the income of all the occupiers in the household*"

9.1.8. It is clear from the above that Esta itself contemplates that while there might indeed be persons occupying the property with an occupier with consent they do not by that reason fall to be defined as occupiers as contemplated, narrowly, in the Act.

10. The reliance of the applicants on the authorities to which they refer is uncertain.

10.1. It has never been disputed that the spouse of an occupier might also be an occupier as defined in Esta, but such cases are clearly limited to instances where both spouses have in fact been granted consent to occupy the property.

10.2. In *Atkinson v Van Wyk 1999 (1) SA 1080 (LCC)*[19] it was clear that the second defendant had continued to occupy the land after the first defendant, who had a right to occupy, had vacated same. It was held that the second defendant accordingly occupied the property with no other ostensible right to do so, and accordingly she was presumed to have consent based on the presumptions in section 3 of Esta.

10.2.1. That is wholly distinguishable from the instant matter where the LCC correctly held that the second applicant's

[19] Applicant's heads of argument at paragraph 24

occupation was pursuant to the first applicant's right to family life.[20]

10.2.2. It is clear that what was intended by section 3[21] was that if somebody was occupying the land of another without any apparent reason to be so present, and in the event the landowner took no steps to evict such person and without reason tolerated his or her presence, then it would be deemed that the landowner was consenting to such presence. This is supported by the comments of the SCA in Sterklewies at paragraph [3] to the extent that:

"*The Act does not describe an occupier as a person occupying land in terms of an agreement or contract, but as a person occupying with the consent of the owner.*

[20] Annexure "JW 3" at paragraph [25]

[21] "*3(4) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved.*

(5) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge."

One can readily imagine circumstances in which in the rural areas of South Africa people may come to reside on the land of another and the owner, for one or other reason, takes no steps to prevent them from doing so or to evict them. That situation will ordinarily mean that they are occupying with the tacit consent of the owner and will be occupiers for the purpose of the Act."

10.3. Similarily in *Conradie v Hanekom 1999 (4) SA 491 (LCC)*[22] it was deemed trite that both respondents were occupiers as defined in the Act, both occupying with consent.[23]

10.3.1. *Conradie* is accordingly once again wholly distinguishable from the instant matter where it is in no

[22] Applicant's heads of argument at paragraph 28

[23] See *Conradie* at paragraph [5] "*Both the respondents were 'occupiers' as defined in the Act as on 4 February 1997 and live together in a house provided by the applicant. Both the respondents were previously in the employ of the applicant but the first respondent was dismissed on 4 August 1998, while the second respondent is still in employment."*

way common cause that both the applicants are occupiers as defined.

10.4. *Venter NO v Claasen 2001 (1) SA 720 (LCC)*[24] is in fact wholly supportive of the contentions of the respondents in this matter, namely that an owner allowing an occupier's spouse to live with them does not constitute consent as defined in Act. See in this regard *Venter* at paragraph [19].

"[19] Die onvermydelike gevolgtrekking wat ek uit bostaande maak, is dat die tweede respondent nie 'n okkupeerder is soos bedoel in die Verblyfregwet nie. Die toestemming of ander reg wat sy het om in die gesinswoning te woon, is nie die soort 'toestemming' of 'regsgeldige reg' wat in die definisie van 'okkupeerder' voorsien was nie."

10.5. In *Simonsig Landgoed (Edms) Bpk v Vers 2007 (5) SA 103 (C)*[25] the court did not hold that the surviving spouses of two occupiers as defined in Esta became occupiers in own right,

[24] Applicants' heads of argument at paragraph 32

[25] Applicants' heads of argument at paragraph 35

but rather that as a result of their familial relationship they were not unlawful occupiers as defined in the PIE Act insofar as they had "*another right in law*" (namely the familial relationship) to occupy the property.

10.6. *Randfontein Municipality v Grobler and Others [2010] 2 ALLSA 40 (SCA)*[26] has with respect no bearing on this matter whatsoever.

10.6.1. In that matter the court held that there was a dispute of fact as to whether or not the occupiers were occupiers as defined in Esta and accordingly the matter could not be determined by the High Court by virtue of the exclusive jurisdiction of the Land Claims Court and the Magistrates' court in Esta matters.

10.7. It is submitted that the LCC correctly interpreted *Sterklewies.*[27] The *Sterklewies* matter dealt specifically with

[26]Applicants' heads of argument at paragraph 38

[27] Applicants' heads of argument at paragraph 40

an instance of a person residing on the property together with another person who it was not disputed had an independent right of occupation and is accordingly wholly distinguishable from the above matter. In *Sterklewies* the Supreme Court of Appeal ordered the eviction of the respondents whose contracts of employment had come to an end, saving one Mr Tsotetsi living on the property in premises together with his spouse who it was not disputed had independent consent to occupy the property. [28]

11. It has been accepted by the courts of the Republic for the last 15 years the persons occupying (rural) land with consent are occupiers as defined in Esta.

11.1. Had the legislature intended to include those holding title under occupiers with consent as occupiers as defined, it could very simply have said so.

[28] See *Sterklewies* at paragraph [27]

11.2. Rather it carefully constructed the legislation in a manner subject to only one interpretation, namely that those taking occupation under occupiers do so subject to such occupiers' title.

12. The fact that spouses/dependent/family members are not afforded the status of occupiers does not have the effect that such people are not protected by Esta.

12.1. It is trite that in terms of Esta, as well as the PIE Act and in accordance with the provisions of section 26(3) of the Constitution, no person can be evicted from their home without considering all relevant circumstances. It is trite that the circumstances of an occupier broadly defined could be sufficient for a court to refuse an eviction application, whether that person has any right in law to occupy the property or not.

12.2. Indeed it is clear from *Simonsig* that spouses of occupiers are not unlawful occupiers as defined in the PIE Act.

12.3. Indeed it conversely appears that in many instances spouses and dependents are far less vulnerable to the whims of landowners than occupiers are. There is a plethora of circumstances contained in the Act in terms whereof the landowner can evict an occupier. None of these circumstances apply to a resident. A resident can only be evicted at the instance of the occupier with consent or upon proof of an upset in the balancing of interests as contemplated in *Hattingh* (supra).

13. There is no authority for the contention that an employee by virtue of his or her employment acquires a right of occupation on the employer's property. There is no authority for the contention that the family member of an occupier as defined with the lapse of time him or herself become an occupier as defined pursuant to the presumptions contained in section 3. There is no authority for the contention that a person taking occupation of another's property pursuant to an occupier's right to family life him or herself by virtue of that occupier's right to family life also becomes an occupier.

Irretrievable Breakdown of the Relationship between the Parties

14. The determination of this issue is one premised wholly on an interpretation of evidence and it is submitted that no constitutional matter arises therefrom, and indeed none is even alleged. It is accordingly submitted that the application for leave to appeal as regards this ground of appeal falls to be dismissed on that basis alone.

15. It is not in dispute that the first applicant was an occupier on 4 February 1997 and accordingly that any application for his eviction falls to be determined in accordance with the provisions of sections 8, 9 and 10 of the Act.[29]

15.1. The applicants rely on three purported errors[30] on the part of the LCC, namely that it imposed an onus on the first

[29] As set out in applicants' heads of argument at paragraphs 67-70

[30] Applicants' heads of argument at paragraph 75

applicant, that it incorrectly considered section 8(2)[31] of the Act in determining a section 10((1)(c))[32] enquiry and that it incorrectly found that there had been an irretrievable breakdown of the relationship.

Sterklewies

16. The findings of the Magistrates' Court in this regard appear from paragraph 2 of its judgment[33], namely that the first applicant's employment had been terminated, referred to the CCMA and settled, incorporating an agreement to vacate. What is very

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[31] "*8(2) 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*."

[32] "*10(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if-……(c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship*"

[33] Annexure "JM 1"

notable from this portion of the judgment is that the issue placed in dispute here was not the compliance or otherwise with section 8 (2), but an allegation by the first respondent that he had a right of habitation.[34]

16.1. The Magistrate then went further and conducted an enquiry pursuant to section 10(1)(c), holding that the relationship had irretrievably broken down for the reasons as set out in paragraph 5 of the judgment.[35]

16.2. The Land Claims Court then also noted that the defence raised by the first applicant was one of a lifelong right of *habitatio*, which contention it too rejected.[36]

16.3. The LCC then held that the first applicant's right of residence had been terminated in terms of section 8(2).[37]

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[34] Annexure "JM 1" at paragraph 2

[35] Annexure "JM 1" at paragraph 5

[36] Annexure "JM 2" at paragraphs 11-12

[37] Annexure "JM 2" at paragraph 16

16.4. It is however important to distinguish, as the LCC did[38], between the termination of the right of occupation in terms of section 8(2) and the grant of an eviction order in terms of section 10.

16.5. The finding in terms of section 8(2) does not have the ineluctable effect that an eviction order will issue, as the LCC correctly noted following the test as prescribed in *Sterklewies.*[39]

16.6. Rather, the termination of the right of occupation and the consequent eviction are separate enquiries.[40]

16.7. There is with respect no reason to hold that the LCC erred in finding that the first applicant had not presented facts to show that the termination of the employment relationship had not

[38] Annexure "JM 2" at paragraphs 16 - 17

[39] Annexure "JM 2" at paragraph 24

[40] As noted in Sterklewies at paragraph [16]

led to the termination of the right of occupation. It should be remembered in this regard that the first applicant had pinned his colours to a purported *habitatio*, which both the Magistrates' Court and the LCC found was not present.

16.8. The LCC did not place an "onus" on the first applicant, it simply held that he had not produced sufficient evidence to displace the *prima facie* assumption that as the employment agreement had been terminated the right of residence too was terminated. This is of course in accordance with the decision in *Sterklewies.*[41]

16.9. The LCC was bound by the decision of the SCA in *Sterklewies.*

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[41] See Sterklewies at paragraph [14], more specifically "*It is capable of the construction that it is a possible specific instance of a just and equitable ground for termination, but that its prima facie weight as such is capable of being displaced by way of evidence that, notwithstanding the fact that the right of residence flowed from the employment agreement and that that agreement had been both lawfully and fairly terminated, it would nonetheless not be just and equitable to terminate the former worker's right of residence*."

The Section 10 Inquiry

17. The crux of first applicant's objection to the LCC's finding in this regard is that the LCC apparently did not take into consideration the first applicant's allegations of abusive behaviour on the part of the farm manager, Mr Burger.

17.1. Mr Burger denied the allegations and not a single other employee on the farm, despite first applicant's allegations that they were similarly treated, elected to tender corroborating evidence.[42]

17.2. The argument of the applicants is that, premised on the authority cited at paragraph 86 of the heads of argument,[43] the respondents' denial that the abusive conduct took place is insufficient to constitute a rebuttal of those allegations.

[42] Respondents' answering affidavit at paragraphs 20.9-20.10

[43] *Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA)*

17.3. The argument presented in the LCC was that as the respondents did not in specific detail deny each and every allegation of the first applicant such allegations were not disputed, relying on the content of paragraph [13] of *Wightman.*[44]

17.4. This argument of course completely ignores the further content of paragraph 13 which stipulates that:

"*There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him*"

17.5. The question then arises, what were the respondents expected to do?

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[44] Specifically, "*A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed."*

17.6. The first applicant gave no times, dates, witnesses or circumstances surrounding the alleged incidents, relying himself on bare assertions. In light of the complete lack of specificity the respondents, and Mr Burger, in denying that the alleged incidents ever took place, were precluded from doing other than that which they did.

17.7. Had the first applicant taken the court into his confidence as to the specificity of the alleged complaints, of a certainty more information could have been forthcoming.

17.8. It is reiterated the allegations of the first applicant were unsupported by an iota of objective evidence or the remotest degree of specificity.

18. The reason for the bringing of the disciplinary enquiry against the first applicant was that he absconded and remained absent from work.[45]

[45] Respondents' answering affidavit at paragraph 7

18.1. The finding that the relationship between the parties had irretrievably broken down was in no way related to the alleged conduct of Mr Burger, but rather that the conduct of the first applicant as a whole resulted in a fundamental breach of the relationship.[46]

18.2. It was also correctly held that the respondents in fact attempted to accommodate the first applicant despite his "idiosyncrasies".[47]

18.3. This breakdown was predicated on the conduct of the first applicant[48] which conduct was based on common cause facts,[49] having nothing to do with the alleged conduct of Mr Burger.

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[46] Annexure "JM 2" at paragraph [21]

[47] Annexure "JM 2" at paragraph [20]

[48] Annexure "JM 2" at paragraph [19]

[49] Respondents' answering affidavit at paragraph 18.2

19. A final issue in this regard which the first applicant wholly ignores both in affidavits and argument is that it is not in dispute that the first applicant expressly, and while being assisted by his union, agreed to the termination of the employment agreement and his right of residence.[50]

The Appeal Forum

20. As noted in applicants' heads of argument[51] the LCC called upon the parties to file written submissions relating to the appeal process.

20.1. It was with respect erroneous however of the applicants to allege in their heads of argument that the submissions related to whether the appeal should have been directed to the LCC or the SCA.

[50] Respondents' answering affidavit at paragraphs 7-7.6, annexure "AA 4"

[51] At paragraph 96

20.2. The question was rather which judgment was the judgment subject to the appeal, the judgment of the LCC on review or the judgment of the Magistrates' Court as the court of first instance.

20.3. A copy of the correspondence in this regard received from the LCC dated 1 September 2014 is attached hereto marked "A".

20.4. That being said, as stated in respondents' answering affidavit,[52] this issue is pre-eminently a procedural and not a constitutional one.

20.5. Further, in a related matter the matter of *Mont Chevaux Trust (IT 2012/28) v Goosen SCA 20568/14*[53], application for leave to appeal on this exact question has been granted to the Supreme Court of Appeal.

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[52] Respondents' answering affidavit at paragraph 5-5.4

[53] Respondents' answering affidavit at paragraph 5.2

20.6. For ease of reference a copy of the judgment of the LCC in *Mont Chevaux* is attached hereto marked “B”.

20.7. It is accordingly expected that this procedural issue, insofar there is any doubt in this regard, will in due course be clarified by the Supreme Court of Appeal.

20.8. It is submitted that on this basis alone the application for leave to appeal falls to be dismissed.

20.9. As regards the arguments in this regard it is submitted that same are succinctly set out in respondents’ answering affidavit at paragraphs 23-25.3.

A Brief Statutory Reiteration

21. As appears from the LCC review judgment[54] the judgment of the Magistrate was confirmed.[55]

[54] Annexure "JM 2"

[55] Annexure "JM 2" at paragraph 29

21.1. It is submitted that the starting point in this argument must be the Esta Act itself.

21.2. The Esta Act makes provision therefore that all eviction orders in terms of the Act shall be sent to the Land Claims Court for review.[56]

21.3. Accordingly every eviction order issued out of the Magistrates' court is inevitably reviewed by a single judge of the LCC.

21.4. As regards appeals Esta is once again tellingly clear stipulating at paragraph 19(2), that "*Civil appeals from Magistrates courts in terms of this Act shall lie to the Land Claims Court*"

21.5. Contending that the judgment which is subject to the appeal is the judgment of the Land Claims Court on review, as the

[56] See section 19(3): "*Any order for eviction by a Magistrate's court in terms of this act,….., Shall be subject to automatic review by the Land Claims Court*.

applicants seek to do, makes a nonsense of the above-mentioned to section of the Act.

21.6. Applicants seek support for their contention further in the content of rule 35A of the LCC rules quoting subsection (3) thereof which stipulates that:

"*After a review has been decided, the registrar must return the record of proceedings to the Magistrate."*

21.7. Applicants then seek to argue that the use of the word "*decided*" clearly means that the magistrate's decision is supplanted by the finding of the LCC. This is with respect disingenuous. The LCC must of necessity make a 'decision', and to not do so would make the automatic review procedure an utter absurdity. This does not however elevate the magistrate's decision to one of the LCC.

21.7.1. It is notable that rule 35A categorically states that after the review is finalised the record must be returned to the Magistrate.

22. What the applicants seek to argue is that appeal and review should in the context of Esta be conflated.

22.1. It should be noted that what the Act specifically makes reference to is an automatic right of review, not appeal.

22.1.1. That the procedure intended by section 19(3) is indeed a review and not an appeal is confirmed by section 19(5) which stipulates that "*Any order for eviction contemplated in subsection (3) shall be suspended pending the review thereof by the Land Claims Court*"

22.1.2. It is trite that appeals suspend the operation of orders. The content of section 19(5) would accordingly have been wholly superfluous in the event the legislature had intended an automatic right of appeal.

22.2. Esta was a dramatic change from the ordinary procedures that had been followed in eviction matters, which were until

then in the Magistrates' Court dealt with exclusively by means of summons.

22.3. It is clear that what the legislature intended was that the LCC should for a limited period exercise an oversight function over Magistrates' Courts until the procedures to be followed have become entrenched, this being the pre-eminent purpose of review proceedings. See in this regard the judgment of the SCA[57] in the matter of *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA 2007 (1) SA 576 (SCA) at paragraph [31]:*

"*In a review the question is not whether the decision is capable of being justified (or, as the LAC thought, whether it is not so incorrect as to make intervention doubtful), but whether the decision-maker properly exercised the powers entrusted to him or her*."

[57] Considering review in the context of administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000.

22.4. It was not necessary for the legislature to confer an automatic right of appeal against decisions of the Magistrates' Court, as it is trite that same already exists.

23. One has to wonder in closing why the applicants are so insistent that occupiers evicted in terms of Esta should be deprived of their automatic right of appeal by arguing that the decision of the Magistrate, which is subject to an automatic appeal on request, should be supplanted by the decision of the LCC wherein leave to appeal can only be granted should the presiding judge be of the opinion that "*the appeal would have a reasonable prospect of success.*"[58]

23.1. The nature of the test to be applied pursuant to the enactment of the Superior Courts Act was considered in the *Mont Chevaux* (*supra*) matter at paragraph 6 of the judgment where the court stipulated after considering the terms of section that:

"*It is clear that the threshold for granting leave to appeal against the judgment of a High Court has been raised in the*

[58] Superior Courts Act 10 of 2013 at section 17(1)(a)(i)

new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. This new standard is applied by section 37(4)(b) of the Restitution of Land Rights Act 22 of 1994 to this court's duty to consider the prospects of and intended appeal."

Conclusion

24. Nothing has been presented which would tend to show that any irregularity has taken place in either the Magistrates court or the LCC.

24.1. The applicants have not presented anything close to sufficient facts or argument that the instant matter is a Constitutional one.

24.2. The propositions that the applicants advance are wholly unsupported by either the facts of this case, the relevant statutes, or the case law that the rely upon.

24.3. It is accordingly submitted that the application for leave to appeal falls to be dismissed.

24.4. It is noted that the applicants asked that leave to appeal be granted with costs, including costs of two counsel.

24.4.1. This matter has to date been competently dealt with by single counsel on behalf of applicants. There is no basis for ask for costs of two counsel.

24.4.2. It is further submitted that it is not the practice in applications flowing from act 62 of 1997 to make costs orders.

24.5. In the event the application is indeed dismissed as prayed then the respondents nonetheless do not ask that the applicants bear the costs of this application.

LF Wilkin
Counsel for respondents
Huguenot Chambers
Cape Town
9 April 2015

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 23/15

In the matter between

JAN KLAASE **First Applicant**

ELSIE KLAASE **Second Applicant**

and

JOZIA JOHANNES VAN DER MERWE N.O.

OF THE NOORDHOEK TRUST **First Respondent**

JOZIA JOHANNES VAN DER MERWE **Second Respondent**

WOMEN ON FARMS PROJECT ***Amicus Curiae***

FIRST AND SECOND RESPONDENTS' FURTHER WRITTEN SUBMISSIONS

INTRODUCTION

1. The first and second applicants ("Mr Klaase" and "Mrs Klaase") have applied for leave to appeal against the order evicting them from the property of the first respondent[1].

2. Pursuant to directions of the Chief Justice issued on 20 May 2015, the consideration of the application and these supplementary written submissions are limited to the determination of the following issues only:

   2.1. Mrs Klaase's rights under the Extension of Security of Tenure Act 62 of 1997 ("ESTA"[2]); and

   2.2. the potential prejudice to women who, under ESTA, find themselves in similar positions to Mrs Klaase.

3. In what follows we consequently assume that Mr Klaase's right of residence was properly terminated in terms of section 8 and that the

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[1] A farm, being portion 15 (a portion of portion 4) of the farm Misgunt No. 499, Clanwilliam, Western Cape Province

[2] In what follows, unless otherwise stated, all references to statutory provisions are to ESTA

other requirements for the making of an order of eviction against Mr Klaase set out in section 9 have been met. We further assume that the only questions raised by the issue set out in paragraph 2.1 above are whether the eviction order against Mr Klaase should operate against Mrs Klaase, or whether the first respondent (the owner of the land) and the second respondent (the person in charge of the land) ("Mr Van der Merwe") should have applied for and obtained a separate eviction order against Mrs Klaase.

4. In these written submissions we deal, first, with the legal status, under ESTA, of the spouse of a person who is an ESTA occupier. Next we deal with the facts. Finally we address, briefly, the issue set out in paragraph 2.2 above, mindful of the fact that such issue is likely to be addressed in the submissions of the *amicus curiae* and we will have the opportunity to respond to those submissions.

THE LEGAL STATUS OF THE SPOUSE OF AN ESTA OCCUPIER

5. Section 1(1) defines '*occupier*' as a person residing on land belonging to another with '*consent or another right in law to do so*'.

6. It follows that, to be an ESTA occupier, the spouse of an ESTA occupier must have consent or another right in law to do so.

Consent

7. Section 1(1) defines '*consent*' as meaning '*express or tacit consent of the owner or person in charge of the land in question*'.

8. The question whether the spouse of an ESTA occupier has the express or tacit consent of the owner or person in charge of the land, is a factual question to be answered on a consideration of all the facts. (The same applies to the granting of consent to other dependants of occupiers.)

9. The granting of the consent may be a unilateral act by the owner or person in charge; or it may be in the form of or be encompassed in an agreement between the owner or person in charge, on the one hand, and the ESTA occupier (i.e. a *stipulatio alteri*) or the spouse (or other dependant) of the ESTA occupier, on the other hand[3].

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[3] *Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga and Others* 2012 (5) SA 392 (SCA) paragraph 3. Compare the disagreement regarding the meaning and consequently the manner of granting of '*consent*' in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at paragraphs 54-59 (Yacoob J), 146 (Moseneke DCJ), 180 (Ngcobo J), 278-280 (O'Regan J) and 356-358 (Sachs J).

10. The granting of the consent may be unqualified or it may be qualified by express or tacit terms or conditions, e.g. by terms or conditions that the consent given to a spouse will operate only for so long as the ESTA occupier to whom the spouse is married continues to have a right of residence and for so long as the marriage between the ESTA occupier or the spouse subsists; or terms or conditions that consent given to another dependant will operate only for so long as the ESTA occupier upon whom that person is dependent continues to have a right of residence and for so long as the dependant remains dependent on the ESTA occupier.

11. Because in some instances the owner or person in charge may in fact grant consent to reside on land to the spouse (or other dependant) of an ESTA occupier, two provisions of ESTA refer to '*occupiers*' who '*are the spouses or dependants*' of ESTA occupiers. See sections 8(4)(a) and 8(5). For the reasons which follow, however, it does not follow that all spouses or dependants of ESTA occupiers are themselves ESTA occupiers.

'Another right in law'

12. Not surprisingly, ESTA does not define the term '*another right in law*'.

13. Despite the wide ambit of the term, we submit it does not encompass the right of the spouse of an ESTA occupier to live with the ESTA occupier as a result of the *consortium omnis vitae* between them[4]. (The same applies to the right of a family member dependant of an ESTA occupier to live with him or her.) That is because ESTA deals separately, in section 6(2)(d), as a right of the ESTA occupier, with the right to cohabitation between spouses and family members (under the rubric of the ESTA occupier's right to family life in accordance with the culture of that family).

14. For this reason, in *Hattingh and Others v Juta* 2013 (3) SA 275 (CC)[5] this Court approached the position of Mrs Hattingh's sons and daughter-in-law by considering whether the right of the occupier (Mrs Hattingh) to family life allowed them to live with her, not on the basis that they were occupiers in their own right because they were her sons and daughter-in-law.

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4 *Volks NO v Robinson and Other*s 2005 (5) BCLR 446 (CC) note 81.

5 See generally paragraphs 30-42. See especially paragraph 42(g): '*the applicants have no right of their own to live in the cottage but only depend upon Mrs Hattingh's right to family life to do so*'.

15. Also for this reason, section 10(3) of ESTA makes provision for the granting by the court of '*an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence*'.

Conclusion on this aspect

16. It follows that the legal status, under ESTA, of the spouse of a person who is an ESTA occupier will depend on all the facts and circumstances of the case.

17. The spouse will be an ESTA occupier herself or himself if, on the facts, the owner or person in charge gave the spouse consent, express or tacit, to reside on the land and any terms or conditions of the consent have been or remain fulfilled.

18. The spouse will also be an ESTA occupier herself or himself if, despite the absence of such consent, on the facts the spouse has another right in law to reside on the land, besides her or his family-law right to cohabitation (which does not qualify as such a right in law).

19. The spouse of an ESTA occupier who does not have such consent or another right in law, on the facts, has a right of residence derived from her or his marriage to the ESTA occupier[6], provided that a right to cohabitation accords with the culture of the family (which we accept will invariably be so in South Africa) and giving effect to it in a particular case will not create an unfair imbalance with the rights of the owner or person in charge[7].

THE FACTS

20. In her founding affidavit in the application in the Land Claims Court ("LCC") Mrs Klaase alleged[8]:

    20.1. she worked on the farm on a full-time basis as a general labourer;

    20.2. it was a material term of her oral contract of employment, that she was entitled to housing;

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6 *Mpedi and Others v Swanevelder and Another* 2004 (4) SA 344 (SCA) paragraph 10.

7 See the discussion of these aspects of section 6(2)(d) in *Hattingh*, *supra* paragraphs 37-39.

8 Mrs Klaase affidavit vol. 3 pp. 165-166 paras. 13-15, 17 and 24.

20.3. her husband's contract of employment contained an identical term;

20.4. the house which they currently occupy was allocated to her after she became pregnant; and

20.5. she is an ESTA occupier in her own right because she was an employee in her own right and lived on the farm with the consent of the owner.

21. In his answering affidavit in the LCC Mr Van der Merwe said[9]:

21.1. Mrs Klaase is not and never has been a permanent employee.

21.2. Mrs Klaase has been a seasonal worker.

21.3. As is the case with all seasonal workers, Mrs Klaase did not obtain an independent right to occupy the property.

21.4. Mrs Klaase came to occupy the property solely by virtue of her relationship with Mr Klaase.

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9 Mr Van der Merwe affidavit vol. 3 pp. 172-173 paras. 11.

22. Further as to the circumstances in which Mrs Klaase came to live on the farm and the basis on which she remained there, in his answering affidavit in the LCC Mr Van der Merwe added[10]:

22.1. About 35 years ago Mrs Klaase and Mr Klaase started a romantic relationship and sometime thereafter she fell pregnant with their first child.

22.2. At the time Mr Klaase was living on the farm with this father, who like Mr Klaase was also a permanent employee on the farm.

22.3. About a year or two after their first child was born, Mrs Klaase moved into Mr Klaase's father's house on the farm without seeking Mr Van der Merwe's father's consent.

22.4. Shortly afterwards, Mr Klaase's father approached Mr Van der Merwe's father and asked him whether an alternative arrangement could be made.

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[10] Mr Van der Merwe affidavit vol. 3 pp. 176-178 paras. 16.4 to 16.11 and p. 185 paras 21.2 and 21.4.

22.5. As a result, Mr Van der Merwe's father agreed to build a cottage on the farm for Mr Klaase, which he then gave Mr Klaase a right to occupy.

22.6. When the building of the cottage was completed, Mr Klaase occupied it, taking Mrs Klaase with him.

22.7. Thereafter, Mr and Mrs Klaase were married.

22.8. Mrs Klaase never asked for, nor was she given any independent right to occupy the farm. She came to live with her prospective husband in a house on the farm that had been made available to him in his capacity as a permanent employee.

22.9. Mrs Klaase has only ever occupied the farm by virtue of Mr Klaase's right to family life.

22.10. Mrs Klaase was never an occupier in her own right.

23. The following relevant facts are now common cause[11]:

23.1. Mr Klaase lived and worked on the farm since 1972.

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[11] Agreed Statement of Facts vol. 3 pp. 156-158 para. 4.

23.2. In the early 1980s Mrs Klaase started living on the farm together with Mr Klaase.

23.3. Mr and Mrs Klaase were married in 1988.

23.4. Mrs Klaase has resided continuously and openly on the farm for many years.

23.5. Over the years, like many of the spouses and other family members of permanent employees on the farm, Mrs Klaase has worked on the farm on a seasonal basis picking and packing fruit and pruning trees, though primarily in the packaging store.

24. We submit that the combination of the common-cause facts and the facts stated by Mr Van der Merwe in his affidavit, especially those summarised above, which must be accepted as correct because he was the respondent in the application in the LCC brought by Mrs Klaase, there was no referral to oral evidence and his allegations are not far-fetched or otherwise clearly untenable, yield the following results:

24.1. Mrs Klaase was not given express or tacit consent to reside on the farm by the owner or person in charge (i.e. Mr Van der Merwe's father).

24.2. Instead, Mr Van der Merwe's father gave Mr Klaase express consent to reside in the house on the farm which he (Mr Van der Merwe's father) had built for him as a permanent employee who he (Mr Van der Merwe's father) considered should be entitled to housing on the farm.

24.3. Mr Klaase, in turn, took Mrs Klaase to the house to live with him.

25. We further submit that as there is no evidence of Mrs Klaase having had any right in law to reside on the farm, aside from Mr Klaase's right to family life, her right of residence on the farm derived from her marriage to Mr Klaase and it continued until his right of residence was lawfully terminated in terms of section 8.

POTENTIAL PREJUDICE TO WOMEN IN SIMILAR POSITIONS TO THE SECOND APPLICANT

26. The Applicants argue that an interpretation of the term *'occupier'* which does not accord family members of occupiers properly so called an independent right of residence would have an unjustifiably discriminatory effect on women, in that female farm workers would in effect be deprived of the right to place specific evidence of their circumstances before a court considering their eviction.

27. In considering whether to grant an eviction order under both ESTA and PIE, the court seized with the matter is enjoined to consider all relevant circumstances in reaching a determination as to whether it would be just and equitable to grant such an order. See sections 10(3) and 11(2) and (3).

28. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), a case decided with reference to the Prevention of Illegal Eviction from and Unlawful of Land Act 19 of 1998, which is not materially different on this aspect, this Court held that a case-specific approach is required, meaning that relevant circumstances in a

particular eviction application will be determined by its factual and legal context; and further (at paragraph 36) that the court is '*called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make*'.

29. In addition, ESTA provides a mechanism for relevant circumstances to be placed before the court, independent of any submissions of the parties. Section 9(3) provides that the Court must request a probation officer or an officer of the Department of Land Affairs or any other officer in the employment of the State to submit a report, *inter alia*, on the availability of suitable alternative accommodation to the occupier; indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education, pointing out any undue hardships which an eviction would cause the occupier; and on any other matter as may be prescribed.

30. We consequently submit that the substantive and procedural provisions of ESTA, and the jurisprudence of this Court, ensure that the relevant circumstances of the occupier and his/her spouse and family members are placed before the court considering any eviction in ESTA[12].

A M BREITENBACH SC

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27 July 2015

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[12] Compare *Landbounavorsingsraad v Klaase*n 2005 (3) SA 410 (LCC) paragraphs 34-39.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 23/15

In the matter between

JAN KLAASE	**First Applicant**
ELSIE KLAASE	**Second Applicant**

and

JOZIA JOHANNES VAN DER MERWE N.O.	
OF THE NOORDHOEK TRUST	**First Respondent**
JOZIA JOHANNES VAN DER MERWE	**Second Respondent**
WOMEN ON FARMS PROJECT	***Amicus Curiae***

FIRST AND SECOND RESPONDENTS' FURTHER WRITTEN SUBMISSIONS IN RESPONSE TO THE SUBMISSIONS OF THE *AMICUS CURIAE*

INTRODUCTION

1. These further submissions firstly respond to the application of the *amicus curiae* ('Women on Farms') seeks to introduce the following evidence under the provisions of Rule 31 of the Rules of this Court and secondly respond to the written submissions of Women on Farms.

THE APPLICATION FOR ADMISSION OF FURTHER EVIDENCE

2. Women on Farms seeks to introduce five reports as evidence under the provisions of Rule 31 of the Rules of this Court.[1]

3. We submit this application should be refused because it is inconsistent with Women on Farms' application for admission as an *amicus curiae*,

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[1] A study providing statistics on farm evictions done by Social Surveys and Nkuzi Development Association in 2005, entitled *"Still Searching for Security: the reality of farm dweller evictions in South Africa"; ('the Nkuzi study');*

A study by the Centre for Rural Legal Studies which resulted in a report by Du Toit, and Ally, F *"The Externalisation and Casualization of Farm Labour in Western Cape Horticulture"* Centre for Rural Legal Studies Research Report no.16 (2003); ('*the CRLS report*');

SANPERI "*The Position of Women Workers in Wine and Deciduous Fruit Value Chains*" (2008) ('*the SANPERI study'*); and

South African Human Rights Commission National Inquiry into Human Rights Violations in Farming Communities (2003) ('*the SAHRC Inquiry Report*');

Women on Farms "*Behind the Label II*", 2005 (*'the WFP Report'*)

it is inconsistent with the Directions of this Court dated 20 May 2015 ('the Directions') and because it is inconsistent with Rule 31 of the Rules.

4. In Women on Farms' notice of application for admission as an *amicus curiae*, it did not seek the right to adduce factual material under Rule 31. The substantive relief it sought was that it be admitted as an *amicus curiae*, and that it be granted the right to deliver written submissions and to make oral submissions.[2] The only relevant part of its application, is the statement in its founding affidavit that it "*seeks leave to place research before the court on the number and effect of such evictions and the gendered impact of the current legislative scheme (as interpreted by the courts).*"[3] When this statement is read together with its notice of motion, it means placing such research before this Court by means of its written and oral submissions. This conclusion is fortified by the contents of the penultimate paragraph of its founding affidavit, which reads: "*The WFP seeks to make the submissions described by*

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2 See paragraphs 1 to 3 of Women on Farms' notice of motion dated 29 April 2015.

3 See paragraph 27 of Solomon's affidavit of 28 April 2015.

way of written heads of argument, including reference to relevant research, case studies by the WFP and academic research articles."[4]

5. Paragraphs 3 and 4 of the Directions dealt with the evidence and the record that is to serve before this Court for purposes of the determination of the application for leave to appeal. The upshot was this Court directed that the record be finalised and delivered by 16 July 2015.

6. Paragraph 5 of the Directions regulated the delivery of written argument, including written argument by Women on Farms which had to be delivered by 3 August 2015. It further provided that any party wishing to respond to such written argument, has to file its responding written argument just over a week later, by 11 August 2015.

7. The Directions did not permit Women on Farms to lodge, together with its written argument, documents to canvass factual material, let alone approximately 580 pages of such documentation (which cannot be addressed properly within a period of just over a week).

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[4] See paragraph 29 of Solomon's affidavit of 28 April 2015.

8. Rule 31 permits any party on appeal *"to canvass factual material which is relevant to the determination of the issues before the Court and which do not specifically appear on the record"*, provided that such facts "*are common cause or otherwise incontrovertible"* or *"are of an official, scientific, technical or statistical nature capable of easy verification."*

9. The First and Second Respondents do not accept that the facts and figures stated in the dated materials which Women on Farms seeks to have admitted – two studies published in 2003, two in 2005 and one in 2008 – accurately portray the current position of women who find themselves in similar positions to Mrs Klaase. The facts and figures are not capable of easy verification, let alone verification in the eight calendar days within which these responding submissions have to be prepared.

10. In what follows we elaborate briefly on these points with reference to each of the documents which Women on Farms seeks to have admitted.

11. The Nkuzi study (2005) is of limited relevance to the position of persons under ESTA in that it covers a period of only 6 years after the enactment of ESTA, being the period between 1998 and 2004.

12. The Nkuzi study sought to determine the number of people evicted from farms in South Africa during the 21 year period from 1984 to 2004.[5] It therefore includes statistics in respect of farm evictions which took place during the 14 year period prior to the enactment of ESTA in 1998. It is not clear from the study what percentage of the women recorded as being evicted from farms relates to the pre-ESTA period and what percentage relates to the period after the enactment of ESTA.

13. The conclusions reached in the Nkuzi study clearly relate largely to the evictions which took place during the pre-ESTA period.[6] As such the conclusions set out in the Nkuzi study cannot reasonably be said to provide undisputed evidence of prejudice to women who, under ESTA, find themselves in positions similar to that of the second applicant.

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5 Nkuzi Study page 11.

6 The Nkuzi study indicates that the largest number of evictions during the period covered by the report took place during 1992 (10.7%) with the next highest number taking place in 1984 (9.5%). It is further evident from the study that 70.7% of the evictions recorded therein relate to the period from 1984 to 1997. See Nkuzi Study page 46.

14. The CLRS report (2003) ought not to be admitted in that the information presented in the report is not common cause or otherwise incontrovertible nor is such information official, scientific, technical or statistical in nature and capable of easy verification.

15. The CLRS report does not include the questionnaire which was administered in order to elicit the quantitative information upon which the conclusions in the report are based. As such there is no reasonable means for the Respondents to determine the accuracy of the information presented in the report or the accuracy of the conclusions reached.

16. Further, the study on which the report is based took place during 2003, some 12 years ago. No evidence is presented to indicate whether the conclusions relied upon in the report are at all relevant to the current position of women who find themselves in a similar position to that of the Second Applicant.

17. Although the report indicates that 77 farms were selected as a basis for the study, no indication is provided in the report of how many persons

were interviewed, how many of those persons were farm workers or how many of the interviewees were women.

18. The only indication of the nature and extent of the sample utilised for the qualitative portion of the study are the following statements:

18.1. Survey respondents were those responsible for management of labour on farms;[7]

18.2. Five contractors were selected for closer investigation; [8]

18.3. Interviews were conducted with four of these contractors as one dropped out; [9]

18.4. In two of the cases interviews were held with the labour contractors only and in the other two cases interviews were conducted with the contractors and their employees; and[10]

18.5. In one case interviews were held with 13 workers outside the farm. [11]

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7 CLRS Report page 7.

8 CLRS Report page 8.

9 *Id.*

10 *Id.*

19. No indication is provided as to the nature of the qualitative interviews which were conducted or the information sought and obtained, or the nature of the analysis used in order to reach the conclusions relied upon in the report.

20. The SANPERI study (2008) relies on a combination of a desktop literature review and a qualitative study for the conclusions reached. It is not clear how the information collected in the qualitative study was analysed in order to reach the conclusions set out in the study.

21. The study sample in respect of farmworkers was limited to 99 persons. The information relied upon in the SAPERI study was gained through *'semi-structured interviews'* as well as four focus group discussions and two interviews with trade union officials.[12] The remainder of the information upon which the study is based was gleaned from interviews with government and industry representatives as well as academics and other persons involved in the labour aspect of the agricultural industry.[13]

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11 *Id.*

12 SANPERI study page 12.

13 SANPERI study page 12.

22. The SANPERI study provides no indication of how the information gleaned from various sources was analysed in order to reach the conclusions presented in the study.

23. Consequently there is no reasonable means for the Respondents to determine the accuracy of the information presented in the study or the accuracy of the conclusions reached.

24. As such the information presented in the SANPERI study is not common cause or otherwise incontrovertible nor is such information official, scientific, technical or statistical in nature and capable of easy verification.

25. The information and findings presented in the SAHRC Inquiry Report (2003) are not capable of easy verification today, 12 years later.

26. The SAHRC Inquiry commenced in 2001 with public hearings conducted during 2002 and 2003. No evidence is presented to indicate whether the conclusions and findings of the SAHRC Inquiry Report are at all relevant to the current position of women who find themselves in a similar position to that of the second applicant.

27. The findings of the SAHRC Inquiry as set out in its final report are based on *'evidence and information presented at the Inquiry'*.[14] The SAHRC Inquiry Report further states that background research was conducted on behalf of the Human Rights Commission,[15] however, no indication is provided as to the nature and extent of this research, how it was conducted or by whom.

28. There is no indication as to the extent to which the conclusions and findings in the SAHRC Inquiry Report are based on data gleaned from research or other sources.

29. Further the stated aim of the SAHRC Inquiry was to *'identify broad trends as underlying causes of human rights violations at various levels in farming communities.'*[16]

30. The study on which the WFP Report (2005) is based was conducted during 2004. No evidence is presented to indicate whether the conclusions and findings contained in the WFP Report are at all

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14 SAHRC Inquiry Report page iv.

15 SAHRC Inquiry Report page ii.

16 SAHRC Inquiry Report page iv. See also page 4.

relevant to the current position of women who find themselves in a similar position to that of the second applicant.

31. The study on which the WFP Report is based relied on an extremely limited sample size. Six indepth interviews were conduced with farm management, eight focus group discussions were held with groups of between ten and fifteen workers, twenty-nine livelihoods questionnaires were adminsitered to between two and four households living on a particular farm.

32. There is no evidence presented as to why the conclusions reached in respect of this small sample size can reasonably be extrapolated to form the basis of factual conclusions as to conditions of women who find themselves in a similar position to that of the second applicant.

33. The WFP Report conclusions are based on a combination of qualitative and quantitative data. However the WFP Report provides no indication of how the information gleaned from various sources was analysed in order to reach the conclusions presented in the study.

34. Consequently there is no reasonable means for the Respondents to determine the accuracy of the information presented in the report or the

accuracy of the conclusions reached. As such the information presented in the WFP report is not common cause or otherwise incontrovertible nor is such information official, scientific, technical or statistical in nature and capable of easy verification.

THE WOMEN ON FARMS SUBMISSIONS

35. In essence Women on Farms asserts that this Court should find that that women (a) who are the spouses of farmworkers, (b) who are employed as seasonal workers on the farms where their spouses are employed and (c) who live together with their spouses in farmworkers' accommodation provided by the farmers to their spouses, are ESTA occupiers in their own right.[17]

36. Women on Farms further appears to assert that only if they are ESTA occupiers in their own right will such women obtain:[18]

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17 Women on Farms submissions page 5 para 4.

18 Women on Farms submissions page 37 para 70.

36.1. The procedural protection of receiving prior notice of the eviction proceedings and being joined as parties to the eviction proceedings; and

36.2. The substantive protection of an enquiry into whether their proposed eviction is just and equitable.

37. Women on Farms is right in saying that only if a woman in a position similar to Mrs Klaase is an ESTA occupier, will she be entitled to the prescribed two months' notice of the intended eviction proceedings[19] and will she be a necessary party to such proceedings, i.e. proceedings in which the owner or person in charge of the dwelling she occupies with her spouse seeks the eviction of her spouse and all persons (including her) whose permission to reside there was wholly dependent on her spouse's right of residence.

38. Women on Farms is wrong in saying that if such a woman is not an ESTA occupier and hence not a necessary party, there will be no enquiry into whether her proposed eviction together with her spouse and any children or other dependants who may be living with him will

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[19] In terms of s 9(d) of ESTA.

be just and equitable. See in this regard our supplementary written submissions of 27 July 2015 at paragraphs 27-30.

39. It follows from the proactive role of the court set out in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) that if a court dealing with an application for the eviction of an occupier who is a male farmworker and everyone whose permission to reside on the farm is wholly dependent on the farmworker's right of residence,[20] does not have sufficient information about the circumstances concerning the residence of everyone living with the farmworker (which are relevant circumstances that have to be considered by the court before it makes any eviction order[21]), the court must take steps to ensure that sufficient information is placed before it. These steps could include requiring the official charged with submitting the report to the court in terms of s 9(3) of ESTA, to further investigate and report on '*how an eviction will affect the constitutional rights of any person*'[22] (one such right being the right of every person conferred by s 26(3) of the Constitution not to be '*evicted from their home … without an order of court made after*

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20 As contemplated in s 10(3) of ESTA.

21 See s 26(3) of the Constitution.

22 Section 9(3)(b) of ESTA.

considering all the relevant circumstances') or making an innovative order such the one made by *Transnet t/a Spoornet v Informal Settlers of Good Hope and Others* [2001] 4 All SA 516 (W) which this Court affirmed in the *Port Elizabeth Municipality* case at paragraph 36 note 35.[23]

40. Turning to the merits, we further submit Women on Farms is wrong in saying that <u>all</u> women who are married to farmworkers, who are employed[24] as seasonal workers on the farms where their spouses are employed and who live together with their spouses in farmworkers' accommodation provided by the farmers to their spouses, are (or should be) ESTA occupiers in their own right.

41. A rule of that sort will be incompatible with the definition of 'occupier' in ESTA, which requires a case-by-case, fact-based assessment of whether a person residing on land belonging to another (a) had consent to do so or (b) had another right in law to do so.

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23 See also *Arendse v Arendse and Others* 2013 (3) SA 347 (WCC) para 45.

24 Various provisions of ESTA contemplate that certain employees may be occupiers (see e.g. s 8(2) of ESTA), but ESTA does not say or imply that all employees are occupiers.

42. A rule that all such women must be irrebuttably presumed to have consent, will also be incompatible with s 3(4) of ESTA, which creates a rebuttable presumption of fact which moreover is limited to instances where a person has continuously and openly resided on land for a period of one year.

43. A rule that all such women have a right in law to occupy the land which renders them ESTA occupiers, will be incompatible with s 6(2)(d) of ESTA as interpreted and applied by this Court in *Hattingh and Others v Juta* 2013 (3) SA 275 (CC) in terms of which their residence on the land is an incident of a balancing of the rights of the owner or person in charge with the right to family life of their spouse (the ESTA occupier).

44. A corollary of s 6(2)(d) of ESTA, which is relevant to the rebuttal of the presumption created by s 3(4), is that where such women have continuously and openly resided on land for a period of one year because of their spouse's right to family life, it would be artificial and wrong to conclude that their residence is a result of the consent of the owner or person in charge. Compliance with a legal obligation, imposed by ESTA, to permit someone to reside on land does not constitute the granting of consent.

45. Another reason why all such women are not invariably ESTA occupiers in their own right, is that if invariably they are occupiers and if they resided on the land in that capacity on 4 February 1997 then s 10 of ESTA will preclude their eviction unless they commit a breach contemplated in s 10(1)(a), (b) or (c) or the conditions for their eviction laid down in s 10(2) or (3) are met. That situation will obtain even if their spouse is otherwise (i.e. but for their right to family life) liable for eviction under e.g. s 10(1)(c). That will be anomalous, indeed absurd, not least because, according to Women on Farms, the reasons why such women must be invariably regarded as ESTA occupiers in their own right are that they are the spouses of farmworkers who live together with their spouses in farmworkers' accommodation provided by the farmers to their spouses.

46. If contrary to what we have said above this Court finds that all such women are ESTA occupiers in their own right, then, in our submission, although they will be entitled to the procedural protections of prior notice of the intended eviction proceedings and joinder as respondents in the proceedings, it does not follow that their right of occupation may not be terminated when (and because) their spouse's right of occupation is terminated. In other words, it does not follow that they have a right

to reside which is wholly independent of their spouse's right to reside. On the contrary, unless, in fact, they have express or tacit consent of their own to reside on the land, their right of occupation will be wholly dependent on their spouse's right to reside; and, consequently, it will be terminated and they will be liable to being evicted if and when their spouse's right to reside is validly terminated.

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Cape Town

11 August 2015

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC case number: 23/2015

SCA case number: 20698/2014

LCC case number: 09R/2014

In the matter between:

JAN KLAASE	First Applicant
ELSIE KLAASE	Second Applicant

and

JOZIA JOHANNES VAN DER MERWE N.O.	First Respondent
JOZIA JOHANNES VAN DER MERWE	Second Respondent

and

WOMEN ON FARMS PROJECT	Amicus Curiae

WRITTEN SUBMISSIONS
ON BEHALF OF
THE WOMEN ON FARMS PROJECT

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INTRODUCTION

1. Farmworkers are a particularly vulnerable segment of South African society. Not only is the relationship between farmer and farmworker characterised by the power imbalance inherent in any ordinary employment relationship, but the imbalance is exacerbated by the unique working conditions and socio economic circumstances farmworkers endure. This power imbalance was referred to in *Bertie Van Zyl v Minister of Safety and Security*[1], where this Court quoted from the South African Human Rights Commission Report titled "*Progress made in terms of Land Tenure Security, Safety and Labour Relations in Farming Communities since 2003"* ("*2008 SAHRC Report"*) which stated that:

    1.1. "*[Farm workers] are not only in an employment relationship with the farmer. Instead they live in . . . a community in which the farmer has extensive control over virtually every aspect of the farm worker's life"*[2]; and

    1.2. "*The power of farm owners extends to ownership of land, employment and access to economic and social needs. Farm [workers] are dependent on employers for*

[1] Bertie van Zyl (Pty) Ltd v Minister for Safety & Security 2010 (2) SA 181 (CC)
[2] Para 67

employment and tenure security, and in some cases, for their basic economic and social rights. This pervades all aspects of [their lives], resulting in gross power imbalances between [the employer and farm worker]".[3]

2. The recognition of the plight of farmworkers was reaffirmed in *Hattingh v Juta*[4] where, in the context of deciding the proper interpretation of section 6(2)(d) of ESTA, this Court recognised farmworkers as part of a "*vulnerable yet significant section of our society*".[5]

3. In this application for leave to appeal the Chief Justice has issued directions indicating that the consideration of the application is limited to the determination of the following issues only:

3.1. The second applicant's rights under ESTA; and

3.2. The potential prejudice to women who, under ESTA, find themselves in similar positions to the second applicant.

[3] Para 67
[4] Hattingh and Others v Juta 2013 (3) SA 275 (CC)
[5] Para 25

4. In light of these two issues, this application raises at its core the scope of protection afforded under ESTA to a sub-category of farmworkers who are particularly vulnerable and marginalised, namely women who are married to farmworkers and who tend to be employed as seasonal workers on the farms concerned.

5. As demonstrated herein, these women are particularly vulnerable because of the challenges they face in securing land tenure. It stands to reason that this insecurity of tenure not only makes them vulnerable to eviction but also to abuse at the hands of male occupiers.

6. The plight of this sub-category of farmworker and the challenges they experience in achieving tenure security was specifically dealt with in the South African Human Rights Commission Inquiry into Human Rights Violations in Farming Communities held in 2003. In its report ("*the 2003 SAHRC report*") the SAHRC stated that:

> *"Women are discriminated against in achieving tenure security, due to the rights of tenure being traditionally vested with men.*

Men receive greater access to employment with corresponding tenure rights than women."[6]

7. This report also provided that:

"*Women are discriminated against in terms of the provision of housing on farms. Men are still regarded as the only possible head of the household, thus excluding women from access to housing*."[7]

THE POSITION ADOPTED BY WFP

8. The WFP aligns itself with the central argument made by the applicants, namely that Mrs Klaase is an *occupier* as defined in ESTA. In this regard, the WFP supports the contentions advanced on their behalf, the essence of which is the following:

8.1. It is undisputed that Mrs Klaase lived on the farm continuously and openly for many years. In view of this:

[6] Page 179
[7] Page 196

8.1.1. She is deemed under section 3(4) of ESTA to have consent to do so unless the contrary is proved; and

8.1.2. She is deemed to have lived on the farm with the knowledge of the owner or person in charge in terms of section 3(5) of ESTA;

8.2. The broad definition of consent contained in ESTA encompasses both express and tacit consent. While the undisputed facts sustain a finding that there was express consent, should this Court find that there was no express consent, at the very least the facts establish tacit consent since, notwithstanding the deemed knowledge of her occupation, the respondents took no steps to stop her from occupying the land.

9. In these submissions, the WFP aims to avoid duplicating submissions already made on behalf of the applicants. Instead it intends making the following pointed submissions in support of the argument advanced on behalf of Mrs Klaase:

9.1. That section 39(2) of the Constitution requires that the provisions of ESTA be interpreted generously so as to afford protection to women who would otherwise not be regarded as the head of their households and who will not be regarded as an *occupier* for the purposes of ESTA;

9.2. An interpretation of the provisions of ESTA which affords greater protection to women seasonal workers or those married to farm workers is to be preferred since these women are a particularly marginalised and vulnerable group within our society. Their plight raises important issues of gender justice and calls out for constitutional protection;

9.3. An interpretation of ESTA which recognises qualifying spouses of farmworkers as *occupiers* in their own right is consistent with:

9.3.1. The scheme of ESTA;

9.3.2. The objectives of ESTA; and

9.3.3. The spirit, purport and objects of the bill of rights.

10. Apart from dealing with the proper interpretation of ESTA, the primary focus of the WFP will be on addressing the issue of the potential prejudice to women who find themselves in similar positions to Mrs Klaase. In this regard the WFP intends introducing new evidence aimed at giving this Court an understanding of the lived reality of women on farms.

11. It is to this question that we turn first.

THE POTENTIAL PREJUDICE TO WOMEN IN SIMILIAR POSITIONS TO THE APPLICANT

Evidence of prejudice to women

12. In order to consider the potential prejudice to women who find themselves in similar positions to the applicant, one must consider the lived reality of women who live and work on farms.

13. In order to convey this lived reality, the WFP has brought an application under rule 31 to introduce new evidence which entails the following:

13.1. A study providing statistics on farm evictions done by Social Surveys and Nkuzi Development Association in 2005, entitled *"Still Searching for Security: the reality of farm dweller evictions in South Africa"; ("the Nkuzi study")*

13.2. A study by the Centre for Rural Legal Studies which resulted in a report by Du Toit, and Ally, F *"The Externalisation and Casualization of Farm Labour in Western Cape Horticulture"* Centre for Rural Legal Studies Research Report no.16 (2003); ("*the CRLS report*")

13.3. SANPERI "*The Position of Women Workers in Wine and Deciduous Fruit Value Chains*" (2008) ("*the SANPERI study"*)

13.4. South African Human Rights Commission National Inquiry into Human Rights Violations in Farming Communities (2003) ("*the SAHRC Inquiry*")

13.5. Women on Farms "*Behind the Label II*", 2005.

14. The WFP submits that the rule 31 application to introduce the above evidence should be granted on the basis that:

14.1. It is highly relevant to the issues for determination in this application;

14.2. The evidence contained is mostly of a statistical nature; and

14.3. It is in the interests of justice to admit this evidence.

15. In summary, the new evidence (dealt with more fully below) supports the following conclusions to be drawn:

15.1. Women are predominantly employed on farms as seasonal or temporary workers;

15.2. Men are more easily afforded permanent employment with corresponding tenure rights; and

15.3. More women are evicted from farms than men. This is a result of the fact that courts define women's and children's tenure rights as secondary, being acquired indirectly through their relations with employed men.

16. Each of these factual conclusions is looked at more closely below.

Women more likely to be employed as temporary or seasonal and earn less

17. The first credible study providing statistics on farm evictions was the Nkuzi study.

18. According to the Nkuzi study:

32.1 the gender of the main breadwinner on the farm before evictions was found to be 77.4% male, with 22.6% female. [8]

32.2 57,2% of women evicted were employed on the farms (includes fulltime, part time and seasonal). [9]

32.3 Of the 57,2% of women employed, 77% were employed full time, compared to 100% of men employed full time.[10]

19. The Nkuzi study finds that:

> "*Although many of the wives, mothers and daughters living on the farm are employed by the farmer, as is illustrated by the results summarised in table 5, this is more often in a lesser capacity through the part-time or seasonal work which men do not generally do. This correlates with the findings of the*

[8] Page 49
[9] Table 5 on page 51
[10] Table 5 on page 51

Employment Trends in Agriculture Report which states that the agriculture sector employs more women on a part-time basis than any other sector of the economy (Stats Sa & NDA 200:30)"[11]

20. The authors are supported in their findings:

"*The agricultural census of 2002 found that not only are there overall more men employed on farms than women, but far more of the full-time employees on farms are men – 319 414 men compared to 138 217 women. More women are employed as casual and seasonal workers – 246 276 women compared to 213 169 men (Stats SA 2005:11).*"[12]

21. The CRLS report finds that:

35.1 Three-quarters of the permanent labour force were found to be men. [13]

[11] Page 51
[12] Page 133
[13] Page 12

35.2 The make up of the temporary labour force differed markedly, with almost two-thirds of the harvesting labour force being women. [14]

22. The authors of the CRLS report noted that:

> *"On-farm temporary workers, for example, are in many ways temporary in name only. They are typically the female 'dependants' of male workers with permanent status. Legally speaking, the 'permanent' (non-fixed) nature of the relationship with a farm means that they are eligible for the same benefits, on a pro rata basis, as their permanent counterparts. In reality, they are usually denied those benefits. They may have occupational rights under ESTA, but typically work on the farm on an 'as needed' basis and are not paid for days they do not work."*

23. The Nkuzi study identifies a trend relating to the full time average income differential between men and women, "*in the past five years a notable difference has emerged, with men now earning considerably more than women.*" [15] Further, "*the increasing difference between wages for male and female farm workers is*

[14] Page 15
[15] Page 52

probably also a reflection of the increasing use of women as casual and part-time workers."[16]

Men are more easily afforded permanent employment with corresponding tenure rights

24. As indicated earlier in these submissions, the *2003 SAHRC report* found that:

> *"Women are discriminated against in achieving tenure security, due to the rights of tenure being traditionally vested with men. Men receive greater access to employment with corresponding tenure rights than women."*[17]

25. Further, "*Women are discriminated against in terms of the provision of housing on farms. Men are still regarded as the only possible head of the household, thus excluding women from access to housing*."[18]

26. Chenwi, L and McLean K point out that

[16] Page 52
[17] Page 179
[18] Page 196

"*A notable weakness of the ESTA, however, is its failure to make reference to the continued right of occupation of the spouse or dependents of the occupier. This is a particular difficulty once it is acknowledged that the right of occupation (on farms) of women is mainly acquired through their relationship with the male labourer*."[19]

27. Even where they are employed on the farms, women are less likely to have independent tenure.

28. In a study done by WFP in 2005 into the living and working conditions on eight wine farms in the Western Cape (*Behind the Label II*, 2005)[20] there was not a single case of a housing contract being in the name of a woman worker.

29. In another study[21] it was found that even in cases where women also hold permanent employment contracts, housing contracts were still held in the names of male partners. Access to housing is thus secured through a relationship with a male farm worker.

[19] "'*A Women's Home is her Castle?' – Poor Women and Housing Inadequacy in South Africa*" 2009 25 SAJHR p 526
[20] Page 26
[21] SANPERI '*The Position of Women Workers in Wine and Deciduous Fruit Value Chains'* (2008)

30. Hattingh, of the Stellenbosch Legal Aid Clinic, in "*ESTA litigation: Reflections on representing occupiers*" states as follows:

> *"Many women in our area are still employed as seasonal workers on the fruit and wine farms. In practice they work on a daily basis from 8 am to 5pm for six months (usually November until April) and for the rest of the year they work on demand. These women rarely receive housing as an employment benefit."*[22]

31. Ruth Hall[23] comments:

> "*The net effect of judicial interpretation of ESTA has been to reduce the number of people considered to be occupiers and, in practice, to define women's rights of residence as secondary rights, derived through their relations with men. Many farmers do not employ women as permanent workers but rather retain a flexible female seasonal labour force compromised of wives, partners and daughters of male workers, resulting in a pattern in which women access both employment and housing indirectly through their husbands or fathers."*

Women are more likely to be evicted than men

[22] ESR review vol7 no 3 page 17
[23] "*Evaluating land and agrarian reform in South Africa*", Occasional paper 3, Programme for land and Agrarian Studies (PLAAS) University of the Western Cape age 15

32. The Nkuzi study finds that between 1984 and 2004 there were 1,7 million people evicted from farms.

33. In relation to the breakdown by gender the Nkuzi study finds:

> "*Just over three quarters of those evicted from farms are women and children and they are more likely to be evicted than men. This is because the judicial interpretation of ESTA and the attitude of landowners has, in practice, defined women's and children's tenure rights as secondary, being acquired indirectly through their relations with employed men*. "[24]

34. Of the evictees 77% were women and children evictees (28% women and 49% children), leaving the number of male evictees at 23%.[25]

35. The authors comment that:

> *"These results can in part be explained by the direct relationship between employment status and land tenure rights and the failure of land owners and the courts to recognise*

[24] Page 41
[25] Page 49

women and children as having their own independent tenure rights." [26]

36. The authors explore the relationship between employment and land tenure rights further:

"The farm dweller's employment status is therefore critical in determining the extent of any farm dweller's tenure vulnerability. There is a clear tenure hierarchy. Adult male employees with formal employment on the farm have the strongest tenure from a land owner's perspective. Other adult male members of the household employed on the farm would appear to have the second highest level of security while, as already discussed, women and children clearly have a lower tenure standing. The highest level of eviction risk comes about when there is no longer any household member employed on the farm, regardless of how many generations of the family may have lived on that farm. This usually occurs when the main employee in the household dies or becomes too ill to work, even when there are other household members still employed on the farm."

37. The cause of 15.7% of the evictions was the fact that the main family breadwinner was fired.[27]

[26] Page 49
[27] Page 68

38. It is against this factual backdrop of the lived reality of women on farms that the court must approach the question of the proper interpretation of the word *occupier* in ESTA.

THE MEANING OF *OCCUPIER* IN ESTA

The proper approach to interpretation

39. Section 39(2) of the Constitution requires that a court, when interpreting any legislation, must promote the spirit, purport and objects of the Bill of Rights. This Court has held that this injunction requires that judicial officers read legislation, where possible, in ways which give effect to the constitution's fundamental values.[28]

40. This Court has repeatedly recognised that the fundamental values enshrined in the Constitution include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism [29] . These values are located in section 1*(a)* and *(b)* of the Constitution. As we have

[28] Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others2001 (1) SA 545 (CC)
[29] See for example Loureiro v Imvula Quality Protection (Pty) Ltd 2014 (3) SA 394 (CC)

demonstrated above, all of these fundamental values are implicated in this matter.

41. We summarise the argument in relation to each of them below.

The proposed interpretation promotes fundamental constitutional values

The attainment of equality

42. In Daniels v Campbell NO[30] this Court held that "*The value of non-sexism is foundational to our Constitution and requires a hard look at the reality of the lives that women have been compelled to lead by law and legally-backed social practices. This, in turn, necessitates acknowledging the constitutional goal of achieving substantive equality between men and women. The reality has been and still in large measure continues to be that in our patriarchal culture men find it easier than women to receive income and acquire property.*"

[30] Daniels v Campbell NO 2004 (5) SA 331 (CC)

43. When considering substantive equality *in casu* it is submitted that account should be taken of the gendered nature of the rural economy, the unequal treatment of women farmworkers when compared to men and the imbalance of power between women seasonal workers and farmers.

Human dignity

44. In S v Makwanyane this court stated as follows:

> "*The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in chapter 3*."[31]

45. There is a fundamental relationship between the values of equality and dignity. It is submitted that the two are in fact inextricably linked,

[31] S v Makwanyane 1995 (3) SA 391 CC para 328.

and the violation of dignity compounds the effect of provisions which fall foul of the value of equality.

46. It is submitted that the dignity of women, who are seasonal workers, is negatively impacted when the provisions of ESTA are interpreted in a way that does not respect their equal worth. The effect of insecure tenure is to impose a dependency on women notwithstanding the fact that, properly interpreted, they ought to be protected as occupiers under ESTA.

The attainment of rights and freedoms - security of tenure

47. In the context of the present discussion, the right of women farmworkers to security of tenure to their homes is significant. This right was recognised as an element of the right of access to housing in terms of s 26(1) of the Constitution[32] and forms a central pillar of the land reform programme.

48. The White Paper on Land Reform 1991, acknowledges the vulnerability of women in the context of land reform:

[32] Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others2005 (2) SA 140 (CC) (2005 (1) BCLR 78) para 29; Gundwana v Steko Development and Others2011 (3) SA 608 (CC) para 40

"Specific strategies and procedures must be devised to ensure that women are enabled to participate fully in the planning and implementation of land reform projects. These have yet to be adequately formulated. Because women generally have less power and authority than men, much more attention must be directed to meeting women's needs and concerns. Unless this is done, existing gender inequities in the allocation of land rights could be exacerbated by the programme. In other countries, gender neutral land reform policies and programmes have had a negative, rather than positive effect on gender equity. These issues must be addressed in the context of national and international developments." [33]

49. The White Paper on Land Reform locates ESTA within the broader land reform programme:

> "*The Department has recently published a Bill intended to address this situation. The Extension of Security of Tenure Bill addresses the relationship between occupiers and owners, as well as the circumstances under which evictions can take place, and the procedures to be followed. The Bill is underpinned by the following four principles:*
>
> - *The law should prevent arbitrary and unfair evictions.*
> - *Existing rights of ownership should be recognised and protected.*

[33] Page 40

- *People who live on land belonging to other people should be guaranteed basic human rights.*
- *The law should promote long-term security, either on the land where people are living at the moment, or on other land.* "[34]

50. Section 25(9) of the Constitution obliges the government to legislate so that tenure can be legally secure for the persons referred to in Section 25(6). The White Paper describes tenure reform as:

> "*a particularly complex process. It involves interests in land and the form that these interest should take. In South Africa, tenure reform must address difficult problems created in the past. The solutions to these problems may entail new systems of land holding, land rights and forms of ownership, and therefore have far-reaching implications*."

51. In view of the above discussion, this Court ought to prefer an interpretation of ESTA which promotes the security of tenure of women farm workers and promotes the constitutional values of equality and human dignity.

[34] Page 87

The proposed interpretation is consistent with the scheme of ESTA

52. It is trite that statutory provisions must be interpreted in the context of the statute as a whole. To this end, this Court has held that the purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[35]

53. In *Bato Star*[36] this court *per* Ngcobo J held that:

> "*The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights."*[37]

The objects of ESTA

54. ESTA is legislation envisaged in s 25(6) of the Constitution to

[35] Bertie Van Zyl para 21
[36] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC)
[37] Para 91

improve security of tenure for those "*whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices*".

55. According to its long title, the purposes ESTA is:

55.1. To provide for measures with State assistance to facilitate long-term security of land tenure;

55.2. To regulate the conditions of residence on certain land;

55.3. To regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and

55.4. To regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land.

56. The preamble of ESTA recognises that "*many South Africans do not have secure tenure of their homes and the land which they*

use and are therefore vulnerable to unfair eviction". According to the preamble, "*it is desirable [to ensure] that the law should promote the achievement of long-term security of tenure for occupiers of land, where possible through the joint efforts of occupiers, land owners, and government bodies; that the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners; that the law should regulate the eviction of vulnerable occupiers from land in a fair manner, while recognising the right of land owners to apply to court for an eviction order in appropriate circumstances; to ensure that occupiers are not further prejudiced*".

57. In dealing with the category of persons which ESTA is designed to protect, the SCA held in *Mkangeli and Others v Joubert and Others*[38] that: *"Generally speaking ESTA protects a particular class of impecunious tenant on rural and semi-rural land against eviction from that land*."[39]

58. The SCA held further that: "*From the synopsis of the provisions of ESTA it is apparent that the Legislature, in an obvious endeavour*

[38] Mkangeli v Joubert 2002 (4) SA 36 (SCA)
[39] Para 9

*to comply with the directives of sections 25(6) and (9) of the Constitution**, intended to ensure security of tenure for occupiers by affording them comprehensive protection against eviction from the land upon which they reside. It seems to follow that as a corollary to this comprehensive protection of occupiers, the Legislature intended to impose extensive limitations on any right to seek the occupiers' eviction from that land***"[40]. (emphasis added)

The provisions of ESTA

59. Section 1 of ESTA provides as follows:

"*'**occupier**' means a person residing on land which belongs to another person, and who has or [sic] on 4 February 1997 or thereafter had consent or another right in law to do so…"*

60. In the same section, *consent* is defined as:

[40] Para 17

"*express or tacit consent of the owner or person in charge of the land in question, and in relation to a proposed termination of right of residence or eviction by a holder of mineral rights, includes express or tacit consent of such holder."*

61. It is significant that ESTA makes no distinction between primary occupiers and persons living on the premises who do not qualify as occupiers. This distinction was however first introduced by the LCC in Venter v Claasen[41] ("*Claasen*") as a matter of interpretation. This issue is dealt with at length in the written submissions filed on behalf of the applicants.

62. This restrictive interpretation of the term *occupier* is at odds with the stated objectives of ESTA. In this regard, Roux in his article "*Pro-poor court, anti poor outcomes: Explaining the performance of the South African Land Claims Court*" [42] states as follows:

"*In the draft version of the Extension of Security of Tenure Act ('ESTA') that was published for public comment in February 1997, an express distinction was made between 'primary' and*

[41] Venter v Claasen 2001 (1) SA 720 (LCC)
[42] 2004 SAJHR 511 at 525

'secondary' occupiers, the latter category consisting mainly of women and children living on commercial farms. The clear intention behind this distinction was to amend the common law by providing special protection against arbitrary eviction for the latter group. After an intervention by the National Land committee, however, the drafters were persuaded that the distinction between primary and secondary occupiers would only perpetuate the discriminatory treatment of female farm workers. The distinction was accordingly dropped. Secondary occupiers, the drafters assured everyone would be protected as occupiers in their own right."[43]

63. Roux next considers the interpretation of the word *occupie*r by the Land Claims Court:

> *"The Conradie judgment was immediately hailed as a triumph for court-driven social transformation in South Africa, ameliorating as it did the centuries-old vulnerability of female farmworkers to the consequences of their husband's actions. Unfortunately, the victory was short-lived: some two and a half years later, in Die Landbou Navorsingsraad v Klaasen a different judge of the LCC glossed and restricted the Conradie judgment. The Klaasen gloss effectively re-instates the discarded distinction between primary and secondary occupiers, but without restoring the special protection originally provided for the latter group. According to the LCC in this case, the 'general rule' in eviction proceedings in South Africa is that*

[43] Pages 525-526

'the sheriff may remove from the farm any person claiming [a right of occupation] through or under [an] occupier'. The ESTA did not expressly change this rule. On the contrary it appeared to support it in a number of provisions that implied that 'an eviction order against an 'occupier' as defined is also operative against family members living with that occupier…….Whereas the effect of the Conradie judgment had been to force landowners, when drafting pleadings in an action for ejectment under ESTA, to cite each member of the male farm worker's family by name, and allege separate substantive grounds for their eviction (which might have been an express allegation that their permission to reside on the property was entirely derived through the male farm worker), the practical effect of the Klaasen judgment has been to restore the common-law position in so far as the method of citation of a farm worker's spouse and dependant's is concerned. In the result, female farm workers and their children are once again being routinely evicted along with their husbands, unless they can prove (the burden being on them) that their tenure rights are not derivative on the tenure rights of the male head of household (because, for example, their employment contract states or implies that they have a right to reside on the farm notwithstanding the dismissal of their husband."[44]

[44] Page 526

64. The narrow interpretation of the Land Claims Court is also criticised by Pienaar because of its prejudicial impact on women. She states:[45]

> "*Essentially this means that the spouse, usually the wife, is not joined in the proceedings. The rather rigid approach in Landbounavorsingsraad is unfortunate for two reasons: (a) it does not deal with tacit consent sufficiently; and (b) is inevitably in conflict with Section 26(3) of the Constitution in that the spouse, who was not part of the proceedings, stands to be evicted without her specific circumstances necessarily being placed before the court."*

65. In Sterklewies (Pty) ltd t/a Harrismith Feedlot v Msimanga and Others 2012 (5) SA 391 (SCA) ("*Sterklewies*"), the SCA found that the reasoning in *Klaasen* that a legal *nexus* was required was unnecessarily restrictive and that:

> *"It suffices to show that persons claiming the Act's protection show that the owner of the land has consented to their being in occupation, irrespective of whether that occupation flows from any agreement or has its source*

[45] Pienaar, J Land Reform, Juta, page 397.

elsewhere. Whatever its origins, it is the right of residence flowing from the consent that must be terminated in terms of s 8 before an eviction order can be obtained."[46]

66. A generous approach to the interpretation of the words *occupier* and *consent* in ESTA is consistent with a purposive approach to interpretation insofar as it seeks to extend protections afforded under ESTA to women who are married to occupiers.

67. Where such a woman is married to an occupier and resides openly and continuously on the farm for a lengthy period of time, such a person must be deemed to have the tacit consent of the owner to do so and therefore qualify as an *occupier* for the purposes of ESTA.

68. Such an approach to the interpretation of *occupier* is entirely consistent with the scheme of ESTA. In this regard, the following is significant:

68.1. ESTA expressly defines *consent* to include both express and tacit consent;

[46] Para 3

68.2. In terms of section 3(4) of ESTA, a person who has resided continuously and openly on land for a period of one year shall be presumed to have consent unless the contrary is proved. In this regard we submit that the word *person* must include the spouse of an occupier and there is no justifiable reason for finding otherwise; and

68.3. In terms of section 3(5) of ESTA, a person who has continuously and openly resided on land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge. This deeming provision provides the spring board for a finding that a spouse who resides continuously and openly on the land for a lengthy period of time (at least more than the statutorily determined period of three years) is deemed to have done so with the knowledge of the owner or person in charge. Where the owner or person in charge has not taken steps to interfere with the spouse's occupation notwithstanding knowledge of their presence, they must have tacitly consented to the spouse's right to reside.

69. Furthermore such an interpretation is consistent with the objects of ESTA. As discussed above, one of the primary objects of ESTA is to ensure security of tenure for occupiers by affording them comprehensive protection against eviction from the land upon which they reside.

70. A generous approach to the interpretation of ESTA extends the protections it offers (and hence the full protection of the right to security of tenure guaranteed under the bill of rights) to a particularly vulnerable and marginalised group to which our constitution owes particular solicitude. Extending the protection afforded by ESTA to spouses of occupiers will result in:

70.1. Substantive protection in the form of an inquiry into whether the proposed eviction is just and equitable, and

70.2. Procedural protection in the form of being legally entitled to receive proper notice of the proposed eviction and to be joined as a party in the eviction proceedings.

71. The proposed approach to the interpretation of occupier and consent is consistent with the spirit, purport and objects of the bill of rights. In this regard, an approach which favours greater protection of women farmworkers promotes its fundamental values of equality, human dignity and the advancement of rights and freedoms. This in in the face of:

71.1. The inequalities faced by women in society and the constitutional imperative to strive for the achievement of equality between men and women and human dignity;

71.2. The gendered nature of the rural economy in that women are more likely to be employed as seasonal and/or casual workers, tend to hold tenure through men as a result of gender discriminatory policies and practices, and consequently are more likely to be evicted from farms;

71.3. The purpose of the legislation and its transformative nature which is aimed at providing protection to vulnerable groups, such as women;

71.4. Women's right to equality and dignity which demands that women be given notice, joined to the proceedings and considered in the enquiry into whether the eviction (and timing thereof) is just and equitable in the circumstances in their own right;

71.5. The hugely prejudicial impact on women in the second applicant's position if they are excluded from the protections of ESTA.

72. Taking into account all the relevant circumstances and applying a "*generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees"* it is submitted that the word *occupier* and *consent* should be interpreted to include women in the second applicant's position.

CONCLUSION

73. It is submitted that the second applicant has made out a case for being recognised as an occupier under ESTA. The respondents

have taken no steps to terminate her right of residence and to obtain an eviction order against her.

74. In these circumstances we submit that an appropriate order is one:

74.1. Granting the application for leave to appeal;

74.2. Setting aside the decisions of the SCA and the LCC;

74.3. Declaring that Mrs Klaase is recognised as an occupier under ESTA;

74.4. Reviewing and setting aside the decision of the Clanwilliam Magistrate's Court to evict the applicants; and

74.5. Dismissing the application brought by the respondents for the eviction of the applicants.

KAMESHNI PILLAY SC

JENNIFER WILLIAMS

Chambers, Sandton and Cape Town

3 August 2015

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 23/15

In the matter between

JAN KLAASE First Applicant

ELSIE KLAASE Second Applicant

and

JOZIA JOHANNES VAN DER MERWE (N.O. OF THE NOORDHOEK TRUST) First Respondent

JOZIA JOHANNES VAN DER MERWE Second Respondent

WOMEN ON FARMS PROJECT *Amicus Curiae*

APPLICANTS' WRITTEN SUBMISSIONS

INTRODUCTION

1. The applicants have applied for leave to appeal to this Court against the following two judgments and orders handed down by the Land Claims Court ("*LCC*") in Cape Town, by the Honourable Mr Acting Justice Canca:

1.1. On 28 March 2014 in which the LCC, on automatic review in terms of ss 19(3) of the Extension of Security of Tenure Act, Act 62 of 1997 ("*ESTA*"), under case number LCC 09R/2014 ("*the review proceedings*"), confirmed an order granted in the Clanwilliam Magistrates' Court for the eviction of the first applicant ("Mr Klaase") "*and all persons who occupy through him*" from the premises which they occupy on the farm Noordhoek ("*the farm*"); [1]

1.2. On 7 October 2014 ("*the LCC judgment*")[2] in which the LCC refused:

1.2.1. Mr Klaase's application for leave to appeal against the review judgment;

1.2.2. Applications brought by the second applicant ("Mrs Klaase"), who is married to Mr Klaase, in which she sought to be joined in the review proceedings, that those proceedings, including the execution of the eviction order against Mr Klaase, be suspended pending the determination of Mrs Klaase's rights in terms of ESTA and that Mrs Klaase's application, in which she contended

[1] Review judgment, vol 1, pp. 43 – 52.
[2] LCC judgment, vol 1, pp. 53 – 66.

that she is an occupier in her own right under ESTA, be consolidated with the review proceedings; and

1.2.3. Mr Klaase's application seeking the suspension of the eviction order against him, pending the determination of Mrs Klaase's rights under ESTA.

2. On 26 January 2015 the Supreme Court of Appeal ("SCA") dismissed, with costs, the applicants' application for leave to appeal.[3]

3. On 11 March 2015 the Chief Justice issued directions that written argument, including argument on the merits of the appeal, must be lodged by the applicants on or before 1 April 2015 and by the respondents on or before 10 April 2015. The respective parties duly complied with the directions.

4. On 20 May 2015 the Women on Farms Project was admitted as *amicus curiae* for the purposes of filing written submissions and making oral submissions as directed. On the same day the Chief Justice issued further directions,[4] including that:-

4.1. the application is set down for hearing on 3 September 2015 in respect of the following issues only:-

4.1.1. the second applicant's rights under ESTA; and

[3] SCA order, vol 1, p. 67.
[4] Directions of the Chief Justice, vol 3, pp. 151 – 154.

4.1.2. the potential prejudice to women who, under ESTA, find themselves in similar positions to the second applicant;

4.2. written argument on those issues, including argument on leave to appeal, must be lodged by the respective parties on the dates stipulated in the directions.

CONSTITUTIONAL ISSUE

5. The issue for determination in this matter is whether Mrs Klaase is an "*occupier*" in her own right in terms of ESTA.

6. ESTA was enacted to give effect to the constitutional right entrenched in s 25(6) of the Constitution. As the interpretation of ESTA is a constitutional matter,[5] it follows that this application for leave to appeal raises a constitutional issue. Furthermore, if Mrs Klaase is found not to be an ESTA occupier, she and the other members of her family stand to be evicted from their home. An eviction from one's home will always raise a constitutional matter.[6]

INTERESTS OF JUSTICE

7. In *Hattingh*[7] this Court found that the issue raised in that matter concerning the interpretation of ESTA affected a vulnerable and yet significant section of our society, namely people who live on other people's land, and that as the appeal had reasonable prospects of success, it was in the interests of justice that leave to be appeal be granted.

[5] *Hattingh and Others v Juta* 2013 (3) SA 275 (CC) [24].
[6] *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC) [26].
[7] *Hattingh,* [25].

8. In the present matter, whether the definition of an ESTA occupier is given a restrictive or more generous interpretation has significant implications for the security of tenure of not only Mrs Klaase, but also many other similarly situated rural women. Applying the principles stated in *Hattingh*, it is submitted that it is in the interests of justice for leave to appeal to be granted.

MRS KLAASE'S RIGHTS UNDER ESTA

Factual background

9. The facts outlined below in respect of Mrs Klaase are common cause:[8]

9.1. Mrs Klaase was born on 20 January 1965. She grew up with her mother on an adjoining farm and went to school until standard four.

9.2. Mrs Klaase started living on the farm together with Mr Klaase, who had lived and worked there since 1972, in or about the early 1980's. Mr and Mrs Klaase got married in 1988. They have six descendants that live with them on the farm.

9.3. The farm is a citrus farm with some 45 hectares under orchard. During the high season, approximately the period from May to September of every year, a large number of seasonal employees are employed on the farm for purposes of picking and packaging fruit and thereafter pruning trees. The day to day

[8] Agreed statement of facts, vol 3, pp. 155 – 159.

employment of these seasonal workers frequently extends over the entire season.

9.4. Mrs Klaase has *"over the years, as have many of the spouses and other family members of permanent employees on the farm, worked on a seasonal basis on the farm"*. She was employed on the farm during the picking season, primarily in the packaging store. Three salary slips dated 31 May 2007, April 2008 and 23 July 2009 were attached to Mrs Klaase's affidavit in support of her applications before the LCC.

9.5. In her application before the LCC, Mrs Klaase stated that she is an ESTA occupier on two grounds, firstly that she was an employee (as a general farm labourer) on the farm and, secondly, that she was living on the farm with the consent of the owner.

9.6. Mrs Klaase has resided continuously and openly on the farm for many years.

9.7. The probation officer's report, dated 16 November 2011, amongst other things stated:

9.7.1. The applicants' three young children, Joendra (aged 8), Danelo (aged 10) and Lenantia (aged 15) attended school nearby the farm;

9.7.2. There is no alternative accommodation available for the applicants;

9.7.3. The applicants have no other family members who can offer them accommodation, they are very much attached to the farm and have nowhere else to go or stay;

9.7.4. An eviction order will render the applicants and their family destitute as they have nowhere else to go. Such an order will also affect their young children who are at school nearby the farm; and

9.7.5. The probation officer accordingly recommended that the applicants and their family remain in the premises they are occupying until alternative accommodation is available. They are prepared to pay rent in respect of the premises up to an amount of R60 per week.

10. The applicants rely on the following facts, which are disputed by the respondents, or which the respondents seek to qualify:[9]

10.1. Mrs Klaase was employed as a seasonal worker for so many consecutive years (estimated at 26) that she regarded herself as a permanent worker, with a right to or legitimate expectation to be employed during the harvesting season.

10.2. Mrs Klaase lived on the farm with the consent of the owner.

10.3. The respondents did not deal with whether Mrs Klaase had '*consent'* to live on the farm in their answering affidavit in the LCC. Instead, they contended that:

[9] Statement of Disputed facts, vol 3, pp. 160 – 161.

10.3.1. Mrs Klaase was a seasonal worker on the farm and '*never obtained an independent right of occupation on the property'*; and

10.3.2. she occupied the property solely by virtue of her relationship with her husband.

11. It will be contended below that:

11.1. whether or not the respondents granted Mrs Klaase *"an independent right of occupation"* is not determinative of whether she is an ESTA occupier. The key question is whether the respondents consented to her living on the farm; and

11.2. the claim that Mrs Klaase occupied the property solely by virtue of her relationship with her husband is inconsistent with her having been employed on the farm for many years as a seasonal worker.

Relevant provisions of ESTA

12. In enacting ESTA the legislature was complying with ss 25(6) and (9) of the Constitution by seeking to provide security of tenure for occupiers by giving them comprehensive protection against eviction.[10] Reading the provisions of ESTA as a

[10] *Mkangeli and Others v Joubert and Others* 2002 (4) SA 36 (SCA) [17].

whole, the justification for granting occupiers security of tenure is that they occupy the land with the owner's consent.[11]

13. ESTA confers certain rights on occupiers, as defined in the Act, the first and most fundamental being the right of residence. Subsection 6(1) provides that:

> *"... an occupier shall have the right to reside on land and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly."*

14. An "*occupier*" is defined as *"a person residing on land which belongs to another person, and who has or [sic] on 4 February 1997 or thereafter had consent or another right in law to do so . . .".* [12] [emphasis added]

15. "*Consent*" is also defined in s 1 of ESTA. The definition is a broad one, the relevant part of it states that it means the express or tacit consent of the owner or person in charge of the land in question.

16. Section 3 of ESTA deals with the concept of consent in greater detail. Subsection 3(1) states that the consent of an occupier to reside on or use land shall only be terminated in accordance with the provisions of s 8 of ESTA. Subsections 3(4) and (5) stipulate that, for the purposes of civil proceedings in terms of ESTA, a person who has continuously and openly resided on land for a period of:

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[11] *Mkangeli and Others v Joubert and Others* 2002 (4) SA 36 (SCA) [19].
[12] In s 1 of ESTA.

16.1. one year shall be presumed to have consent to do so unless the contrary is proved;[13] and

16.2. three years shall be deemed to have done so with the knowledge of the owner or person in charge.[14]

17. Section 8 set outs the grounds upon which an occupier's right of residence may be terminated. Section 9 provides that an occupier may be evicted in terms of ESTA only if the following four requirements have been satisfied:[15]

17.1. The occupier's right of residence has been terminated in terms of s 8;[16]

17.2. The occupier has not vacated the land within the period of notice given by the owner or person in charge;[17]

17.3. There has been compliance with the conditions for an eviction order stipulated in ss 10 or 11;[18] and

17.4. There has been compliance with the notice provisions in ss 9(2)(d).[19]

18. An applicant for an eviction order under ESTA *"must make all the necessary averments and adduce the necessary evidence to make out a case in relation to every provision to*

[13] Subsection 3(4).
[14] Subsection 3(5).
[15] Section 9(2). These four requirements are peremptory: see *City Council of Springs v Occupants of the Farm Kwa-Thema 210* [1998] 4 All SA 155 (LCC) [9].
[16] Section 9(2)(a).
[17] Section 9(2)(b).
[18] Section 9(2)(c).
[19] Section 9(2)(d).

which the court must apply its mind in deciding whether an eviction order is justified."[20]

19. The nature of the right of residence has been analysed by the SCA in *Dlamini and another v Joosten and others*,[21] where it was held that ss 6(1) creates a real right in land. An occupier's right of residence is in principle registrable in a Deeds Registry because it is a burden on the land, that is, it reduces the owner's right of ownership and binds successors in title.[22]

20. Whether or not Mrs Klaase is an ESTA occupier and entitled to the protections conferred by ss 26(5) of the Constitution and ESTA turns on whether she resided on the farm with the consent of the respondents.

The ESTA jurisprudence on consent

21. The development of our jurisprudence in respect of the requirements for consent to reside on land under ESTA has been inconsistent. In *Rademeyer and Others v Western District Council and Others*[23] the first respondent, a local authority, owned a property on which the further respondents had built informal housing structures. Neighbouring land-owners and residents had sought the eviction of the informal settlers on the grounds that they constituted a nuisance. The Court held that the conduct of the local authority in permitting the further respondents to remain on its property and providing them with water and sanitation constituted, at the very least, tacit consent to their

[20] *De Kock v Juggels and Another* 1999 (4) SA 43 (LCC) [13], approved in *Land en Landbouontwikkelingsbank van Suid Afrika v Conradie* 2005 (4) SA 506 (SCA) [15].
[21] 2006 (3) SA 342 (SCA).
[22] At [16].
[23] 1998 (3) SA 1011 (SE).

occupation of the property.[24] It followed that they qualified as ESTA occupiers and, as the applicants had not complied with the provisions of the Act, they were not entitled to an interdict compelling the local authority to remove the informal residents.[25]

22. *Rademeyer* was considered by this Court in *Residents of Joe Slovo Community v Thubelisha Homes,*[26] in the context of whether informal residents occupied land with *"consent"* and accordingly fell outside the definition of an *"unlawful occupier"* in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). *Rademeyer* was distinguished in the judgment of Yacoob J (at [82]) and O'Regan J held (at [276] – [278]) that local governments which comply with their constitutional obligations to indigent people living in informal settlements by providing them with basic services do not, as a matter of fact, thereby consent to the presence of the residents, but as the City of Cape Town had gone far beyond providing basic services, it had consented to the occupation of the land. *Rademeyer* was approved in the judgment of Sachs J (at [357]). The judgments of Moseneke DCJ (at [149] – [156]) and Ngcobo J (at [208]) adopt a similar approach to that of Sachs J with regard to consent.

23. In *Atkinson v van Wyk*[27] the owner of a farm sought the ejectment of Mr Van Wyk and Ms Dina Natus, without regard to ESTA, on the common law grounds that they were in unlawful occupation of the property. A certificate filed by the owner's attorney, upon request by the Magistrate (who was concerned that ESTA might apply) reflected that Ms Natus originally occupied the premises with the consent of Mr Van Wyk, who in

[24] At 1017B – C.
[25] At 1017C.
[26] 2010 (3) SA 454 (CC).
[27] 1999 (1) SA 1080 (LCC).

turn had the consent of the owner to occupy premises in terms of an employment contract. The certificate stated that Ms Natus "*despite never having had any right to occupy the premises and despite never having gained any right or consent to occupy the premises, remained on the premises.*"[28] [Emphasis added]

24. On review in terms of ss 19(3) of ESTA Dodson J pointed out that the certificate did not say that Ms Natus had the consent of the owner at the time that she occupied the premises, but he held that, in the absence of any explanation to the contrary, the probability was that the owner would have been aware of a person who occupied one of his cottages with the consent of the employee (i.e. Mr Van Wyk) and that if the owner was aware of her occupation and *"did not object to it when the employment contract still subsisted, that would have been sufficient to constitute tacit consent."*[29]

25. The LCC held that Ms Natus' position was strengthened by the presumption in ss 3(4) of ESTA. As Ms Natus had resided continuously and openly on the land for over a year, the presumption was applicable and the land-owner had failed to adduce sufficient evidence to disprove consent.[30]

26. *Atkinson* is significant as it established that although Ms Natus' rights were derivative, in that she occupied through or under Mr Van Wyk, this did not prevent the land-owner from tacitly consenting to her residing on the farm, nor did this preclude the presumption in ss 3(4) from operating. The effect of the judgment was that Ms Natus was an ESTA occupier without there being any question of a direct contractual nexus between her and the owner or person in charge.

[28] At [4].
[29] At [9].
[30] At [10].

27. *Atkinson* was followed by *Conradie v Hanekom*,[31] in which a Magistrate had granted an eviction order against a husband and wife, both of whom were ESTA occupiers.[32] They had initially both been employed on the farm. When the husband's employment had been terminated due to misconduct, the owner sought to evict both of them. The owner averred that it was an express condition of their contracts that they could only continue living in the house for as long as both of them were employed on the farm.[33]

28. The LCC found that as Mrs Hanekom was an occupier in her own right, independent of her husband, the fairness of the agreement that provided that she could lose her right of residence as a result of the conduct of her husband was *"questionable"*[34] and that the grounds for terminating her occupation could not be equated with grounds for terminating the occupation of her spouse.[35] The LCC also found that the failure to distinguish between the circumstances pertaining to the two respondents was prejudicial to Mrs Conradie's constitutional rights and the rights conferred on her by statute. The eviction order granted against Mrs Conradie was set aside and, as she was entitled to family life as a component of her right of residence on the farm,[36] the eviction order against her husband was replaced with one declaring that he was no longer an ESTA occupier, but only entitled to use the residence on the farm by virtue of his family relationship with his spouse.[37]

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[31] *Conradie v Hanekom and Another* 1999 (4) SA 491 (LCC).
[32] At [5].
[33] At [6].
[34] At [16].
[35] At [20].
[36] At [21].
[37] At [22].

29. In *Venter NO v Claasen en Andere*[38] the applicant was the trustee of the insolvent estate of the first respondent. The second respondent was the first respondent's wife and the third and fourth respondents were members of his family. The first respondent was the owner of a farm and the second respondent claimed that she was an ESTA occupier by virtue of the *'consent'* or *'other right in law'* which she had acquired by reason of her marriage to the first respondent and that the other respondents were entitled to continue residing on the farm as members of her family.

30. The LCC held that ESTA distinguished between inhabitants of a property in terms of the definition of *'occupier'* and family members of occupiers, who could reside on the property as a result of their familial bond with the occupier.[39] The Court concluded that the second respondent had derived her consent or other right to continue residing on the farm from the first respondent, not in his capacity as owner or person in charge, but in his capacity as marriage partner. This was not the kind of *'consent'* or *'right in law'* that ESTA had intended to protect. The protections conferred by ESTA flowed from the weighing of the interests of occupiers against the interest of property owners in their capacities as such and had nothing to do with consents or rights derived from marriage relationships.[40]

31. In *Glen Elgin Trust v Titus and Another*[41] the LCC (per Meer J) found that the respondents (i.e. Mr and Mrs Titus) were both occupiers on the farm as defined in ESTA.[42] This finding was made even though the second respondent derived her right

[38] 2001 (1) SA 720 (LCC).
[39] At [9].
[40] At [11]. A similar conclusion was reached in *Dique NO v Van Der Merwe en Andere* 2001 (2) SA 1006 (T).
[41] *Glen Elgin Trust v Titus and Another* [2001] 2 All SA 86 (LCC) at [2] ("*Glen Elgin*");
[42] At [2].

of residence from her marital relationship.[43] The first respondent's right of residence stemmed from his employment on the farm.[44] His right of residence was terminated when he was dismissed from his employment. The LCC found that as the second respondent's right of residence was dependent on that of her husband, her right of residence was terminated together with his.[45]

32. In *Landbounavorsingsraad* v *Klaasen*,[46] the LCC substantially narrowed the scope of the definition of an *"occupier"* in terms of ESTA. Mr Klaasen was dismissed by the applicant who subsequently instituted proceedings to evict him and the other members of his household. Gildenhuys AJ held that the primary meaning of *"consent"* is *"voluntary agreement to"*,[47] and that in the context of ESTA it means that "*the person concerned must be or must have been a party to a consent agreement with the owner of the land*".[48] It follows, so the LCC reasoned, that a person residing on land will not be an ESTA occupier unless there is a legal nexus between him or her and the owner or person in charge.[49]

33. The LCC concluded that a family member who considers himself or herself entitled to live with a labourer on a farm (such as a spouse wanting to share a matrimonial home) must enforce that right against the labourer, not the owner.[50] The Court found that only if the farm owner gives consent to live in the house directly to a wife (i.e. if there is a

[43] As above.
[44] At [2].
[45] At [3].
[46] 2005 (3) SA 410 (LCC).
[47] At [20].
[48] At [21].
[49] At [23].
[50] At [25].

consent agreement with the wife) will she be an occupier "*in her own right*" with the "*same entitlements under the Tenure Act as her husband*."[51]

34. Gildenhuys AJ did not refer to *Atkinson*, although his interpretation of the term *"occupier"* was inconsistent with that adopted in the earlier case, as on his approach Ms Natus could not have qualified as an ESTA occupier, as there was no legal nexus between her and the owner or person in charge.

35. In *Simonsig Landgoed (Edms) Bpk v Vers and Others*[52] the first respondent had been in a permanent conjugal relationship with one of the appellant's employees, who had since passed away. The second respondent was the widow of another employee who had died. The two employees (and the members of their families) had been entitled to occupy cottages on the appellant's farm in terms of their employment contracts. After the deaths of the employees, the appellant had given the respondents notice in terms of ss 8(5) of ESTA to vacate their cottages within 12 months. When the respondents failed to comply with the notices, the appellant launched an application in the Magistrates' Court for their eviction in terms of PIE, on the grounds that they were unlawful occupiers.

36. The appellant's allegation that the respondents had never had consent to occupy the cottages was not disputed and had to be accepted as correct.[53] Applying *Klaasen* and *Venter* the Court found that the respondents' entitlement to reside in their cottages was derived from their partners, who were employees of the appellant, and *"not from consent originating in any agreement entered into by them with the appellant or by*

[51] At [24].
[52] 2007 (5) SA 103 (C).
[53] At [16] - [17].

operation of law". It followed that the respondents were not *"occupiers"* as defined in ESTA.[54]

37. For the duration of the 12 month period after they had been given notice to vacate in terms of ss 8(5) of ESTA, the respondents occupied under *"another right in law"* in terms of the definition of an occupier in ESTA.[55] As the Court held that former ESTA occupiers were excluded from the PIE definition of an unlawful occupier, it dismissed the application for the respondents' eviction.

38. In *Randfontein Municipality v Grobler and Others*[56] the owner of a farm, Mr Grobler, sought to evict informal settlers from his farm in terms of PIE. The local authority and the residents contended that the dispute stood to be determined in terms of ESTA, not PIE, as the residents had consent to occupy the land and the High Court accordingly lacked jurisdiction.[57]

39. The SCA referred to this Court's judgments in *Joe Slovo* in relation to *Rademeyer*[58] and concluded that the lengthy period for which residents had been occupying the land, the circumstances in which owner had bought the property, coupled with the municipality's provision of basic municipal services, gave credence to the occupiers' claims that they had consent to occupy the land.[59] The land-owner bore the onus to establish the jurisdiction of the High Court and had failed to address the issue of consent in his founding affidavit.[60] As *"ESTA clearly recognises tacit consent which may be in the*

[54] At [19].
[55] At [23] – [27].
[56] [2010] 2 All SA 40 (SCA).
[57] At [1].
[58] At [10].
[59] At [20].
[60] At [15].

form of prior consent by other owners or people in charge" there was a genuine dispute of fact with regard to the issue of consent and the matter was referred to oral evidence.[61]

40. In *Sterklewies v Msimanga*[62] the SCA overturned the LCC's narrow reading of the definition of consent in *Klaasen* on the following grounds:

> "*The Act does not describe an occupier as a person occupying land in terms of an agreement or contract, but as a person occupying with the consent of the owner. One can readily imagine circumstances in which in the rural areas of South Africa people may come to reside on the land of another and the owner, for one or other reason, takes no steps to prevent them from doing so or to evict them. That situation will ordinarily mean that they are occupying with the tacit consent of the owner and will be occupiers for the purpose of the Act. Accordingly, when in Landbounavorsingsraad v Klaasen 2005 (3) SA 410 (LCC) para 35 it was said that 'consent must originate from an agreement, or exist by operation of law', I think that an unnecessarily restrictive view of the provisions of the Act arose. It suffices that persons claiming the Act's protection show that the owner of the land has consented to their being in occupation, irrespective of whether that occupation flows from any agreement or has its source elsewhere. Whatever its origins it is the right of residence flowing from that consent that must be terminated in terms of s 8 before an eviction order can be obtained."*[63] [Emphasis added]

41. In *Hattingh and Others v Juta*[64] this Court was called upon to decide whether an ESTA occupier's right to family life in terms of ss 6(2)(d) of ESTA encompassed two of her adult sons and her daughter-in-law living with her. The interpretation of *"consent"*

[61] At [14].
[62] 2012 (5) SA 392 (SCA).
[63] At [3].
[64] 2013 (3) SA 275 (CC).

under ESTA was not an issue in the appeal before this Court.[65] This Court held that there was no justification for limiting the term *"family"* in ss 6(2)(d) to the nuclear family[66] and the purpose of conferring the right to family life on occupiers was to ensure that, despite living on other people's land, this vulnerable group of people would be able to live a life that approximated as closely as possible the kind of life that they would live on their own land. The object of ESTA was to give members of this section of our society the human dignity which had been denied to them under apartheid.[67]

42. Zondo J, writing for a unanimous Court, concluded that an occupier may not reside on a landowner's property with more family members than is justified *"by considerations of justice and equity when the occupier's right to family life is balanced with the rights of the landowner."*[68] This Court concluded, after balancing the relevant considerations, that the appellants were not entitled to remain in occupation of the property by virtue of ss 6(2)(d).

43. In *Applethwaite Farm (Pty) Ltd v Tshongweni and Another*[69] the Western Cape High Court, applying the judgment of the LCC in this matter, concluded that the wife and son of a former farm employee were not occupiers as defined in ESTA.[70]

The proper interpretation of "occupier"

44. ESTA, like the Restitution of Land Rights Act 22 of 1994 ("the Restitution Act") is *"remedial legislation umbilically linked to the Constitution".* In construing the

[65] See [12] and [14].
[66] At [34]. This had been the interpretation adopted by the LCC.
[67] At [35].
[68] At [39].
[69] (12299/2014) [2014] ZAWCHC 193 (12 December 2014).
[70] At [22] – [25].

provisions of the Restitution Act courts are required to avoid a *"blinkered peering"* at its language and to adopt the approach set out by this Court in *Department of Land Affairs v Goedgelegen Tropical Foods (Pty) Ltd*:[71]

> *"we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole, including its underlying values."*[72] [emphasis added]

45. In *Brown v Mbhense*[73] the SCA held that the principles of interpretation articulated by Moseneke DCJ in *Goedgelegen* also apply to the interpretation of the Land Reform (Labour Tenants) Act 3 of 1996.[74] It is submitted that similar considerations arise with regard to ESTA and that the *Goedgelegen* principles are equally applicable in the present matter.

46. Academic commentators have noted that, despite having been on the statute books for over a decade, ESTA has had little impact on the insecure tenure conditions

[71] 2007 (6) SA 199 (CC).
[72] At [53].
[73] 2008 (5) SA 489 (SCA).
[74] At [23] – [25].

experienced by farm workers.[75] This is of particular significance when one has regard to the historical context against which the legislation was enacted.[76]

47. The fundamental issue to be determined is whether Mrs Klaase was residing on the farm with the consent of the respondents.

48. In finding that Mrs Klaase is not an ESTA occupier, the LCC distinguished between two classes of people who occupy the property of another in terms of ESTA:

48.1. those who are granted consent to occupy and thus enjoy protection under ESTA; and

48.2. those who, although not occupiers in terms of ESTA, are entitled to reside on the property by virtue of the right to family life, as provided for in terms of ss 6(2)(d) of ESTA.[77]

49. The LCC referred to the first category of persons as '*occupiers in their own right'* and the second category as '*residents'*. It held that the right of an '*occupier in his own right'* to stay on a farm is derived from the consent given by the owner or person in charge, while the right of a '*resident*' to stay on the farm is usually derived from a family relationship with an '*occupier in his or her own right'*.[78]

[75] J Pienaar and K Geyser *"Occupier" for purposes of the Security of Tenure Act: The plight of female spouses and widows" THRHR*, issue 73, vol 2, May 2010, 248 at 249 and the research referred to in footnote 8 of the article.
[76] See *Goedgelegen* at [53].
[77] LCC judgment [22], vol 1, p. 59.
[78] LCC judgment [23], vol 1, p. 60.

50. The LCC found that Mrs Klaase is a resident rather than occupier in her own right.[79] In making this finding the Court reasoned as follows:[80]

50.1. the applicants misconstrued *Sterklewies* in contending that *"a person residing on property with consent ipso facto becomes an ESTA occupier"*;

50.2. *Sterklewies* held that consent in terms of ESTA does not need to be an agreement or contract strictly construed;

50.3. Consequently, *"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"*; and

50.4. Mrs Klaase came to live on the property as a result initially of *"her living there with her mother and subsequently as a result of her marriage to the respondent"* and ESTA and the Constitution barred the respondents from denying her access to the property by virtue of Mr Klaase's right to family life.

51. It is submitted that only the second of the four steps in the LCC's reasoning, as reflected in the preceding paragraph, is correct.

52. If one disregards the categories of people referred to in paragraphs (b) and (c) of the definition of an occupier (which are not relevant for present purposes), ESTA stipulates the following requirements in order to qualify as an occupier:

[79] LCC judgment [24], vol 1, p. 60.
[80] LCC judgment [25], vol 1, p. 60.

52.1. residence on land which belongs to another person; and

52.2. consent or another right in law, on 4 February 1997 or thereafter, to do so.

53. A person who resides on the land of another with consent qualifies as an ESTA occupier. Nothing more is required – contrary to what is implied by the first step in the LCC's reasoning.

54. The LCC's finding, in the third step of its reasoning, that an ESTA occupier must be residing with *"apparent consent"* and *"without any other right to do so"* is not supported by authority or the wording of the Act, which requires only that an occupier reside *"with consent or another right in law to do so"*. It is quite possible that an occupier could reside on land both with consent and with another right in law to do so.[81]

55. In the final step of its reasoning the LCC focused on the reasons for Mrs Klaase coming to live on the farm, rather than whether she lived there with the respondents' consent. It's finding that her presence was due initially to *"her living there with her mother"* is insupportable. It is common cause that Mrs Klaase grew up with her mother on a neighbouring farm.[82]

56. The LCC also erred in its finding that ESTA and the Constitution prevented the respondents from denying Mrs Klaase access to the farm *"by virtue of* [Mr Klaase's]

[81] For example, where an occupier has explicit consent in the form of a lease agreement.
[82] Statement of Agreed Facts, vol 3, p. 156, para 4.1.

right to family life". Mrs Klaase started living together with her husband on the farm in the early 1980's, many years before ESTA and the Constitution were enacted.[83]

57. In addition, the LCC's finding that Mrs Klaase is not an ESTA occupier is inconsistent with Mrs Klaase's rights to equality and dignity in sections 9 and 10 of the Constitution. Both Mr and Mrs Klaase are joint heads of their household. Subsection 25(2) of ESTA states that a court will not be bound by any agreement which seeks to limit the rights of an ESTA occupier. Insofar as the respondents claim that Mrs Klaase lived on the farm *"under"* her husband in terms of his employment contract, this Court is not bound by the terms of a contract which seeks to limit Mrs Klaase's rights.

58. In any event, the LCC's finding that Mrs Klaase only occupies the property *"under"* her husband, when she has worked on the farm as a seasonal worker over a period of many years, is demeaning, and is irreconcilable with our constitutional values.[84]

59. The respondents did not deal with whether Mrs Klaase had '*consent'* to live on the farm in their answering affidavit in the LCC. Instead, they contended that:

    59.1. Mrs Klaase was a seasonal worker on the farm and '*never obtained an independent right of occupation on the property'*; and

    59.2. she occupied the property solely by virtue of her relationship with her husband.[85]

[83] Statement of Agreed Facts, vol 3, p. 156, para 4.2.
[84] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) [21].

60. The respondents' reliance on the fact that they had not granted Mrs Klaase a right to occupy the property does not assist them: as was pointed out by the SCA in *Sterklewies*, a contract between the owner and occupier is not a requirement for consent. The claim that Mrs Klaase occupied the property solely by virtue of her relationship with her husband is irreconcilable with the common cause fact that she worked on the farm over a period of many years: her presence on the farm is attributable, at least in part, to her working there. In any event, even if she had not worked on the farm, the key issue would still not be the reason for her presence there, but rather whether she lived there with the consent of the respondents.

61. In determining whether a person has consent under ESTA, it is necessary to take into account that Parliament has:

61.1. adopted a broad definition of consent, encompassing both express and tacit consent. The *Concise Oxford Dictionary* defines *"tacit"* as *"Understood, implied, or existing, without being stated"*;

61.2. carefully regulated the grounds on which consent to reside on land may be terminated so as to ensure that this takes place only in circumstances which are just and equitable;[86]

61.3. focused on the substance, rather than the form, of the consent, by providing that consent shall be effective regardless of whether official authorisation is required for the occupier's residence;[87]

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[85]LCC Answering Affidavit, vol 3, pp. 172 – 173, paras 11 to 11.5.
[86] ESTA, ss 3(1), read with s 8.

61.4. presumed that a person who has resided openly and continuously on land for a year has consent, unless the contrary is proved;[88] and

61.5. deemed that a person who has resided openly and continuously on land for three years has done so with the knowledge of the owner or person in charge.[89]

62. All of the above factors suggest that Parliament intended the term *"consent"* to be interpreted broadly and generously, rather than restrictively, so as to ensure that a wide range of people who have been subject to past racially discriminatory laws and practices gain the benefit of the protections provided by ss 25(6) of the Constitution.

63. In *Sterklewies* the SCA found that where in rural areas people reside on the land of another and the owner takes no steps to prevent them from doing so or to evict them, they will *"ordinarily"* be occupying with the tacit consent of the owner and accordingly qualify as ESTA occupiers. This is consistent with the approach of the LCC in *Atkinson*, in which it was held that knowledge of occupation (on the part of the owner), coupled with a failure to object to it, was sufficient to constitute tacit consent.[90]

64. It is not in dispute that Mrs Klaase resided on the farm '*continuously and openly'* for many years. It follows that in terms of

64.1. ss 3(5) of ESTA, she is deemed to have lived on the farm with the knowledge of the respondents; and

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[87] ESTA, ss 3(3).
[88] ESTA, ss 3(4).
[89] ESTA, ss 3(5).
[90] *Atkinson*, [9].

64.2. ss 3(4) of ESTA, it is presumed that she had consent to reside on the land.

65. We submit that there is no evidence to rebut the presumption that the respondents consented to Mrs Klaase residing on the farm. Consent is defined broadly so as to encompass tacit consent, which is (in terms of the dictionary definition) *"understood, implied, or existing, without being stated"*. The respondents' failure to object to Mrs Klaase residing on the farm or to take any steps to evict her, implies tacit consent in terms of the test stated in *Sterklewies* and *Atkinson.*

66. The undisputed fact that Mrs Klaase was employed on the farm as a seasonal worker for many years is evidence that the respondents expressly consented to her living there and that she accordingly qualifies as an *"occupier"*, even in terms of the narrow definition of the term adopted in *Klaasen*. As the respondents have not terminated Mrs Klaase's consent to reside on the land in terms of s 8 of ESTA, she remains an occupier in terms of the Act.

67. It is accordingly submitted that Mrs Klaase has at least made out a *prima facie* case that she is an ESTA occupier and the LCC should have granted a stay of the eviction order in terms of ss 12(5) of ESTA.

POTENTIAL PREJUDICE TO WOMEN IN SIMILAR POSITIONS TO MRS KLAASE

68. The narrow interpretations of the term *"occupier"* adopted in *Klaasen* and by the LCC in the present case relegate women living in rural areas to subordinate positions within

their households and impair their rights to dignity, autonomy and self-worth. They also ignore the consent that landowners give to many women living on their land and prioritise consent given to male household heads.[91]

69. The net effect of the narrow interpretation given to the term *"occupier"* has been to reduce the number of people considered to be occupiers under ESTA and, in practice, to define women's rights of residence as secondary rights, derived from their relations with men.[92] Many farmers do not employ women as permanent workers but rather retain a female seasonal workforce comprised of wives, partners and daughters of male workers.[93]

70. Furthermore, s 26(3) of the Constitution requires that, before evicting people from their homes, courts must take into account all the relevant circumstances, placing the emphasis on the need to seek concrete and case specific solutions to the difficult problems that arise in evictions. In such cases the judicial function is to balance out and reconcile the opposed claims in as just a manner as possible, taking into account all the interests involved and the specific factors relevant in each case.[94]

71. If the narrow interpretation of the term *"occupier"* adopted by the LCC in this case is upheld, it will mean that in many cases female farm workers will not be joined as parties in ESTA eviction applications. This inevitably will lead to women being

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[91] "*Evaluating Land and Agrarian Reform in South Africa*" An occasional paper series; 3 Farm Tenure Ruth Hall, Programme for land and Agrarian Studies School of Government Western Cape, September 2003 at p.16. (http://www.plaas.org.za/publication-categories/elarsa) See also LAWSA Vol 14: Part 1 Land (2ed) at p.137 par 127.
[92] As above.
[93] As above.
[94] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (C9076C) [22] – [23].

evicted without evidence of their specific circumstances having been provided, detracting from the ability of courts to fashion case specific remedies.

CONCLUSION

72. It is submitted that Mrs Klaase has made out at least a *prima facie* case that she is an ESTA occupier and the LCC erred in failing to suspend the eviction order pending the final determination of her rights under ESTA. The applicants request orders in terms of paragraphs 1 to 6 of their notice of motion of 9 February 2015.[95]

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15 July 2015

[95] Notice of Motion, vol 1, p. 2.