IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: LCC 120/2019

Before the Honourable Flatela J
Heard on: 8, 15 February 2023
Delivered on: 26 May 2023

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO

26/05/2023
DATE

SIGNATURE

In the matter between:

APPLETHWAITE FARM (PTY) LTD	Applicant
and	
PETRUS JAARS	First Respondent
RAGEL JAARS	Second Respondent
TANIA LOUW	Third Respondent
SUE-ANN LOUW	Fourth Respondent
GODFREY JAARS	Fifth Respondent
GODWIN LOUW	Sixth Respondent
JOSLIN LOUW	Seventh Respondent

ALL OTHER OCCUPIERS, MEADOWS 8, APPLETHWAITE FARM	Eighth Respondent
THEEWATERSKLOOF MUNICIPALITY	Ninth Respondent
HEAD: WESTERN CAPE PROVINCIAL DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	Tenth Respondent

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JUDGMENT

FLATELA J

Introduction

[1] This is an opposed eviction application. The Applicant seeks to evict the first to the eighth Respondent from the manager's house on its property, commonly known as Applethwaite Farm, situated in Grabouw, Western Cape; alternatively, their relocation to alternative premises situated on the property based on the first Respondent's conduct which the applicant alleges that it has caused an irretrievable breakdown of the relationship between them.

[2] The application served before me on 8 February 2023. I was informed by the parties' legal representatives that the matter could be settled. The matter was postponed to 15 February 2023 to allow the parties time to engage meaningfully. The parties failed to settle, and the matter proceeded on 15 February 2023 on an opposed motion.

Parties

[3] The Applicant is Applethwaite Farm (Pty) Ltd, a company with limited liability duly registered in terms of the company laws of South Africa ("Applethwaite) with its principal place of business as Applethwaite Farm, Appletizer Road, Grabouw, Western. The Applicant owns portions 12, 13, and 22 of the Farm Van Aries Kraal, Farm number 455, Caledon Rd, Western Cape. The portions are farmed as one unit commonly known as Applethwaite Farm. The property is given over to the propagation of fruits, primarily apples.

[4] The first Respondent is Petrus Jaars, a pensioner who resides at house No. 8 Meadows on the property with his adult children and grandchildren. The second Respondent is now late. The third to fifth respondents are the first Respondent's adult children. The Sixth and Seventh respondents are his adult grandchildren. At the time of the prosecution of this application, the first Respondent was 66 years of age, the third to fifth respondents were aged 41, 39 and 34, and their grandchildren were 24 and 21, respectively.

Factual Background

[5] On 10 April 2006, the Applicant and the first respondent entered into an employment agreement in which the first Respondent was employed as an Orchard Manager. The Applicant offered accommodation to the first Respondent as required for the proper execution of his duties.

[6] The first Respondent has lived at Applethwaite Farm with his late wife (the 2nd Respondent), three adult children, and two grandchildren from 2005 to date. Initially, he was allocated a three-bedroom house in the Village. The Village is housing units designated for the Applicant's salaried employees. In 2011 the first Respondent and his family were allocated the manager's house at Meadows 8 due to his position as an Orchard Manager. Meadows are designated houses for senior managers.

[7] The first Respondent retired from employment in April 2017. Upon retirement, Mr Dirk Meyer, on behalf of the Applicant, convened a meeting with the first Respondent to discuss the first respondent's relocation to a retirement village. The first Respondent was informed that the property was required to accommodate the new Orchard Manager to be employed. The applicant contends that the first respondent agreed to vacate the premises by the end of September 2017. The respondent has refuted this contention.

[8] The first Respondent is refusing to relocate to the retirement village on three grounds, namely:

(a) that his previous employers gave him a right of *habitio;*

(b) the property that is made available for relocation is not suitable for his family's needs;

(c) he is willing to relocate to the premises provided the Applicant makes the premises habitable; alternatively, the Applicant must provide the first Respondent with a cash offer of R60 000 to improve the condition of the premises.

Issue for determination

[9] The question that arises in this application is whether it is just and equitable, as envisaged by section 10(1)(b) and (c) of the Extension of Security of Tenure Act,[1] ("ESTA"), to grant an eviction order directing the first to eighth respondents, to be evicted from their current residence based on the first Respondent's conduct which the applicant alleges that it has caused an irretrievable breakdown of the relationship between them.

Applicant's submissions

[10] The Applicant contends that the accommodation of the first Respondent arose solely from the employment contract. The Applicant further contends that the tacit terms of the housing policy stated that the first Respondent would, upon his retirement, vacate the premises with all those occupying the property through him and relocate to premises that the retirement Village, a designated housing for retired persons on the property.

[11] The Applicant argues that the first Respondent agreed to vacate the house but indicated that he did not want to move to the retirement village on the farm. He requested at least five months to get his affairs in order to secure alternative accommodation elsewhere. It was agreed that the first Respondent would vacate the house by the end of September 2017. The Respondent failed to vacate the premises as agreed.

[12] The Applicant avers it granted this request because, at the time of his

[1] 62 of 1997

retirement, the first Respondent was earning a basic salary of R12 892.31, and he also received a retirement benefit of R470 164 .75 on his retirement, so he could afford to secure private alternative accommodation.

On 2 October 2017, the Applicant met with the first Respondent as another cottage known as 3 Paradise Lane became available. The Applicant avers that this cottage was specious than the one previously offered in the retirement village. It was 205 square meters consisting of three bedrooms, a kitchen, a lounge, and a bathroom. The first Respondent rejected this offer because it was unsuitable for his family.

[13] On 3 October 2017, the Applicant addressed a notice to the first Respondent noting the agreement to vacate by the end of September 2017 and requesting the first Respondent to state his intentions, giving him a three months' notice to vacate by the end of December 2017. The first Respondent was also advised that he was no longer entitled to free electricity. No response was received from the first Respondent regarding the issues raised.

[14] When it became clear to the Applicant that the Respondent had no intention of vacating the house, the Applicant sent him further notice to vacate the property. The first Respondent was offered alternative accommodation at the retirement village. The first Respondent and his family were required to relocate to unit 13 by 28 September 2018. Before the 28 September 2018, first Respondent advised that he would not vacate the property.

[15] On 24 September 2018, a notice in terms of section 8(1)(e) of ESTA was served upon the first Respondent calling on him to make representations regarding his family's housing needs with specific reference to the following:

a. Their needs as regards housing, including any special needs;
b. Whether there was any reason for not relocating to the retirement village
c. The names and ages of all the persons living on the premises with particular reference to anybody that might be vulnerable;
d. The employment details of the persons living on the premises;

e. Whether a monthly rental of R100 would be affordable, if not any reasons thereof and

f. Any factors relevant to the matter.

The first Respondent did not tender the required representations in terms of section 8(1)(e) of ESTA.

[16] The Applicant has rejected the first Respondent's demands on the basis that the Applicant has fulfilled its obligations in terms of the employment contract to provide accommodation for the first Respondent and his family while he was in their employ and to provide accommodation in the retirement village on his retirement. After several engagements, the parties could not agree on the proposed relocation hence these proceedings.

[17] The Applicant contends further that it has always been the policy of the Applicant that minor children of employees who resided on the farm stay with their parents; however, it is expected that when the children reach the age of majority, they must vacate the farm. The Applicant states that this policy has not been applied consistently throughout the years due to the cost of securing the eviction of adult dependants.

[18] Furthermore, the Applicant contends that the first and second respondents have, contrary to the agreement, allowed their adult children to remain on the property with them, and despite demand, the respondents have failed to remedy the breach of fair and material terms of the agreement. Additionally, the Applicant argues that it is only in the circumstances, such as the present, where the breach is especially egregious, that the Applicant is left with no alternative but to institute these proceedings.

[19] The Applicant submits that several meetings were held with the first Respondent wherein this issue was discussed, and several offers were presented to the first Respondent.

[20] The Applicant contends that four different cottages have been offered:

(a) Paradise 3; Village 13;
(b) Village 17, and
(c) Village 33. The first Respondent rejected all of these offers. Instead, the first Respondent demanded that the Applicant buy a house suitable for his family's needs, alternatively renovate the cottages, and add rooms to accommodate his family's needs.

[21] The Applicant also engaged with several people nominated by the first Respondent to represent him. The reasons advanced by the first Respondent for refusing to vacate/relocate are that the house he is currently occupying is more spacious than all the houses he has been offered and that he has spent about R57 000 (fifty-seven thousand rands) on the current property, renovating and installing fittings.

[22] The applicant submitted that on 8 November 2018, another notice to relocate was served upon the first Respondent. The first Respondent was advised that should he wish to continue to stay in the house, he must pay a rental of R7000 (seven thousand rands) for the Applicant to use the rental to secure suitable accommodation for its senior staff member. The first Respondent was also reminded to pay the nominal rent for the services he and his extended family consume. There was no response to this notice.

[23] On 26 February 2019, a notice terminating a right of residence was served upon the first Respondent and those occupying the property under him. In this notice, the Applicant states that the Respondent's rights were terminated due to the irretrievable relationship breakdown caused by the first Respondent's refusal to relocate and his failure to pay the rental. They were afforded 14 (fourteen) days to make written representations as to why their right of residence on the land should continue.

[24] In response, the first Respondent stated that he had already spoken to the Applicant's representative regarding alternative accommodation wherein he demanded that the Applicant add two rooms and renovate them to be habitable. He stated that his furniture would not fit in the houses offered to him. He then demanded

stated that his furniture would not fit in the houses offered to him. He then demanded that the Applicant make a cash offer to buy a suitable house in town.

[25] The Applicant contends that the manager's house is needed to accommodate Mr George Hugo, a management employee and his family into the house the respondents currently occupy. Mr Hugo's household comprises nine persons currently residing in Paradise 5, far smaller premises unsuitable for their family. Mr Hugo's family consists of the following persons:

a. Mr. Hugo;
b. His wife;
c. Their three children, aged 17, 9 and 4;
d. Their grandchild aged one year;
e. Mrs. Hugo's uncle, aged 69 years;
f. Mrs. Hugo's aunt, aged 67 years;
g. Mr Desmond van Jaarsveld aged 32 year

Alternative Accommodation

[26] The Applicant contends that it has made available alternative accommodation for the first Respondent in the retirement village where the retired former employees enjoy these benefits:

a. Gratuitous occupation for them, their spouses, and minor dependants;
b. Free electricity up to 500 municipal units per month and subsidized electricity after that;
c. Free water;
d. Free primary health care;
e. Every second Sunday, every person on the farm is transported to Grabouw free of charge to do their shopping;
f. In case of emergencies like deaths and legal issues, the Applicant provides free transportation to attend to the issue;
g. There is a provision for transport for school-going children to different schools.

[27] The Applicant contends that the right of occupation afforded to the respondents is generous in the extreme.

The Respondent's submissions

[28] The first Respondent conceded that upon his employment as an Orchard Manager he was afforded a house with his offer for employment, including free electricity and water. He was allocated a house in the Village and in 2011 he was relocated from the house in Village 3 to Meadows 8 with his wife and adult children and grandchildren.

[29] The first Respondent further contends that an oral agreement was entered between him and the Applicant duly represented by its first manager wherein he was granted the right of habitio to reside on the farm while in employment and after retirement free of charge.

[30] The first Respondent contends that in 2017 he was advised by one Mr Dirk Meyer that he must vacate the property when the first Respondent retires. The first Respondent was due to retire in April 2017. He avers that on 3 October 2017, he was served with a notice to vacate the farm, and the first Respondent refused to sign the notice as he believed there was no legal basis for both.

[31] The first Respondent contends that ever since his retirement, the second manager has been harassing him and his family, insisting that he must vacate the house, which caused his family tremendous distress and anxiety. His two grandchildren, the sixth and seventh respondents, could not complete their schooling in 2019 due to the conduct of the Applicant's manager.

[32] The first Respondent denies the existence of the housing policy and its terms governing accommodation after retirement. He states that no former employee was ever relocated to the retirement village since he started working for the Applicant. The first Respondent contends that it is not the Applicant's standard practice to evict retired employees off the farm. He contends that the Applicant is biased towards him, and

this bias arose from their dispute over the installation of electricity meters at the farm.

[33] Regarding installing an electricity meter on the farm, the first Respondent states that the Applicant, contrary to their agreement that the Applicant would provide electricity for free at the time of his employment, in 2015, the Applicant sought to introduce the installation of an electricity meter. The first Respondent contested the agreement amendment and insisted that the original agreement bound the Applicant. The disagreement created animosity between him and the applicants.

[34] On alternative accommodation, the first Respondent disputes that the Applicant has a designated area for retired employees. He states that retired employees often remain in occupation of the premises they were allocated at the time of employment. He states further that he is entitled to reasonably suited accommodation for his needs at all times during his residency at the farm. The relocation premises offered are situated in the farmworkers' Village.

[35] The Respondent's family consists of 9 family members, and the current house they are residing in is 208 square meters in extent . When these proceedings were launched, the premises made available for the respondents was a small two-bedroom house measuring between 80 and 90 square meters.

[36] The first Respondent contends that the proposed relocation premises would cause his family hardship in that:

a. It will destroy his family tradition and culture, they are a close, loving, and supporting family, and they do not wish to be displaced;
b. He will suffer financial loss as he started and maintained a vegetable garden that has sustained his family;
c. He also maintained a rose garden, flower beds, and a lawn around the house, keeping it neat and aesthetically attractive for his family's mental health.
d. The farming community currently residing in the relocation premises engages in alcohol abuse which his family is not exposed to in Meadows 8. He fears that the relocation will harm his family

e. The relocation premises are not equivalent to the premises he currently occupies.

[37] The first Respondent is willing to relocate to Paradise 3, a three-bedroom house subject to being renovated to be in a habitable condition. He states that he requested the Applicant to repaint the house, renovate the flooring and repair the cabinets at Paradise 3.

[38] He reiterates that the Applicant is bound by their agreement to provide him with suitable accommodation, and this Court must declare him duty-bound to provide him with suitable accommodation, free electricity, alternatively at a subsidized rate.

[39] The first Respondent is a protected occupier as contemplated in section 8(4)[2] of the Act; and as such, the Applicant must prove that the 1st Respondent committed a breach as contemplated in sections 10(1)(a) – (c).[3] The Applicant submits that the Applicant needs to establish such a breach.

[40] The respondents submit that the Applicant's conduct is discriminatory as his

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[2] **Termination of a right of residence and eviction**

(8)(4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and—

(a) has reached the age of 60 years; or
(b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability, is unable to supply labor to the owner 45 or person in charge,

may not be terminated unless that occupier has committed a breach contemplated in section 10( )(a), *(b)* or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.

[3] **Order for eviction of person who was occupier on 4 February 1997**

10. (1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if—
(a) the occupier has breached section 6(3), and the Court is satisfied that the breach is material and that the occupier has not remedied such breach;
(b) the owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar month's notice in writing to do so;
(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;

family is subjected to these proceedings, and his eviction would not be just and equitable.

Dispute of facts

[41] The Applicant relies heavily on the housing policy concerning retirees. The Applicant contends that it has always been the policy of the Applicant that minor children of employees who resided on the farm are entitled to stay with their parents; however, it is expected that when the children reach the age of majority, they must vacate the farm.

[42] The Applicant further contends that the retirees are expected to relocate to the retirement village upon retirement. The retirement premises are Flat 1-4, comprising 2 small bedroom flats to accommodate pensioners and their caretakers.

[43] The Applicant contends further that in terms of this policy, the retirees are expected to pay a rental of R100 and electricity services. The Applicant contends that the Respondent owes them R38 710 .59 (thirty-eight thousand, seven hundred and ten rands, fifty-nine cents) regarding electricity consumption charges. The first Respondent denies this.

[44] It is contended on behalf of the Applicant that the first Respondent has breached the terms of this policy by staying with his adult dependants, refusing to pay rental and electricity and refusing to relocate to the designated premises for retirees.

[45] It is further contended that despite demand, the first Respondent has failed to remedy the breach, his conduct is egregious, and the Applicant is left with no alternative but to institute these proceedings.

[46] The first Respondent disputes that the Applicant has a designated area for retired employees. He states that retired employees often remain in occupation of the premises they were allocated at the time of employment. He states further that he is entitled to reasonably suited accommodation for his needs at all times during his residency at the farm.

[47] I shall first deal with this dispute having regard to the *Plascon-Evans* principle laid in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty).*[4] The first Respondent's first bone of contention is that there is no policy regarding retirees, and he was granted a right to live in the property with his family even after retirement. The first Respondent further disputes that there is a retirement village for pensioners and avers that there is accommodation for Applicant's workers, and that is where he is being relocated.

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[4] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634H-635C. Also see Wightman t/a JW Construction v Headfour (Pty) Ltd & another 2008 (3) SA 371 (SCA), paras 11 – 13 where Heher JA, in discussing the principle, said:

> 'The first task is accordingly to identify the facts of the alleged spoliation on the basis of which the legal disputes are to be decided. If one is to take the Respondent's answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant's application was bound to fail. Bozalek J thought that the Court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine, or bona fide. For the reasons which follow I respectfully agree with the learned Judge.
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> > "Recognizing that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. . ."
>
> A real, genuine, and bona fide dispute of fact can exist only where the CourtCourt 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. 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. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the CourtCourt will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision.
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> A litigant may not necessarily recognize or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the CourtCourt takes a robust view of the matter.'

[48] In terms of the Plascon –Evans principle, an applicant who seeks final relief in motion proceedings must, in the event of a dispute of fact, accept the version set up by his or her opponent unless they are, in the opinion of the Court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.[5]

[49] Without going into a legalistic definition of the word policy, it is deductible from the Applicant's case that the reference to the housing policy means a codified instrument governing and supplementing a benefit to their employees as part of the employment relationship, terms and conditions. However, there is no evidence that the alleged policy existed, nor has it been pleaded that the first Respondent was ever furnished with it. Instead of it being a housing policy in the traditional sense, in which case codification of it would have been expected, the relocation of retirees to alternative accommodation within the Applicant's properties has been. It is a practice, not a policy. A practice cannot be elevated to the status of a policy. The former is akin and can be a contract of protocol and procedure, whereas the former could be put to something like a culture of people.

[50] The first Respondent's dispute of the existence of the policy is not so untenable in that the allegation can be rejected out of hand. The Applicant used the term Policy and Agreement interchangeably, and again there is no evidence that any agreement existed between the Applicant and the first Respondent.

[51] The first Respondent also relied on the allegation of an oral agreement of *habitio* for resisting relocation. The Applicant disputed that such a 'right' had been conferred upon the first Respondent. The Applicant argued that *habitio* is unenforceable as it would be contrary to the Subdivision of the Agricultural Land Act.[6] In *Grobbler v Philipps,*[7] *the Court* settled that to enforce a right of *habitatio* against successors in title, the right must have been reduced in writing and registered against

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[5] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] (3) SA 371 (SCA); [2008] 2 All SA 512 (SCA) para 12.
[6] 70 of 1970.
[7] Grobler v Phillips and Others [2022] ZACC 32; 2023 (1) SA 321 (CC).

the property's title deed.[8] Therefore, I do not have to decide on this dispute.

Legal Framework

[52] Section 8 of ESTA provides that the right to residence may be terminated on any lawful grounds, provided that such termination is just and equitable, having regard to all relevant factors. The provisions read as follows: -

> "(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to-
>
> (a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
> (b) the conduct of the parties giving rise to the termination;
> (c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
> (d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises after the effluxion of its time; and
> (e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an adequate opportunity to make representations before the decision was made to terminate the right of residence.
> (2) . .
> (3) . .
> (4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and –
>
> (a) has reached the age of 60 years; or
> (b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury, or disability, is unable to supply labor to the owner or person in charge,
>
> may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labor shall not constitute such a breach." (my emphasis)

[8] See *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 at 16; *Janse van Rensburg and Another v Koekemoer and Others* 2011 (1) SA 118 (GSJ) para 19.

[53] The Applicant brings this matter under the provisions of sections 10(1)(b) and (c) and section 11.[9] The provision reads:

> "(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if—
>
> (a) the occupier has breached section 6(3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;
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> *(b)* the owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar months' notice in writing to do so;
>
> *(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;

[54] In terms of section 8(4), the first Respondent's right to residence may not be terminated unless he has committed a breach contemplated in sections 10(1)(a),(b), or (c). The Applicant contends that the first Respondent is in breach of the housing policy/rules and or agreement in terms of sections 10(1)(b) and (c).

[55] I have already found that no evidence has been established that such a housing policy exists on paper other than the relocation of retirees being a practice of the Applicant, which up until now, has consistently been implemented successfully without resistance. However, the matter does not end there. In issue here is not a breach of

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[9] **Order for eviction of person who becomes occupier after 4 February 1997**

11. (1) If it was an express, material, and fair term of the consent granted to an occupier to reside on land. that the consent would terminate upon a fixed or determinable date, a court may on termination of such consent by effluxion of time grant an order for eviction of any person who became an occupier of the land in question after 4 February 1997, if it is just and equitable to do so.
(2) In circumstances other than those contemplated in subsection (1). a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.
(3) In deciding whether it is just and equitable to grant an order for eviction in terms of this section. The Court shall have regard to-
(a) the period that the occupier has resided on the land in question;
(b) the fairness of the terms of any agreement between the parties; (c) whether suitable alternative accommodation is available to the occupier;
(d) the reason for the proposed eviction;
(e) the balance of the interests of the owner or person in charge. the occupier and the remaining occupiers on the land.

the non-existent policy but rather the refusal of the first Respondent to be relocated elsewhere. The refusal is impugned conduct, and it is against this conduct that an inquiry of whether the first Respondent has committed an egregious breach as contemplated by section 10(1) is to be evaluated in the context.

[56] Explaining the provisions of sec 10(1)(c) of ESTA, Schippers JA writing for the majority in *Nimble Investments (Pty) Ltd v Malan*,[10] said the following:

> "The plain wording of this provision makes it clear that what is contemplated is an act of breaking the relationship on the part of the occupier that is essentially impossible to restore. The LCC has held that a fundamental breach of the relationship between an owner and an occupier contemplated in s 10(1)(c) "relates to a social rather than a legal relationship" and that this requirement would be met if "it is practically impossible for the relationship to continue due to a lack of mutual trust ."[11]

[57] The learned Judge summarised the factors that must be considered when determining whether the occupier has committed the breach as envisaged in s 10(1)(c) of ESTA. She expressed herself as follows:

> "In determining whether an occupier has committed a fundamental breach of the relationship envisaged in s 10(1)*(c)* of ESTA, it seems to me that the following factors must be considered. The history of the relationship between the parties prior to the conduct giving rise to the breach. The seriousness of the occupier's conduct and its effect on the relationship. The present attitude of the parties to the relationship as shown by the evidence."[12]

[58] The Applicant alleged that the first Respondent had committed a material breach as encapsulated by 10(1)(b) and (c) of ESTA in the following manner:

a. It is contended that the first Respondent has, contrary to the agreement, allowed his dependants' children to reside with them, and he failed to

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[10] [2021] ZASCA 129; [2021] 4 All SA 672 (SCA); 2022 (4) SA 554 (SCA)

Para 46-47.

[11] *Nimble Investments (Pty) Ltd v Johanna Malan and Others* [2021] ZASCA 129; [2021] 4 All SA 672 (SCA); 2022 (4) SA 554 (SCA) at para 46.

[12] Id at para 47.

remedy the breach;

b. It is further contended that in terms of the agreement between the Applicant and the first Respondent, the first Respondent and his family were to have relocated to the retirement village upon retirement. Only his minor dependents and spouse were entitled to be on the property with him, and he would be entitled to free services while employed by the Applicant, not after that;

c. It was contented by the Applicant that these terms were both material and fair and that the Applicant has complied with the agreement.

d. The first Respondent was given a month to comply with the agreement's material terms, failing which his right of residence would be cancelled.

e.

f. Wide-ranging assistance with the relocation was offered to the first Applicant.

g. The first Respondent's refusal to pay rent for services caused discontent in the property. All the retired personnel had paid their monthly rental of R100 until they learned that the first Respondent and one Elize Prins were not paying for their services. They have since adopted the attitude that there is no reason why they should pay the nominal rental.

h. The Applicant believes that the first Respondent is encouraging others not to pay for services and their rental, endangering their rights to remain on the property.

[59] Overall, their conduct has caused an irreparable breakdown of the relationship between the Applicant and the first Respondent.

A breach or no breach?

[60] It is not clear what conduct exactly is referred to by the Applicant, labelling the behaviour of the respondents as 'egregious' and leading to the relationship breakdown. The Applicant has referred to the failure of the Applicant to vacate the property as undertaken or relocate or pay rent and services as the breaching conduct.

The other facts do not support this averment.

[61] The Applicant also appears to conflate the terms of the alleged policy/agreement and reference to the right to occupy, which arises from an employment contract in section 10(1)(d). The Applicant relies on the terms of the letter of appointment of the first Respondent on the breach of the agreement for living with his adult dependents. The letter stated, ***"As it is required for the proper execution of your duties that you will be resident on Applethwaite Farm, suitable accommodation will be provided for you and your wife."*** It is common cause that the first Respondent's children were already adults when they moved in with their parents in 2005. Had this policy existed, then the breach of the employment contract (and it) would have been at the point of the first Respondent moving in with his family and not at the date on which the Applicant took issue with such residence. This altogether negates the Applicant's policy breach allegation.

[62] The Applicant avers that the tacit term of the agreement that the first Respondent is alleged to have breached is a refusal to relocate to the retirement premises on the property. Though I have found that no such policy exists, what is clear is that the "egregious" breach on the part of the first Respondent refuses to be relocated. For reasons which follow, the first Respondent has no right in law or fact to resist the relocation. However, with that being said, his resistance certainly cannot amount to an egregious breach rendering the relationship between the two irretrievable broken down, significantly when the first Respondent believed that he had a right to stay in the property as long as he wanted. At the very least, there are tensions but not so irretrievable in a manner that must have been caused by the Respondent as contemplated by section 10(c) of ESTA.

[63] In the present matter, the first Respondent and his family have been living on the property since 2005 without any destructive behavior. They have maintained their house; the first Respondent started and maintained a rose garden, flower beds and lawn around the house. The first Respondent also started a vegetable garden producing fresh produce for years. Although not pleaded, it is recorded in one of the letters from Ms from the Department of Community Development Workers, Western

Cape that the first Respondent has spent about R57 000 on improvements to the house.

[64] In deciding whether an occupier has committed a material breach warranting their eviction in terms of section 10(1) of ESTA, the Court is called to make a value judgment regarding all the facts and context at hand.

[65] Regarding the first Respondent's attitude and resistance to the relocation, such resistance has not been in or with mala fide intent. It has always been the first Respondent's case that he enjoyed a right of *habitio* to occupy the house he holds on, although incorrect in law, is bona fide and militates against a view that such resistance could be deemed a material breach. In his view, based on his right of *habitio* to occupy the present property, and additionally, if he were to be ejected from it, then, again in his view, he was entitled to be relocated to a property of equivalent size and status. Simply put, the first Respondent was merely protecting his interests rather than acting with mala fide intent to frustrate the Applicant. Furthermore, any breakdown and tension in the relationship between the Applicant and the Respondent is remediable and will be cured by the order I shall make regarding the Applicant's alternative prayer.

[66] The above finding disposes of the Applicant's main contentions. The rest of his allegations, particularly the alleged incitement by the first Respondent to encourage others not to pay their rental services, stands uncorroborated.

[67] Considering all the relevant factors, I find that the first Respondent has not committed any serious breach as in section 10(c).

Termination of the right to residence on land

[68] The Applicant sought the eviction of the first Respondent and terminated his right of residence because he refused to relocate to the so-called retirement village. The first Respondent is over 60 years of age and has resided on the farm for over 27 years without any grievance. Section 8(4) of ESTA is applicable. That section provides that the first Respondent's right to residence may not be terminated unless he has

committed a material breach, as captured in the references of section 10(1). I have already pronounced this issue and found no such material breach. It, therefore, follows that the Applicant's termination of the first Respondent's right to residence is in contravention of section 8(4) and thus cannot stand.

The third to the eighth Respondent

[69] The third to eighth Respondent's right to residence was terminated solely on the alleged conduct of the first Respondent. It is common cause that the third to eighth respondents obtained their right of residence on the property when the first Respondent moved into the property in 2005. They have been residing in the property for 27 years. They, therefore, obtained their right to residence in terms of section 3(4)[13] or 3(5)[14] of ESTA.

[70] The Applicant contends that their occupation in the property was without consent, which is incorrect. Even if that was a correct position in this matter, it is neither here nor there because the consent needed is not that of the Applicant but rather that of the first Respondent. Zondo J expressed the exact same sentiments in *Klaase* this way: [15]

> "It is clear from *Hattingh* that for purposes of an occupier bringing onto the property a family member or family members to reside with him or her, the consent of the property owner is not required. Only the occupier's consent is required."

[71] The Constitutional Court in *Snyders and Others v De Jager and Others*[16] stated that:

> "Section 8(1) makes it clear that the termination of a right of residence must be just and equitable both at a substantive level and at a procedural level. The requirement for the substantive fairness of the termination is captured by the introductory part that requires the termination of a right of residence to be just and equitable. The requirement for

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[13] **Consent to reside on the land.**
3(4). For civil proceedings in this Act, a person who has continuously and openly resided on land for one year shall be presumed to have consent unless the contrary is proved.
[14] **3(5).** For civil proceedings in this Act, a person who has continuously and openly resided on land for three years shall be deemed to have done so with the knowledge of the owner or person in charge.
[15] *Klaase and Another v van der Merwe N.O. and Others* [2016] ZACC 17, para 37.
[16] [2016] ZACC 55; 2017 (5) BCLR 614 (CC); 2017 (3) SA 545 (CC)

procedural fairness is captured in section 8(1)(e)."[17]

[72] The third to the seventh Respondent's right to occupy arose from the first Respondent's right to family life in section 6(2)(d) of the Act.[18] The first Respondent opposes the eviction of the third to seventh respondents as they depend on him. They are not working. The first respondents also argued that eviction would destroy his family tradition and culture. They are a close, loving, and supportive family and do not wish to be displaced. On the other hand, the Applicant relied heavily on the fact that the third to seventh Respondent is not expected to live with their parents.

[73] Addressing the question of what constitutes a family, Zondo CJ in *Hatting and Others v Jutas*[19] expressed himself as follows :

> "The reference to "family life" in section 6(2)(d) of ESTA raises the question of what constitutes a "family" for purposes of that section. The applicants contended for the inclusion of an extended family in the term "family" whereas the Respondent contended for its restriction to the occupier's spouse and dependent children. The Land Claims Court held that the "family" contemplated in section 6(2)(d) is constituted by the occupier's spouse or partner and dependent children. That means the nuclear family. In my view there is no statutory justification for limiting the term "family" in section 6(2)(d) to the nuclear family. The Land Claims Court based its conclusion in this regard on section 8(4) and (5). It said that those provisions gave an indication that even in section 6(2)(d) the family contemplated was the spouse of the occupier and his or her dependent children. Section 8(4) gives no such indication. Section 8(5) makes a reference to a spouse and a dependant but I do not think that the mere mention of those words in the provision is sufficient to serve as a proper basis for the conclusion that the reference to "family" in section 6(2)(d) is a reference to a nuclear family. As it was said by this Court in *Dawood*,families come in different shapes and sizes. There is no need to attempt to define the term "family" with any precision other than to say that it cannot be limited to the nuclear family. The first and third applicants are two of Mrs Hattingh's sons. The second Applicant is Mrs Hattingh's daughter-in-law. In my view, whatever notion of family is contemplated in section 6(2)(d) will include the children of the occupier. I do not think that the attainment of the age of majority or being

[17] Id at para 56.
[18] See *Klaase and Another v van der Merwe N.O. and Others* 2016 (6) SA 131 (CC) (14 July 2016).
[19] 2013 (3) SA 275 (CC).

independent of parents takes a person out of the ambit of his or her parents' family. . . "[20](Footnotes omitted)

[74] The Constitutional Court recognized that the family right is not restricted to the occupier being able to live with his or her spouse or partner or children only. He or she may also live with other members of his or her family provided that doing so will not be unjust and inequitable to the landowner when the landowner's rights are balanced against the occupier's right to family life. In this matter, the Applicant has not demonstrated any hardship caused by the continued occupation of the first Respondent's family. Their termination of residence and ground of eviction was closely linked to the conduct of the first Respondent. In any event, the eviction of the second to the eighth Respondent is premised on the eviction of the first Respondent being granted if he were to be evicted. I decline to do so.

[75] Considering all the material factors, the termination of residence of the second to the eighth respondents would not be just and equitable.

Would relocation of the Respondent impair the first Respondent's dignity?

[76] The Applicant has made house no 27, Village, available, measuring approximately 104 square meters in extent. It has four bedrooms, a lounge, a kitchen, an indoor bathroom and a covered carport. The ERF is about 493 square meters, with a fenced garden.

[77] The terms and conditions are that the respondents shall pay rent of R100 per month, escalating by 4% per annum.

[78] The respondents shall pay all amounts relating to electricity consumption at the premises known as Village 27.

[79] The Respondent's attorneys attended to the house's inspection and wrote to the Applicant's attorneys regarding the state of the property. It is contended on behalf

[20] Ibid, para 31.

of the Respondents that the premises are not suitable accommodation in size and location in that:-

i. It is small and in poor condition;
j. Weekly workers currently use it;
k. It is of poor standard; it is run down;
l. It needs painting, and the wall cracks need to be attended;
m. It needs maintenance and new fencing;
n. It needs tiling in the communal area, and the bedroom carpet;
o. Built-in wall units need to be installed;
p. The Applicant must pay the Respondent an amount of R60 000 to the first Respondent in order to make the house habitable;
q. The Applicant must assist the 1st Respondent's family with relocation.

[80] The first Respondent's issue with the premises offered as alternative accommodation is that it is of a lower standard than the house the first Respondent and his family are currently occupying. It is not their case that the house is uninhabitable and that being relocated will impair their dignity; neither is it pleaded that all of his conscientious objections to all of the Applicant's offers were because his dignity would have been impaired by the issues he took within all of the properties of the Applicant's offers.

[81] In *Rouxlandia 2 Ltd*[21] in a matter which dealt with the relocation of the occupiers from one house to another, the appellant argued that the house they were relocated to was smaller than the house the appellant was occupying. Therefore, the relocation would impair his dignity. Nichols AJA writing for the Court, said:

> "However, what of the situation where a relocation does not impact on the human dignity of the occupier? The Constitutional Court has acknowledged that the right of residence conferred by s 8 of ESTA is not necessarily tied to a specific house. The protection afforded by those parts of ss 5 and 6 of ESTA, on which the appellants rely, is to ensure that an occupier will not be subjected to inhumane conditions violating human dignity. To this extent, an occupier's right to resist relocation is protected. But these sections do not amount to a blanket prohibition on relocation under any

[21] *Orange and Others v Rouxlandia Investments (Pty) Ltd* 2019 (3) SA 108 (SCA) (Rouxlandia 2)

circumstances. If indeed the relocation were to impair an occupier's human dignity, then the provisions of s 5 and s 6 would apply, and the occupiers could invoke their constitutional rights. This does not mean that all relocations necessarily suffer the same fate."[22] (footnotes omitted)

"Suitable alternative accommodation is defined in s 1 of ESTA as 'alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation.' Rouxlandia has offered alternative accommodation. It is not a manager's house but a smaller 5-roomed house. It has been newly painted and has running water, a flush toilet, and an inside bathroom. The roof is corrugated iron and is leak-free. The criteria for suitability have, in my view, been fulfilled. In any event, Mr. Orange does not object to the alternative accommodation on the basis that it is unsuitable. His complaint is that it does not befit the status of a manager. He wants a 'bigger and better' house."[23] (footnotes omitted)

[82] The learned Judge continued in the following paragraph and stated:

"ESTA was not enacted to provide security of tenure to an occupier in the house of his or her choice. The primary purpose of ESTA, as set out in the preamble, is: 'To provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and the circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from the land; and to provide for matters connected therewith."[24]

[83] The principles in *Rouxlandia* are applicable in this matter. Moreover, it is for those reasons that I order that the Applicant's alternative prayer be granted.

[84] I accordingly order as follows:

1. The relocation of the first to Eighth Respondent from Meadows 8 to the premises known as Village 27 is granted.
2. The first to Eighth Respondents shall vacate the premises and relocate to Village 27 on or before 1 September 2023.

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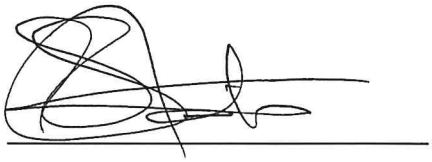
[22] Oranje and Others v Rouxlandia Investments (Pty) Ltd [2018] ZASCA 183; 2019 (3) SA 108 at para 18
[23] Supra, fn 10, para 20.
[24] Ibid, para 21.

3. In the event the respondents fail to vacate by 1 September 2023, the sheriff of the High Court is authorized to relocate them on 4 September 2023.



L FLATELA
JUDGE
LAND CLAIMS COURT

Appearances

For the Applicant	Adv Wilkin
Instructed by	**Le Roux Attorneys**
For the Respondent	Adv C FEHR
Instructed by	Attorneys Zumpt