IN THE LAND COURT OF SOUTH AFRICA

HELD AT RANDBURG

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **YES**

1 October 2024 .....

SIGNATURE

In the matter between:

Before: **The Honourable Justice Spilg**

Land Claims Court Case Number: **LCC20R/2022**
LCC09R/2023
LCC14R/2023

In the matter between:

1. **LCC Case Number: LCC20R/2022**

   Worcester District Magistrates' Court Case Number: 44/2022

   PIETER JOSEPH ADRIAAN CONRADIE N.O.
   And others First to Third Applicants

   and

ALICE VAN WYK	First Respondent
BREEDE VALLEY MUNICIPALITY	Second Respondent
ANY OTHER ADULT OCCUPIER OF PREMISES	Third Respondent

In the matter between:

2. **LCC Case Number: 09R/2023**

   Grabouw District Magistrates' Court Case Number: 04/2021

P REUVESRS PLASE (PTY) LTD & ANOTHER	1st to 2nd Applicants
and	
CINTELL FRANSISCA HENDRICKS & OTHERS	1st to 5th Respondents
THEEWATERSKLOOF MUNICIPALITY	6th Respondent
PROVINCIAL DIRECTOR OF THE DEPARTMENT OF AGRICULTURE, LAND REFORM & RURAL DEVELOPMENT	7th Respondent

In the matter between:

3. **LCC Case Number: 14R/2023**

   Caledon District Magistrates' Court Case Number: 02/2022

IDEAL FRUIT (PTY) LTD & ANOTHER	1st to 2nd Applicants
and	
DEON DANIEL VAN DER MERWE	1st to 5th Respondents
THEEWATERSKLOOF MUNICIPALITY	6th Respondent
PROVINCIAL DIRECTOR OF THE DEPARTMENT OF AGRICULTURE, LAND REFORM & RURAL DEVELOPMENT	7th Respondent

DEPARTMENT OF AGRICULTURE, LAND REFORM & RURAL DEVELOPMENT 8th Respondent

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JUDGMENT

SPILG, J

INTRODUCTION

1. This judgment concerns three cases which came on automatic review from Magistrates' Courts in the Western Cape pursuant to the grant of eviction orders against persons who have been residing in housing provided on farms and to whom the provisions of the Extension of Security of Tenure Act 62 of 1997 ("*ESTA*") apply. They will be referred to as ESTA occupiers.

2. The Land Court is obliged to exercise its oversight power of automatic review in respect of every eviction of an ESTA occupier granted in a Magistrates' Court. This is provided for in s 19(3) of ESTA.

   In addition, the subsection sets out the orders which this court can make on review.

   Section 19(3) reads:

   Any order for eviction by a Magistrates' 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 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 Magistrates' Court with directions to deal with any matter in such manner as the Land Court may think fit:*

3. The judgments of the learned Magistrates who sat as courts of first instance raise a number of similar concerns which this court identified in a set of Directions and requested argument to be presented before deciding on an appropriate order.

4. In chronological order, the first case on review is LCC 20R/2022. In this matter the three applicants are members of the Conradie family. They are cited in their capacity as co-trustees of the Glen Oak Trust.

   Glen Oaks successfully obtained the eviction from its farm of Ms Van Wyk and everyone claiming occupation through her. They were required to vacate three calendar months after the order was made.

   The Breede Valley Municipality is cited as the second respondent.

   The case emanated from the Worcester District Magistrates' Court and will be referred to as the Glen Oaks case.

5. The next case is LCC09R/2023. The applicants are P Reuvers Plase (Pty) Ltd and its controlling director. They obtained the eviction of Ms Hendricks and others from their farm which is located within the Theewaterskloof Municipality. The Municipality and the Provincial Director of the Department of Agriculture, Land Reform and Rural Development ("*the Provincial Director Land Reform*") are also cited as respondents.

   This matter was decided in the Grabouw District Magistrates' Court and will be referred to as the Reuvers Plase case.

6. The final case is LCC14R/2023. In this case Ideal Fruit (Pty) Ltd and its operational manager are the applicants. They obtained an eviction order against Mr. van der Merwe and four other persons who were residing with him. Here too the local authority is the Theewaterskloof Municipality. It was cited together with the Provincial Director Land Reform.

   The case was decided in the Caledon District Magistrates' Court and will be referred to as the Ideal Fruits case.

7. The first review order made by this court was in the Glen Oaks case on 12 August 2023. The order was subsequently varied to avoid ambiguity and reads.

   1. *In order to consider the review of the order granted on 5 August 2022 in the Magistrates' Court for the District of Worcester between the above parties under case number 1538/2020 this court will hear the applicants and each of the respondents, including the Second Respondent being the Breede River Valley Municipality and also the Provincial Director of the Department of Agriculture, Land Reform and Rural Development, on the following issues;"*

      a. *Whether the first respondent acquired any other right of occupation under the Extension of Security of Tenure Act 62 of 1997 ("ESTA") after her dismissal in 2016 but before the letter terminating her right of occupation in September 2019*

      b. *Whether it is competent for a court to grant an eviction without referring the matter to evidence if there is a dispute of fact as to whether the occupier will be rendered homeless. In this regard the relevance of the object and purpose of ESTA is to be argued as well as the Bill of Rights provision of the Constitution to the extent that it may be a permissible aid to interpret ss 10(2), (3) or 11(3) of ESTA;*

c. *If, on the facts of this case, the court is not obliged to refer to evidence a dispute as to whether the occupier will be rendered homeless, then;*

   i. *was there sufficient evidence to demonstrate that the occupier was not homeless*

   ii. *what test is to be applied to identify the evidence which the court is entitled to take into account and if there is an onus, on whom does it rest.*

d. *What is meant by suitable alternative accommodation. In particular;*

   i. *Does it have regard to the quality of the accommodation from which the occupier is sought to be evicted?*

   ii. *Is there a minimum requirement and if so, what is it in relation to the structure and ablution facilities?*

   iii. *Does it include providing access to water or electricity or refuse removal and if so, who is responsible for the cost of such services?*

e. *If the occupier would be rendered homeless if no alternative suitable accommodation is available, then what are the respective responsibilities of the landowner and the second respondent to providing accommodation and to what extent, if any, do the considerations set out in City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties [2011] ZACC 33; 2012 (2) SA 104 (CC) in relation to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE") apply to ESTA*

f. *Were the reports provided by the authorities with the regard to the availability of temporary emergency or any other form of housing adequate for the purposes of a s 11 decision and if not, in what way were they deficient.*

8. In the Reuvers Plase matter the first four and the last paragraphs of the order read:

    a. *Whether the first to fourth respondent and anyone occupying through them acquired any right of occupation under the Extension of Security of Tenure Act 62 of 1997 ("ESTA") other than through the late Mr and or Mrs Hendricks*

    b. *What weight or legal validity do the terms of the employment and housing agreements, which were concluded with the first and third respondents' parents a number of years after the latter had commenced working and residing on the farm, have in respect of the considerations the court is to take into account under ESTA*

    c. *Whether on the facts before the court section 8 (5) of ESTA applied to the first and third to fourth respondents. If so, what effect does that have on the second respondent*

    d. *Whether special considerations apply to the fourth respondent. If so, what effect does that have on the first respondent, if any*

    .....

    j. *Does a period of one month to vacate satisfy the requirements of ESTA? If not, what period would be satisfactory compliance having regard to the circumstances of this case*

    Paragraphs (b) to (f) of the Glen Oaks order became (e) to (i) in the Reuvers Plase case.

9. The initial order in the Ideal Fruits case was also varied and followed that of the Glen Oaks case save that para (a) reads:

a. *Whether the first respondent and those occupying through him acquired any right of occupation under the Extension of Security of Tenure Act 62 of 1997 ("ESTA") other than through the late Bernard van der Merwe*

GENERAL

10. Save in one respect, only those facts which are necessary to answer the questions raised by this court need to be addressed. They concern what constitutes a fair procedure once the owner decides to terminate an occupier's right of residence under s 8(1)(e). They also include the efforts which the owner and the occupier must make in order to secure suitable alternative accommodation for the latter in circumstances where s 10 applies. In this judgment the reference to an owner will include a "*person in charge*" as defined in ESTA.[1]

These considerations arose during argument with regard to when the Municipalities or Provincial Government should first become engaged in issues concerning the obtaining of suitable alternative accommodation for the occupier, taking into account that;

a. in terms of s 8(1)(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 effective opportunity to make representations before the decision was made to terminate the right of residence*"

[1] In eviction proceedings under ESTA, the rights of persons in charge are respected (as is the authority they exercise) to the same extent as that of an owner. Both terms are defined in s 1. A *"person in charge"* means *"a person who at the time of the relevant act, omission or conduct had or has legal authority to give consent to a person to reside on the land in question".*

and this is a relevant factor which a court is required to weigh when determining whether the termination of the right of residence is just and equitable (as provided for at the commencement of s 8(1)).

b. in terms of s 10(3)(i) it is necessary, in cases where the person was in occupation on 4 February 1997, to take into account:

> *"the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier"*

as one of the factors in deciding whether it is just and equitable to grant an order for eviction under s 10(3)

THE GLEN OAKS CASE

11. It is common cause that Ms van Wyk is an occupier who may only be evicted from the applicants' farm pursuant to a court order granted in terms of ESTA.

12. Van Wyk and (at the time of the application) her then 19 year old daughter had resided in a house on the property. According to the applicants' founding affidavit, van Wyk initially obtained occupation through her husband when they married "*in about 2000*"[2]. They further alleged that she was employed from 25 August 2000 until she either resigned when disciplinary proceedings were brought against her or she was dismissed pursuant to such proceedings[3]. It is alleged that this occurred in about April 2016.

13. In her answering affidavit, Van Wyk stated that she had only married her husband in 2001. The applicants did not put this in issue.[4]

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[2] FA para 16
[3] FA paras 20, 25, 36 and 51
[4] AA para 10 rw RA para 9

In a later paragraph to the answering affidavit, van Wyk said that, before her marriage she had worked at Glen Oaks "*as a house help for the third applicant*"[5]. The applicants' response to this allegation was to deny it "*insofar as it is inconsistent with the contents of the applicants' founding affidavit*" and added that:

> "*It is admitted that the first respondent did at one point work as a house help to the second and third applicant. During this period the second and third applicants went on vacation, leaving the first respondent to look after their house. The first respondent without permission consumed liquor belonging to the second and third applicant and was found unconscious in the second and third applicants' house by another employee of the applicant, who later informed the second and third applicants of this. At this stage, the first respondent was moved from working in the second and third applicant's house to working as a general farm worker on the farm.*"[6]
> (emphasis added)

14. van Wyk also averred in her answering affidavit that she was dismissed but disputes that it was pursuant to a disciplinary process. On her version, she had approached a trade union representative, who she identified as Mr. PC Maars, when the applicants tried to dismiss her. She claims to have attended on the CCMA in the company of Maars and that the CCMA decided that because she wanted to live at Glen Oaks, she needed to ask the applicants for her job back. She alleged that they refused to re-employ her on the grounds that she had approached the CCMA. It was only after that, on 26 October 2016, when she took up employment on a neighbouring farm.[7]

15. In their reply, the applicants simply noted the averment that she was dismissed and her denial that it was pursuant to a successful disciplinary process[8]. In dealing with

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[5] AA para 12
[6] RA paras 10 and 11
[7] AA pars 14 and 15
[88] RA para 12

van Wyk's allegations concerning her approach to the CCMA at the time when the applicants dismissed her, they then (for the first time) claimed that a disciplinary hearing was held because she failed to show up for work for several days without providing any explanation, that she was dismissed after a hearing and that she made no attempt to return to work or secure employment after that. The applicants point out that van Wyk did not provide any proof that she had approached a trade union representative or the CCMA.[9]

16. It is necessary at this stage to mention the unsatisfactory nature of the applicants' founding affidavit and replying affidavit as well as that of van Wyk's answering affidavit.

17. The court will firstly deal with the applicants' affidavits. It ought to be evident from the cited extracts of the founding affidavit that the applicants claimed not to have known whether van Wyk resigned or was dismissed after due process. Nonetheless, in their replying affidavit, and without explanation, it is asserted that they had gone through a proper disciplinary process and are now able to even identify the nature of the misconduct (albeit in general terms).

    In such circumstances they were obliged to refer to any explanation that van Wyk may have given at the alleged disciplinary hearing or state under oath that she had provided none. They were also obliged to expressly dispute that van Wyk had approached the CCMA through a union representative, rather than argue on paper that she did not provide corroborating evidence.

18. In this regard; in support of their denial of van Wyk's version of events they argue that she provided no extrinsic evidence to back up her version. But the same may be said of their own version. They do not explain why in their founding affidavit they did not know whether van Wyk had resigned or was dismissed, nor did they take the court into their confidence regarding whether there exists any record or summary of what occurred at the alleged disciplinary hearing.

[9] RA paras 13 to 15

19. It is however evident that van Wyk was able to secure employment on a neighbouring farm shortly after she left the employ of the applicants and that there is no real evidence to support a contention that at the time of her leaving the applicant's employ they needed the premises she had been occupying. This raises issues regarding the relationships which exist among the farming community in the area in respect of the availability of a workforce that at times may be seasonal but which is required to be on hand and readily available whether it be during the sowing or reaping season. This is borne out by the contents of cl 1.2 of van Wyk's employment contract which will be dealt with later.

20. Moreover, in the other cited extracts, the applicants deal in the vaguest manner with van Wyk's assertion that she had in fact been working for the applicants as a house-help before marrying her husband in 2001. What they do is to raise for the first time allegations of misconduct while keeping vague when it occurred. It is however clear that whatever might have happened did not affect her general employability at Glen Oaks.

21. On an application of *Plascon-Evans*, which all the parties are agreed is the basis for determining the pool of evidence which the court is to accept if the matter is to be decided on affidavit alone, it is clear that the applicants' version of events leading to van Wyk leaving the employee of Glen Oaks, but remaining in her premises, cannot be accepted nor can it be accepted that van Wyk only commenced employment when she married her husband[10]. The question which arises is whether prior to her marriage she occupied any premises on Glen Oaks as an employee.

22. However van Wyk also fails to explain a number of ambiguities in her version. The applicants correctly picked up that she claimed to have worked at Glen Oaks for twenty-three years yet said that she had been residing on the farm for only the past

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[10] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-I; See also *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) at para 13.
Schippers JA in *Monde v Viljoen NO and Others* 2019 (2) SA 205 (SCA) at para 7 applied Plascon-Evans to ESTA cases.

nineteen. While the assumption can be made that although she had been working there prior to being provided with accommodation it does not tie up with what she allegedly said to Mr. Beerwinkel prior to deposing to her answering affidavit[11].

Beerwinkel is the probation officer appointed in terms of s 9(3) of ESTA. In para 3.1 of his report he states that van Wyk said that she arrived on the farm in February 1992 when she came to stay with her parents and that by July 1992 she started working on the farm while residing with them.

23. There are other passages in van Wyk's answering affidavit which the court has had to interpret in order for them to make sense, but they remain capable of a different interpretation. Moreover some of the contents are not what one expects to find in a properly prepared affidavit. By way of illustration, there is a paragraph in the answering affidavit which reads:

> *"I submit further that I remembers (sic) my husband left later in the year 2014. I further aver that she worked on Glen Oak farm before getting married, as a house help for the third applicant.".* (emphasis added)

24. In another disjointed set of allegations, van Wyk admitted that she was dismissed but did not deal with the reason for, or the fairness of, the dismissal. But then neither did the applicants state in their founding affidavit the basis on which van Wyk was dismissed[12]. In fact, as set out earlier, in the founding affidavit they couched her leaving in the alternative- it was either a resignation or a dismissal. [13]

25. It is unnecessary to find that van Wyk's legal representation may not have been adequate in the circumstances. The reason for this is twofold.

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[11] The report was prepared in April 2021 and the answering affidavit was deposed to in July of that year.

[12] it is trite that a party cannot make out a case in reply, save possibly where there is an adequate explanation, and the other party would not be prejudiced. See *Swissborough Diamond Mines v Government of the Republic of South Africa* 1999 (2) SA 279 (T) *per* Joffe J

[13] FA paras 20,21, 28 36 and 51

Firstly, the applicants themselves have been vague in respect of how van Wyk, soon after leaving their employ, was not only able to obtain work on a neighbouring farm but still continued to reside at Glen Oaks for a lengthy period of time without formal steps being taken to evict her.

The other reason is that the applicants' attorneys would have seen the report of Beerwinkel once it was filed. They in fact caused a subpoena to be served on him on about 29 April 2021. In the circumstances of this case, and the general vagueness of some of the material allegations, it is of concern that in the replying affidavit the applicants did not dispel any suggestion about how van Wyk initially came to be on the farm, and in particular whether or not her parents had been living and working there since at least 1992. The correction of the date in clause 1.1 of the employment agreement and the discrepancies between the date set out in that clause and clause 1.2 cannot therefore be answered by reference to which typewriter is to be believed.

26. Even if it is accepted that van Wyk had been employed on the farm since about August 2000, it was only in 2014 that both an employment agreement and a housing agreement were concluded between her and the applicants. This coincided with van Wyk's husband leaving the applicants employ. It was mentioned earlier that a problematic feature of the employment agreement is that clauses 1.1 and 1.2 are at face value contradictory. The first clause refers to van Wyk's employment commencing on 4 February 2014. This date was inserted by hand on the standard form contract and the year which was originally inserted has been altered. However the second clause states that the agreement "*takes*" effect from 25 August 2000 and ends during the year when no work is available, provided that work will be offered to the employee when it again becomes available. [14]

[14] The contract is in Afrikaans. The printed words read:

1.1 Aanstellngsdatum van die werknemer is: .....

1.2 *Hierdie ooreenkoms neem in aanvang op ..... 20.... en eindig gedurende die jaar wanneer daar nie werk beskikbaar is nie met dien verstande dat werk aan die werknemer aangebied sal word as werk weer beskikbaar is*

27. The housing agreement provides that van Wyk had to pay 10% of her gross wages as "*okkupasie koste*"[15]. The applicants claimed that this referred to a nominal fee to assist with the maintenance of the premises and was only subtracted while van Wyk was employed by them[16]. Van Wyk denied this and averred that

> *"I paid rental for one month and was further advised by the second applicant that I must not pay rent because he wanted me to vacate the farm. I further submit that I was more than willing to pay rent but the applicants would not accept."*

28. In its context and bearing in mind that it is common cause that on leaving the applicants' employ, whether through resignation or the finalisation of disciplinary proceedings against her, van Wyk was soon able to take up employment on a neighbouring farm where she continued to work at the time the application was brought. By this time her daughter was only able to find seasonal work.[17]

29. Despite being dismissed in April 2016, whether through due process or otherwise, it took another four years, to September 2020, before the applicants took any formal steps or made any formal demand terminating van Wyk's right of residence or requiring her to vacate.

30. The formal steps to ultimately evict were taken by way of a s 8(1) letter which *inter alia* afforded van Wyk ten days from date of receipt to make representations to either the applicants or their attorneys as to why she should not be requested to vacate the house she occupied. She was also informed in the letter that if she did not respond the applicants would proceed to terminate her right of residence and thereafter apply for an eviction order.

31. Insofar as the requirements for eviction or concerned, van Wyk in her answering affidavit admitted that;

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[15] FA Annex C7, p43
[16] FA para 24 p 13
[1717] Report of Manager of Human Settlements for Breede Valley Municipality of September 2021

a. her right of occupation was derived solely from her employment agreement which came to an end when it was terminated in April 2016;

b. housing is only provided to those who are employed on the farm and those employed elsewhere cannot expect to be provided with housing;

c. the housing agreement was fair;

d. she had no expectation that her employment would be renewed after it had been terminated;[18]

e. she never declared a dispute with regard to her dismissal and that any right of residence came to an end when her employment agreement was terminated;[19]

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[18] AA para 34 read with FA para 45

[19] Insofar as van Wyk could rely on an employment relationship, s 8(2) provides that:

> "the *right of residence of an occupier who is an employee and who's 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,*
>
> This provision is to be read together with s8(3) which provides that:
>
> *"Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act.*

Furthermore, whether as a result of the termination of the employment agreement or by reason of being a deemed occupier with consent to occupy under s 3(5), in terms of s 8 (1) the applicants were entitled to terminate van Wyk's right of residence:

> *"on any lawful ground, provided it is just an 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 fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to determine need the right of residence."*

f. she was afforded an opportunity to make representation in terms of s 8(1)(e) of ESTA and that she failed to do so;

g. she had received the letter advising that her rights of occupation were terminated, that she was to vacate by 31 December 2019 and that the third applicant explained its contents to her.

32. Accordingly, despite the anomalies with regard to when van Wyk actually came onto the farm and the circumstances of her dismissal, the Magistrate was entitled to accept that s 11 applied and that the only issue for consideration was whether she should be evicted, and if so by when.

33. In terms of s 11(3), in deciding whether it is just and equitable to grant an order for eviction, the court is required to 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; and*

e. *the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land.*

Section 11(3)(a)

34. Earlier I indicated that affidavit evidence is unsatisfactory with regard to the period that Wyk resided at Glen Oaks or when she actually commenced work. Her employment agreement of 2014 recognised that there may be times when no work is

available but this did not necessarily mean that the right to reside ended since, when work did become available again, her employment would resume.

Section 11(3)(b)

35. I am uncomfortable where employment agreements and housing agreements are concluded many years after the employee commenced work and was given occupation. An ESTA employee who is expected to sign such agreements after a number of years on the farm is at a distinct disadvantage.

    Realistically, the employee is likely to have little choice and no bargaining power because the risk of not signing such agreements renders the employee's position extremely precarious. As with so many cases that have come before this court, the agreements are in standard form generally compiled by lawyers or by organisations representing the interests of landowners.

    A court is therefore not in a position to consider the second factor it is required to under s 11(3)(b) unless it hears evidence from the parties and witnesses they may wish to call on when and how van Wyk first came to be at Glen Oaks, when she first took up employment there, and if such employment was related to her parents being on the farm and her occupying with them, even as an adult

Section 11(3) (c)

36. van Wyk said at the time that she was earning R4100 per month and claimed that there was no available alternative accommodation. It was accepted that her then employer, Willow Creek, had no available accommodation. [20]

37. The report requested by the Magistrate indicated that van Wyk's daughter was working at the time, but no indication was given about her wages and whether her employment was permanent. In my view, care should be taken by both the legal representative of an occupier and by the court to obtain sufficient information for a

[20] AA p 88 para 31 and p 90 para 41

court to know whether the employment is permanent, seasonal or precarious. These are important factors in determining whether the obtaining of alternative accommodation is in fact sustainable.

38. The applicant contended that van Wyk could live with her husband or rent elsewhere. Van Wyk however pointed out in her answering affidavit that she had been separated from him for six years and that he lives with another woman.[21]

39. This did not unduly concern the applicants or for that matter the Magistrate.

In their replying affidavit the applicants said that:

> *The first respondent has failed to indicate or explain why she is not divorced from John van Wyk and why Mr. van Wyk does not contribute to household expenses such as potential rental, alternatively why Mr. van Wyk does not pay spousal maintenance or maintenance to Amber van Wyk as he is supposed to"* [22]

In finding that van Wyk had access to alternative accommodation the Magistrate said that:

> "*The court finds that the first respondent should be able to find alternative accommodation with her husband on the farm where he resides and is employed, since she is entitled to family life in terms of section 6(2)(d) of ESTA.*[23]

40. This reasoning is most unfortunate. Either the court *a quo* held that van Wyk must live under the same roof as him and the woman he left van Wyk for, or that the owner of the farm where he lives must provide for his enjoyment of family life by providing additional accommodation for her.

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[21] AA p 83 para 5; p88 para 33
[22] RA p106 para 45. They also said that
[23] Judgment at p 8 (half-way down)

If the latter then it is a *non sequitur,* particularly if regard is had to the Constitutional Court judgment of *Hattingh*.[24]

If the former, then no court can expect a woman whose husband has left her for another and who has been living with that other woman for some six years to be required to share the same home. It offends common sensibility, let alone amounts to a court order which by its nature would impair her human dignity, a right which courts are required not to violate but to protect under section 10 of the Constitution.

41. The Magistrate had postponed the case when it first came to court to enable meaningful engagement and the Municipality was required to furnish a report on where land has been or can reasonably be made available by it, other organs of State or another landowner.

42. The order also required the report to specify the nature of the building which was being occupied, whether the continued occupation would give rise to health or safety concerns, whether an eviction order is likely to result in all or any of the occupiers becoming homeless, and if so what steps the local authority proposes to take in order to alleviate the situation by way of providing alternative land or emergency accommodation as well as the implication for the owners if eviction is delayed and whether there is scope for a mediated process to secure the departure of the occupiers from the building and their relocation elsewhere.

43. The Municipality provided a report which concluded that if an eviction order was granted, van Wyk and her daughter would be rendered homeless. The Magistrate accepted that the Municipality did not have any vacant plots available and were unable to assist.

44. However the municipal report indicated that the Municipality had purchased land for housing in one area and had started negotiations for acquiring land in another. It

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[24] *Hattingh and Others v Juta [2013] ZACC 5 per* Zondo J (at the time)

was mindful of its constitutional obligation in eviction matters and proceeded to identify options available to it should an eviction order be granted.

45. The one option was the provision of kits to construct makeshift structures of corrugated iron or wood of less than 30 square metres to which the evictees could add their own material. However there were no vacant plots at that stage.

    A second option was the provision of rental units for persons earning less than R4500 per month but that such units were only likely to come on stream in the next two years. The report was dated September 2021.

    The final options were the provision of accommodation in informal areas on serviced sites, individual housing subsidies for evictees and the provision of housing based on equitable allocation of houses determined by existing waiting lists. In all these cases it was anticipated that habitation would only occur later in 2021 or in 2022.

46. It was common cause that van Wyk had not applied to be placed on any housing list, not even when the initial set of attorneys were appointed to represent her.

Section 11(3)(d)

47. The reasons given by the applicants for the proposed eviction were that there are several young employees who play an increasingly important role in their farming activities and who still live with their parents on the farm but that it is the applicants' wish to empower and promote some of them through the provision of their own housing.

    The applicants added that they could not do this while persons not in their employ occupy available housing on the farm. They said that they:

"have received various unhappy requests from current employees who wish to have a house of their own – they are unhappy with the situation where persons not working on the farm occupy housing on the farm." [25] (Emphasis added).

48. The applicants were not entirely frank in their founding affidavit because they did not reveal that another of their employees was living in the premises occupied by van Wyk and that they had put that person there themselves.[26]

49. It was only when van Wyk revealed in her answering affidavit that the applicants

"allowed Mr Thuyse Booysen, a young man to reside in the house with myself. Mr Booysen has been residing with me in the house since 2018." [27]

that the applicants admitted that one of their employees was actually occupying the residence. They then tried to make a virtue of this by stating that this was the only living space the applicants could provide to Booysen precisely because illegal occupiers such as van Wyk were creating a shortage of accommodation.[28]

50. However this admission undermines the very reason for seeking the eviction. If, as stated in the founding affidavit, young employees want "*a house of their own*" then they would not take over from van Wyk because Booysen was already there[29]. At the least, the applicants were required to explain this apparent contradiction. The applicants did not do so in their reply. It is not for the court to now speculate.

51. These were the only grounds set out in the founding affidavit for seeking the eviction. It is trite that generally a party cannot make out a case in reply unless

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[25] FA para 27

[26] Even in para 15 the applicants state that as far as they know there is no other adult occupying the premises. They should have revealed the presence of the other employee

[27] AA para 19. This was in direct response to the preceding allegation in para 27 of the FA.

[28] RA para 21 and 23

[29] See FA paras 22 to 27

possibly there is an adequate explanation, and the respondent is afforded an opportunity to respond.[30]

Nor were any other grounds raised in the September 2019 s 8(2) notice which would have been required if a failure to respond is to have legal consequences.

52. Accordingly, the applicants' averments set out in the replying affidavit regarding van Wyk's conduct cannot be relied on.

Section 11(e)

53. The applicants averred, and the Magistrate accepted, that van Wyk had been occupying the premises concerned rent free for the past six years and that if she was willing and able to pay rent then she was also in a position to pay rent for alternative accommodation.

The difficulty is that van Wyk was referring to the 10% charge that had been taken off her wages. This was dealt with earlier. There is no suggestion that she was able to pay much more than that, or that accommodation for such a low rental could be secured. The position of the Magistrate was more argumentative than based on facts actually placed before the court.

54. A further difficulty is that the balance of the interests of the owner, the occupier and the remaining occupiers on the land, as well as the period that the occupier has resided on the land and the fairness of the terms of any agreement between the parties should not be a snapshot of the recent situation but should also take into account, where applicable;

    a. the historic nature of the remuneration which the occupier earned, relative to the work that he or she was required to do and if it effectively rendered the

[30] See *Swissborough Diamond Mines v Government of the Republic of South Africa* 1999 (2) SA 279 (T) *per* Joffe J

occupier and the occupiers' family captive and realistically unable to leave the farm as was the case with the system of indentured labour;

b. whether during the same period, the landowner was also enduring hardship and making losses in real terms or was able to expand or increase profits; and

c. whether there was a correlation between the relative earnings of the occupier having regard to the work they did while engaged by the landowner and the benefits, if any, derived by the owner having regard to the remuneration actually paid. This would have to take into account the provision of accommodation on the one hand and the availability on their own farm or on neighbouring farms of an available or ready source of labour from either the occupier or his or her children (as they came to be of working age and the occupier became less productive).

55. The last-mentioned consideration arises from one of the applicants' reasons for seeking van Wyk's eviction. They claimed that they needed to free up accommodation on the farm, at least in part, so that when children of existing occupiers who grew up on the farm (or were returning to it), came of working age they would be able to take up employment in order either to supplement or take over the labour provided by their parents on the farm when the latter grew old.

Conclusion on s 11(3)

56. The finding that it was just and equitable to evict van Wyk cannot be allowed to stand by reason of the significant weight that the court *a quo* attached to its materially defective finding that she was able to obtain alternative accommodation with her husband on the farm where he now resides with his partner.

57. This is particularly so where the other finding which influenced the Magistrate, namely that she had lived rent free on the farm for some six years, was too narrow a focus and failed to take into consideration all other factors which may be relevant in

circumstances where there was insufficient to show that Wyk and her daughter would not be rendered homeless, let alone be able to secure "*suitable alternative accommodation*". [31]

I am fortified In this view by *Blue Moonlight* at para 39, where the court said;

> "*A court must consider an open list of factors in the determination of what is just and equitable the relevant factors to be taken into account in this case are the following. The occupiers have been in occupation for more than six months. Some of them have occupied the property for a long time. The occupation was once lawful. Blue Moonlight was aware of the occupiers when it bought the property. Eviction of the occupiers will render them homeless. There is no competing risk of homelessness on the part of Blue Moonlight, as there might be in circumstances where eviction is sought to enable a family to move into a home.*"

Glen Oaks- Issues raised by the Court

58. The first issue raised was whether van Wyk acquired a right of occupation under s 3(5) after the termination of her employment but prior to the applicants' seeking to terminate her right of residence and whether this affects the nature of the protection afforded under ESTA.[32]

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[31] The court in *Baron and others v Claytile (Pty) Limited and Another* [2017] ZACC 24; 2017 (10) BCLR 1225 (CC); 2017 (5) SA 329 (CC) did not look at the period of time the occupier had remained on the farm rent free in isolation. See both paras 49 and 50 as well as para 39

[32] Section 3(5) provides that:

> *"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."*

59. It is clear that the dismissal or resignation of van Wyk in 2016 triggered an entitlement to terminate her residence under s 11 (2) but the right to terminate was only exercised in 2019. Section 8(2) appears to envisage the termination of the right of residence pursuant to the resignation or dismissal from employment.

While the deeming provision of s 3(5) may afford some protection in cases where three years has elapsed between the resignation (or dismissal) from employment and the formal termination of the right of residence, it does not alter the nature of the inquiry which must be undertaken under ss 8(1) or 11(3) and possibly 10(d). It may however affect the employer's entitlement to rely on a material or fundamental breach of the employment agreement under s 10(1)(b) or (c). None of these contentious situations arise in the present case and it would be inappropriate to consider the matter further in these proceedings.

60. The next issue was whether the contents of the report which indicated that van Wyk was already in occupation prior to February 1997 raises a dispute of fact and if so, should this issue have been referred to evidence.

Later I deal with the reason why great care should be taken before evicting an ESTA occupier, particularly where the issue of homelessness may arise.

In the present case, the applicants were aware before deposing to their replying affidavit that a report had been filed setting out how van Wyk came to be in occupation prior to February 1997. This was by reference to her parents having resided at Glen Oaks and that at least one of them would have been an employee and therefore eligible to reside there. These were not averments made in the air and therefore needed to be dealt with by the applicants.

61. Moreover, the report had been called for by the Magistrate and these statements were in direct response to the information which the Magistrate had required. It is difficult to appreciate how in such circumstances the provision of a report containing

information expressly called for by a court does not form part of the pool of evidence which must be taken into consideration.[33]

62. However, how much weight can be attached to its contents is another matter which must be answered on a case-by-case basis having regard to all the circumstances.

63. In the present matter it would have been relatively easy for the applicants to demonstrate that van Wyk's parents never resided at Glen Oaks. Accordingly the failure to deal with that aspect of the report in their replying affidavit creates a sufficient dispute of fact which may be relevant to the overall considerations of whether it is just an equitable if a court were to evict van Wyk and her daughter without hearing *vive voce* evidence.

64. I have already dealt with the Magistrate's finding that van Wyk was not homeless because she could reside where her estranged husband lived with his partner. The finding was in fact a value judgment which is either not supported by the Constitutional Court case of *Hattingh* or amounts to a gross inroad into van Wyk's constitutionally protected rights.

65. The question of what is meant by suitable alternative accommodation arises in this case because since at least 2000 van Wyk has resided in a five roomed house, but at best she will be given material to construct a wood and corrugated iron structure, generally referred to as a Wendy house with outside communal ablution facilities.

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[33] In Monde *v Viljoen NO & Others* 2019 (2) SA 205 (SCA) at para 27 the Supreme Court of Appeal said:

"The LCC has subsequently in Cillie held that a probation officer's report was not a mere formality. It found that the issues in s 9(3) of ESTA that had to be addressed in the report were necessary to assist a court in deciding whether an eviction was just and equitable; that the importance of the report in an eviction could not be overemphasised; and that it ensured that the constitutional rights of those affected by eviction were not overlooked. Likewise, in Drakenstein Municipality, the LCC noted that s 9(3) was cast in peremptory terms; that the court's ability to discharge its function was frustrated without a report by a probation officer; and that the absence of the report negatively affected the interests of occupiers, since the purpose of ESTA was to protect occupiers from unlawful eviction and where eviction was inevitable, to ameliorate its adverse impact".

This aspect arises in all the other cases and will therefore be dealt with as a separate topic later in the judgment.

66. This case also engages the respective responsibilities of the landowner and the authorities in providing accommodation as there is insufficient information placed before the court at this stage for it to be satisfied that van Wyk and her daughter will not be rendered homeless. When this matter came before me, van Wyk no longer had employment.

The court recognises that a landowner is not obliged to continue providing accommodation indefinitely[34]. The issue however is whether, and if so in what circumstances, ESTA envisages a situation where the occupier may be rendered homeless if the authorities cannot provide accommodation and the occupier is evicted from private owned land on the grounds that the premises are required for the residence of other employees.

This is an issue which is common to all the other cases and therefore will also be dealt with separately.

67. The final issue is the adequacy of the reports provided by the authorities. In the Glen Oaks case the report provided under s 9(3) by the Human Settlements manager of the Breede Valley Municipality at face value appeared comprehensive but on closer analysis lacked sufficient detail with regard to future developments of sub-economic housing, whether there was funding for the development of adequate housing and whether Government owned land was available which did not require funding for its acquisition. [35]

68. It will also be more convenient to deal with this later as a separate topic.

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[34] See *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA)

[35] The earlier report, which was from Beerwinkel, the probation officer at the Project Coordinator of the Cape Winelands (Worcester), has already been mentioned.

Conclusion- Glen Oak

69. Because of what equates to a material misdirection, this court has little option but to set aside the eviction order in whole under s 19(3)(c). The question of what order should be made in its place will be dealt with later. Suffice to indicate at this stage that a structural order involving the Municipality and the Provincial Directors of both Land Reform and of Human Settlements appears to be necessary at some stage. Such orders are also referred to as structural interdicts or supervisory orders.[36]

THE REUVERS PLASE CASE

70. In this case the first and third respondent occupiers are the children of the late Mr. Isaac and Mrs. Cynthia Hendricks, The second respondent, who was born in May 1991 is in a relationship with the first respondent and they have a child who was two years old at the time of the application.

71. Isaac Hendricks had lived and worked on the farm since 27 December 1990. This appears from an employment contract concluded on 14 April 2013 between him and the Lorraine Farm Trust, which was the predecessor in title to the first applicant.

    However, in a subsequent employment agreement signed by him a little more than a year later, Israel Hendricks commencement of employment is stated as 2 June 2014.

72. The first agreement was specifically typed out for the parties. including in typed print the working times, the wages, the persons who were allowed to reside in the house and even Isaac Hendricks' name and identity number. The subsequent agreement was in standard form, leaving space for the details regarding remuneration to be filled in by hand.

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[36] See *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010(3) BCLR 177 (CC) and *Pheko v Ekurhuleni Metropolitan Municipality (Socio-economic Rights Institute of SA as amicus curiae)* 2012(4) BCLR 388 (CC) at par. 50 and *Master (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality and Others* [2017] ZAGPJHC 270; 2018 (2) SA 555 (GJ) at para 10

73. The earlier employment agreement incorporated both the terms of work as a "*tractor driver*" and also the provision of staff housing. It stated that housing was provided to employees while in the service of the employer and that the residence could only be occupied by the employee and immediate family who were specifically named in the agreement.

    The immediate family so identified, included the first respondent who was born in February 1992, the third respondent who was born in August 1999 and the fourth respondent who was born in June 1973. Isaac's wife was not included in the list. This is because she would conclude a separate agreement a month later which effectively recorded that, as an employee, she had the same rights to housing as her husband.

74. The subsequent employment agreement also incorporated terms regarding the provision of housing. However in this agreement Isaac Hendricks is now described only as a "*general worker*".

    Provision was also made in this agreement for the insertion of three various amounts which comprised the total wage package that was to be paid every second week. However none of the amounts were entered.

75. It is evident that the farm owner, now identified as P Reuvers Plase, intended to replace any earlier agreement with the one of June 2014. In particular, under clause 4.10 which is headed "*Housing*", the following provision is now to be found:

> "*In the event that housing is available, free housing will be provided for the duration that this contract is in force. On termination of employment, the employee will be given one month to vacate. Employees who live in the houses of P Reuvers Plase are subject to the house rules which are available in the Personnel Policy.*"

76. It is necessary to mention at this stage that no explanation is offered by the applicant as to why it was necessary to conclude the June 2014 agreement with Isaac Hendricks, or why it failed to correctly record that he had commenced employment almost a quarter of a century earlier than stated, why it no longer mentioned if anyone could reside with him or why it altered his occupation from tractor driver to general worker..

77. The failure to correctly record the date when he was first employed or to insert an *essentialia* of an employment contract, namely the remuneration, raises the question of whether Isaac Hendricks could have understood the contents of the document he was signing or its import. Its import was to reduce his protection from a s 10 to a s11 ESTA occupier and leave open, at least contractually, who may live with him.

78. The failure to insert an essential term of an employment contract also raises concerns about its true purpose, bearing in mind that the contract Isaac Hendricks had signed the previous year contained all the essential terms of an employment contract and purported to identify that occupation was based on Mr. Isaac Hendricks continued employment. ESTA itself provided the framework under which his occupation could be enjoyed and terminated, rendering it unnecessary to conclude the subsequent agreement.

79. It therefore cannot be said that getting Isaac Hendricks to sign the second agreement was unmotivated on the part of the applicants.

80. The same scenario arose with Isaac Hendrick's wife. She too had signed an employment agreement with Lorraine Farm Trust in identical terms to the one signed by her husband, albeit a month later in May 2013. It recorded that she had commenced work on 26 March 1990. The same provisions regarding staff housing as contained in Isaac Hendrick's April 2013 agreement appear in this one, even to the recital of those who could occupy with her.

81. A year later on 2 June 2014 she also signed a standard form employment agreement in identical terms to that signed by her husband on the same date, save that the post she was employed in was not inserted in the blank space provided. Except for inserting her date of employment as commencing on 2 June 2014, none of the other blank spaces where her wage package was to be filled in were completed.

82. The second respondent signed an employment agreement with Lorraine Farm Trust on 30 May 2013. It recorded that he had commenced employment on 17 July 2012. Although there were the same provisions in relation to staff housing as contained in the agreements signed in 2013 by Isaac and Cynthia Hendricks, nothing was inserted in the space provided for the identification of persons who were allowed to reside in the house allocated to him. In other words the second respondent was allocated his own house on the farm but was not entitled to have anyone living with him at that time

83. He too was required to sign a subsequent agreement of employment on 2 June 2014 which recorded that he had only commenced employment on that same date. This was the same standard form contract signed by the others and none of the other blank spaces were filled out.

84. Israel Hendricks died in March 2020 at the age of 52 after having lived and worked on the farm from the age of 23. Cynthia died in January of the following year at the age of 50 after having been on the farm as a general worker from the age of 21.

85. All their children were born on the farm and brought up there. In the case of the first respondent, Cintell, she was employed briefly on the farm from June 2012 to November 2014. She commenced a relationship with the second respondent and moved into his home wand subsequently bore their child.

86. Earlier it was mentioned that the second respondent commenced working in July 2012 and was allocated a room. The first respondent moved into the second respondnet's house once they had formed a relationship. He was later dismissed

from employment on 6 January 2015 but continued to live in the house. They moved back into the house where the second respondent was born when her parents passed away.

87. The third and fourth respondents had been living in their parents' home all the time but moved into the room occupied by the second and first respondents when the latter had moved back to the parents' home after their deaths.

88. It is common cause that the third respondent never worked on the farm but continued to live with his parents in the house.

89. The first and third respondents have lived on the farm since their birth. The fourth respondent has lived there since 1990. They all contended that they were s 10 occupiers. It was also contended that due to the effluxion of time the first respondent, her daughter and the third and fourth respondents had consent to reside on the farm independently of Israel and Cynthia Hendricks's rights to occupy. They relied on ss 3(4) and (5) of ESTA.

90. According to the first respondent, she was on maternity leave when the new owners took over the farm and on returning to work she was told that they no longer needed her services

91. The applicants' case was that housing is an employment benefit for their permanent employees until such right terminated through death or dismissal and that in the case of the first, third and fourth respondents, their rights ended when their parents died.

92. In the case of the second respondent, the applicants aver that the right of occupation ended when he was dismissed. The applicants contended that a court cannot have regard to the period of time an occupier was on the property prior to attaining majority and that therefore even though they were born on the farm, they had not attained majority by the 4 February 1997 cut-off date.

It was however accepted that the fourth respondent came onto the farm in about 1990 and therefore qualified as a s 10 occupier.

93. The fourth respondent was mentally disabled and although alternative accommodation was available the Municipality did not indicate if it is suitable for him more particularly since any structure must be erected personally.

94. It is clear that the second respondent is a section 11 occupier since he only came onto the farm in 2012

95. The applicants state that when Cynthia Hendricks passed away in January 2021, they expected the respondents to vacate the property. When this did not occur, their attorneys engaged in various discussions with the respondents as to why they should vacate the property and explained to them what they should do in order to acquire alternative accommodation. This becomes relevant because of the applicants' contention that attempts were made to use their own attorneys as mediators.

96. The respondents contended that they would be rendered homeless. In the replying affidavit the applicants refer to having found out that the respondents had received a lump sum from the pension fund when their parents died. This had not been disclosed by them to the probation officer in March 2022 when he was compiling his report.

97. The court *a quo* found that this nondisclosure resulted in the probation officer concluding that the respondents would be rendered homeless and exposed to violent crimes, poverty and squalor and would have their constitutional rights affected

98. The respondents claimed that they had applied for government housing but that there was a three-year waiting list and that it was financially impossible for them to obtain suitable alternative accommodation.

99. It is common cause that the respondents did not communicate with the applicants' attorneys. They however claimed that, because they were lay people unfamiliar with ESTA, they did not want to place themselves in a position where they might prejudice their legal rights.

100. The report filed by the Municipality informed the court that there was no available temporary emergency accommodation. In a subsequent report filed some four months later the Municipality advised that meaningful engagement had taken place, that the respondents qualified for temporary emergency accommodation on a serviced plot and that the Municipality would provide materials

101. The Magistrates' Court found that the issue turned on whether the termination of the right of residence was just and equitable.

102. It held that s 8(1)(a) and (b) did not apply because there was no agreement of occupation on which the applicants could rely. It found that Section 8(1)(c) did apply since the housing on the farm is utilised solely for the accommodation of permanent employees as an employment benefit and that the respondents may be left homeless if they are evicted.

103. In applying Section 8 (1)(d) the court said that the respondents had no reasonable expectation of being able to continue residing on the farm and that there was no agreement that could be renewed because the agreement to reside had been with the respondents' parents.

104. It was also found that the respondents had been given an opportunity to make representations in terms of a letter of 26 March 2021 as required by Section 8(1) (e) but that they had not responded.

105. It was common cause that a notice of termination of rights of residents had been served on the respondents requiring them to vacate.

106. In weighing up the competing rights and interests the Magistrate found that the respondents had made no effort to secure alternative accommodation and that the hardship for the applicants and his employees was that they needed the house for occupation by permanent employees. The court also found that the first and third respondents had the financial means to secure alternative accommodation, and that the lump sum received from the pension fund "... *will enable them to secure accommodation*".

107. The court a quo gave all the respondents only a month to vacate failing which the sheriff was entitled to remove them from the farm.

108. At this stage it is necessary to point out that the court appeared to overlook that the fourth respondent was a section 10 occupier and was mentally disabled. When this matter was heard by me, I was advised that the fourth respondent had since passed away.

109. The court *a quo* also concluded that in terms of *Blue Moonlight* a property owner cannot be expected to provide free housing on its property for an indefinite period.

Issues raised in Reuvers Plase

110. The first issue is whether, aside from the fourth respondent, any of the other respondents enjoyed s 10 rights. The first and third respondents have lived on the farm their entire lives. It will be recalled that the first respondent was born in 1992 and the third respondent in 1999.

111. In *Bakoven*[37] Flatela J relied on *Hattingh* which was concerned with family life and concluded that there was a distinction drawn between an occupier and the family of an occupier who were dependent on the occupier and therefore were not

[37] *Bakoven Plase (Pty) Ltd and Others v Maqubela and Others* [2024] ZALCC 3

themselves occupiers. This was an appeal and therefore a full court decision which is binding on me if the facts are the same.

In that case the person who was a minor had never worked on the farm.

112. In the present case the applicants confirm that the first respondent worked on the farm for them. But they only acquired the farm in 2014 and do not state if the first respondent was employed prior to the date when the applicants acquired the farm. The first respondent admits that she was dismissed for non-attendance in 2015.

113. The applicants aver that the first respondent was never given a separate right to live in her own home on the farm.

114. It is common cause that the third respondent at no stage worked on the farm.

115. Save possibly in the case of the first respondent, this is a similar case to *Bakoven* where the owner allowed family members to remain there.

116. In the case of the first respondent, it appears that she was employed only during the period 2012 to 2015 after which she was dismissed. She therefore continued to live with her parents until their death. She was 20 years old when she commenced her brief period of employment at Reuvers Plase.

117. In the earlier case of Glen Oaks the applicants alleged that they required the accommodation provided to van Wyk for young employees who no longer wished to live with their parents and wanted a place of their own on the farm.

118. It will be recalled that in *Hatting* Zondo J (at the time) adopted a nuanced approach as to who may or may not be permitted to remain with the occupier.

119. It may be open to argue that one should not concertina the concept of occupier and the date on which the person now in occupation either became employed by the owner or otherwise obtained consent to remain in occupation independently of their

family member on the one hand and, on the other hand, whether they were residing on the farm on 4 February 1997.

120. The scenario envisaged in *Hattingh* did not contemplate a situation where, as in the present case, the farm owner relies on the children of the adult occupiers who he had engaged to provide an available source of labour when they reached an employable age.

121. I can conceive that a possible interpretation of the term "*occupier*", when considered in relation to s 10 and the cut-off date of 4 February 1997, envisaged at least a situation where the person whose eviction is sought should receive the enhanced protection provided under that section because he or she was an employee of the owner at the time the right of residence was sought to be terminated under Section 8 but who had either been born on the farm or had lived on the farm with their parents on 4 February 1997, albeit that he or she was a minor at the time.

122. It is difficult to conceive that the intention of the legislature was not to protect a person who was expected to remain on the farm as a source of labour, who has only known the farm and the community which are all the other farm workers and their families, only knows a common farm school, centre of worship and life on the farm. It is difficult to conceive that the intention of the legislature was to cast such a person out into a completely unknown environment with inadequate life skills to do anything else without either being re-skilled or integrated into another environment. P*rima facie* it offends some of the most basic rights such as dignity and may possibly unfairly discriminate between a person who may have been born a day before or a day after the cut-off date. I will however assume form present purposes that the first respondent does not enjoy such protection.

123. There are however four other issues which need to engage the court. The one is that the Magistrate considered that the first, second and third respondents were able to secure satisfactory alternative accommodation because of the remaining amount

they received from life policies which had been taken out by their parents. The full amount was R298 818, of which R119 000 remained.

124. The other is the fact that the court gave the respondents only one month to vacate. This is much too short particularly considering that the first respondent was born on the farm and has only known it and its environs for some 30 years. This should also be considered against the backdrop of the first respondent being unemployed and looking after a two year old child, the fact that the respondents had applied for RDP housing and are on a three-year waiting list, and furthermore that there was the prospect of suitable alternatives accommodation becoming available within a period of three years.

125. The third issue is the applicants' contention, for the purposes of s 8(1)(e), that they had engaged the respondents in a fair procedure to try and resolve the issues and to make representations before the decision to terminate the right of residence was made. In particular, the applicants' legal representatives had offered to mediate.

126. In my view the respondents rightly rejected any process where the representative of the landowner, who by definition has been engaged to look after that party's interests, offers to mediate between his or her client and them.

This in any event runs counter to the requirement that the mediator should at least be neutral, if not totally independent neutral.[38]

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[38] Rule 41A of the Uniform Rules requires that a mediator be impartial and independent.
These attributes are well recognised. By way of illustration the Code of Conduct of the Association of Arbitrators of Southern Africa ("A*o*A") in respect of mediators provides in section 2.2(c):

> *"Mediators will always act in an independent and impartial way. They shall act in an unbiased manner, treating all parties with fairness, quality and respect."*

The AoA Code follows that of the Dispute Settlement Accreditation Council which applies that prescribed by the International Mediation Institute.
Court Annexed mediation in the New York State Code provides that "*Mediation*" shall refer to *"an ADR process in which a neutral third party (referred to as a mediator) helps parties communicate, identify issues, clarify perceptions, and explore options for a mutually acceptable outcome".*
Under the Utah Uniform Mediation Act and Rules a *"Mediator"* means *"an individual who is neutral and conducts a mediation."*
In English law see *Halsey v Milton Keynes General NHS Trust and related case* [2004] EWCA Civ (CA) 576 at para 30 and *Farm Assist Ltd (in liquidation) v The Secretary of State for the Environment, Food and Rural Affairs* (no 2)

127. In *Kalagadi Manganese (Pty) Ltd and Others v Industrial Development Corporation of South Africa Ltd and Others* (2020/12468) [2021] ZAGPJHC 127 at para 24 I identified four pillars of mediation reflected in Rule 41A. Although recognising that mediation under Rule 41A requires the mediator to be impartial and independent, I overlooked to add this as a fifth pillar. Unfortunately this passage was adopted in a subsequent case by another judge and therefore needs rectification.[39]

128. There is debate about the requirement of absolute independence as a *sine qua non* for all mediations and whether impartiality and neutrality requires absolute deference to be given to mediation as process driven[40]. In the South African context of standard mediation where equality of arms is unlikely to be the norm, particularly in issues concerning land occupiers, at least neutrality and impartiality (even if not in a totally disinterested sense) remain essential requirements.

129. I therefore take the liberty of revising the contents of para 24 of *Kalagadi* by referring to what are in fact the five pillars of mediation under Rule 41A, which are:

a. A voluntary non-binding non-prescriptive dispute resolution process;

b. The terms of the process to be adopted are those agreed upon by the parties;

[2009] EWHC 1102 (TCC). In the United States see *CEATS Inc v Continental Airlines Inc* 755 F. 3d 1356 (Fed. Cir. 2014) and *Cheng v GAF Corporation*, 631 F.2d 1052 (2nd Cir 1980).
While both the AoA and IMI Codes recognise that *"the existence of relationships or interests potentially affecting, or appearing to affect, a Mediator's impartiality will not automatically imply unfitness to act as a mediator provided these circumstances have been fully disclosed and addressed to the satisfaction of the parties and the Mediator (s 3.3 of IMI)"* it is difficult to envisage a situation where an unrepresented occupier could objectively be satisfied that perceptions of bias can be satisfactorily addressed.

[39] In the subsequent case of *M.Y v J.Y* (2024/013982) [2024] ZAGPJHC 684 at para 21 the learned acting judge repeated para 24 of *Kalagadi*

[40] See for instance on absolute mediator neutrality Bernie Mayer and Jackie Font-Guzmán *The Neutrality Trap: Disrupting and Connecting for Social Change*

c. The mediator facilitates the process to enable the parties to themselves find a solution and makes no decision on the merits nor imposes a settlement on them;

d. The mediator must be impartial and independent

e. The process is confidential.

In cases where the form which mediation takes is not prescribed it may suffice if the mediator is neutral and impartial but not necessarily entirely independent.

130. The final issue is the Magistrate's view set out in the judgment that in *Blue Moonlight* "*... the court held that it cannot be expected from the property owner to provide free housing on its property for an indefinite period*".

This was said in the context of balancing the interests of the applicant against those of the respondent, the Magistrate finding that the applicants are unable to utilise their house to provide accommodation for their employees while the respondents enjoy free accommodation without any counter performance.

131. The difficulty with this part of the judgment is that *Blue Moonlight* is not about the existence of only two interests. *Blue Moonlig*ht is concerned with balancing the interests of three parties; the owner, the occupier and the State. It would be taking *Blue Moonlight* out of context to suggest that it was concerned with whether or not an occupier could ever be evicted from private property. It was concerned with the State's ultimate constitutional responsibility to progressively realise the right of occupiers who would otherwise be rendered homeless to have access to adequate housing under section 26 of the Constitution. The Constitutional Court held that the State could not indefinitely abdicate its constitutional obligations to a private landowner.

132. The Magistrate's reasoning, with respect, also fails to address the real issue; which is whether an occupier will be rendered homeless, or in the case of an ESTA occupier, will not be relocated to suitable alternative accommodation if evicted by a landowner at any time before the State can or is obliged to provide such accommodation.

133. In the circumstances of this case I am satisfied that the decision of the Magistrate should be set aside so that State land, if available, can be identified and once that is done it should be possible to facilitate resolution between the applicants, the occupiers, the Municipalities, the Provincial Director of the Department of Land Reform and the Provincial Director of Human Settlements.

A suitable order will therefore be made in these terms.

134. It is now possible to deal with the points raised in the Direction

Save for the possible caveat regarding the first respondent (which was not argued either before the Magistrate or this court) neither she nor the second or third respondents acquired a right of occupation under ESTA other than through the late Mr. and Mrs. Hendricks and that after their death the respondents continued to reside with the consent of the owner by reason of the deeming provision of s 3(5) to which reference has already been made.

The court is also satisfied that s 8(5) does not apply to the respondents because, save in respect of the fourth respondent, who was mentally incapacitated, none of them were dependents.

Furthermore the late Mr. and Mrs. Hendricks had not reached the age of 60 nor was it contended that they were unable to supply labour as a result of ill health, injury or disability. The surviving children of the late Mr. and Mrs. Hendricks therefore were not, on the papers and argument presented, entitled to a one-year notice period to vacate.

135. There remains a factual dispute as to whether the occupier will be rendered homeless. This precludes the court from granting an eviction order without referring the matter to oral evidence. The outcome is therefore not simply a matter of law but is fact dependent.

136. Ordinarily the court has regards to the *Plascon-Evans* rule[41]. However the consequences of a person being rendered homeless or, in the case of an ESTA occupier, unable to secure suitable alternative accommodation requires a greater degree of circumspection with regard to the nature of the evidence presented to court and whether such evidence is enough to satisfy the court that alternative accommodation is available if an eviction order is granted,

137. This heightened degree of circumspection appears to be justified because ESTA is concerned with protecting the rights to security of tenure (section 25 of the Constitution), to the progressive realisation of the right to housing (under section 26 of the Constitution) and that homelessness places the individual's fundamental rights at risk. I will return to this.

138. In the present case the applicants did offer mediation and on obtaining the services of their own an attorney the respondents became amenable to follow that course. The applicants cannot now retract that offer when its substratum was flawed and is now capable of being remedied.

139. Finally, the Municipal and Provincial Department's reports are inadequate for the same reason as given in the Glen Oaks case.

IDEAL FRUIT CASE

140. The applicants' case is that in 2014, and as part of the employment benefits, the late Bernard van der Merwe was allocated a house on Ideal Fruits' farm where he

[41] See judgment at ftn 9.

was engaged by them as a truck driver. The farm itself was used for Ideal Fruits' pack house operations.

141. The house had originally been allocated to Bernard's father. After the father passed away, Bernard secured permanent employment there and obtained consent to occupy the house in terms of agreements concluded in August 2014. Bernard passed away in 2020. The applicants allege that Bernard was given occupation of the house for operational reasons because of his irregular and unscheduled working hours.

142. The first to fifth respondents obtained consent to occupy the premises as family members by reason of Bernard's right to family life as set out in s 6(2)(d) of ESTA.

In addition the applicants allege that none of the respondents acquired an independent right to occupy the premises even though the second respondent, Jerome Lewis, had permanent employment as from December 2017 with the applicants as an inspection assistant. Since her employment was at a lower level which only requires her to execute tasks during normal working hours and excluding weekends, all employees at her level are not provided housing but are transported to and from work.

143. In the case of the first respondent, Dion van der Merwe, although he had been employed by the first applicant, pursuant to a disciplinary hearing he was dismissed on 3 March 2021 because of illegal substance abuse. He however had no independent right to reside on the property. He had been employed as a forklift operator

144. The third respondent, Deone Lewis was employed by the first applicant on a seasonal basis while the fourth respondent, Do Wayne Lewis was never employed by the applicants. The third respondent was 25 years old at the time the application was launched and the fourth respondent was 18.

145. All the respondents are identified in Bernard's housing agreement with Ideal Fruits as being entitled to live in the house. The agreement provides a rental of R758 per month which includes the cost of water and electricity to which an annual market-related increase is added.[42]

146. The applicants contend that in January 2021, when Bernard passed away, they initiated steps to have the respondents vacate the premises and after that also attempted to formally mediate through their attorneys with the respondents. The avowed purpose of the mediation was to secure alternative accommodation. The respondents were also requested to engage their own attorneys for this purpose. They however did not take up the offer to mediate.

147. The applicants joined the Municipality and the Provincial Director of Land Reform because of their statutory responsibilities in relation to the provision of accommodation.

The applicants also contend that they have no responsibility to provide alternative accommodation and that any failure to obtain alternative accommodation was entirely attributable to their refusal to participate in the mediation process offered by the applicants.

148. The founding papers do not aver that the respondents could independently obtain suitable alternative accommodation. They however indicate that the applicants had been willing to assist the respondents in relocating from the property.[43]

149. In their answering affidavit the first respondent said that his father had worked on the farm since 1983 as a forklift driver. The first respondent also said that he had lived on the farm since the age of two, grew up there and since the 1980s had worked on the farm for the Theyeboom Kooperasie.

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[42] FA, Annex TB09 cl 3
[43] FA para 70

150. The first respondent is in a relationship with the second respondent while the other respondents are all family members. When their father passed away in 2009, they, together with Bernard, remained on the farm. There are also two minor children in the family.

151. Ideal Fruits took over Theyeboom Kooperasie in 2010 and the first respondent remained an employee on the farm. In February 2020 he received a 10 year service certificate. This means that the applicants recognised that the first respondent had been employed on the farm since at least 2010.

152. The respondents also contended that the disciplinary charges in respect of which the first respondent's employment was terminated is not one of the grounds identified in section 6(3).

153. The first respondent raised the issue that they as a family lived on the farm, working for the Vyebos Koop long before the applicants took over in 2010. They argued that their rights to use and enjoy the property had been with the consent of the previous owner. In this regard, it is noted that according to the deponent, Bernard had been a forklift driver not a truck driver. The applicants contend that Bernard's right to occupy was by reason only of being a truck driver which required him to remain on-site.

154. Furthermore at the time he was employed by Vyebos Koop, the first respondent avers that there were no levels of employment which determined if an employee would have access to housing or not. He claimed that the farm employees earned too little to afford their own housing and this was the reason why the Co-op had provided all of them with housing.

155. The first respondent stated that he was currently unemployed and struggling to find employment while the second respondent earned approximately R1100 per month working night shift for four hours and her income alone was not enough to

secure alternative accommodation or pay for basic necessities such as groceries and clothing, water or electricity.

156. In their reply, the applicants disputed that the first respondent had lived on the property uninterruptedly since the age of two and averred that he only started occupying the property sporadically since 2014. This was demonstrated by a letter written by Bernard in August 2018 where he informed the applicants that the first respondent would live in the house with him as he, the first respondent, had relocated from Villiersdorp.

157. Insofar as the rental is concerned, the applicants denied that it constituted rent but that it was an amount deducted from the employee's salary in accordance with the Sectoral Determination 13 for farm workers who received housing as an employment benefit. It ceased on the termination of employment. In other words it is in the nature of a taxable benefit.

158. The difficulty presented by this case is that the nature of the relationship between the respondent and the applicants cannot be determined by an agreement concluded in 2014 because the basis of occupation and of employment had pre-existed that date and was prior to Ideal Fruits acquiring ownership of the farm.

It is also evident that at some point in time all members of the family were engaged in working on the farm in one capacity or another

159. Once again, the real issue is whether there has been adequate engagement, particularly bearing in mind the attachment of the family to the farm and its operations since the time of the first respondent's grandfather.

160. I am of the view that while there may be certain disputes of fact, there is sufficient evidence to demonstrate the extent to which the respondent family has been on the farm. The fact that the first respondent may have left and returned at some stage

does not provide adequate evidence that the respondents will not be rendered homeless.

THE REMEDIAL NATURE OF ESTA AND THE APPLICATION OF PIE PRINCIPLES

161. The constitutional foundation, objective and architecture of ESTA are not dissimilar to that of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("*PIE*"). ESTA provides at least equal if not greater protection and in addition provides the potential of conferring stronger rights in land than available to an occupier under PIE (by reason of s 4).

162. This may not be unexpected because PIE accepts that the occupier may never have enjoyed a legal right to occupy at any stage, whereas an ESTA occupier must have been on the land with at least the consent of the landowner.

Furthermore, the preamble to PIE identifies it objective to be essentially "*the prohibition of unlawful eviction ...* (and) *... to provide for procedures for the eviction of unlawful occupiers*". A body of jurisprudence has built up around the granting of an eviction order under either Section 4 (7) or s 6(3) of PIE informed as it is by s 26 of the Constitution.[44]

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[44] Section 4(7) which applies to an eviction from privately owned land reads;

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

Section 6(3) which applies to State land provides that:

In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

(b) the period the unlawful occupier and his or her family have resided on the land in question; and

(c) the availability to the unlawful occupier of suitable alternative accommodation or land.

(emphasis added)

In considering whether it is just and equitable to evict, a court must have regard to "*the availability to the unlawful occupier of suitable alternative accommodation or land*". [45]

163. By contrast the objective of ESTA is more ambitious. In the preamble the legislature firstly notes 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, that "unfair evictions lead to great hardship, conflict and social instability" and that "this situation is in part the result of past discriminatory laws and practices*". It then identifies the following objectives of the legislation:

> *"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.*

164. PIE is remedial legislation that was introduced to protect occupiers from eviction "*without an order of court made after considering all the relevant circumstances*" and to "*achieve the progressive realisation*" of "*the right to have access to adequate housing*" as expressed in s 26 of the Constitution.

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[45] Section 6 of PIE provides that:

ESTA not only seeks to give effect to s 26 of the Constitution, but also to the property rights provisions of s 25 of the Constitution, in cases where land tenure is legally insecure as a result of past racially discriminatory laws or practices. One of its purposes is to promote the nation's commitment to land reform and the reforms to bring about equitable access to all South Africa's natural resources and foster conditions which enable citizens to gain access to land on an equitable basis. [46]

Section 5 of ESTA recognises that, subject to reasonable and justifiable limitations in an open and democratic society, an occupier, owner and a person in charge shall have the right to human dignity, freedom and security of person with due regard to the objects of the Constitution and ESTA.

165. PIE, as interpreted by the courts, ensures that an occupier cannot be rendered homeless. The obligation to provide a shelter either falls on the landowner or on the State. PIE does not allow the occupier to fall through the cracks; for otherwise it would offend almost every significant Constitutional right.[47]

166. If the application of PIE resulted in an occupier being evicted from a dwelling and rendered homeless, then it would mean that an order of court would have put the occupier's right to life at risk, would have stripped that person of all dignity, would be treating him or her in an inhuman or degrading manner and would endanger that person's right to bodily and psychological integrity.

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[46] See ss 25(5), (6) and (8) of the Constitution which provide:

(5) The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(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.

(8) No provision of this section may impede the State from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

[47] See especially the Constitutional Court decision in *Blue Moonlight*

The s 26 provision in the Constitution which gives everyone the right to have access to adequate housing also provides that no one may be evicted without an order of court made after considering "*all the relevant circumstances*". All relevant circumstances must have regard to the constitutionally protected right of human dignity (s10), life (s11) and freedom and security of person (s 12 and particularly subsections (1)(e) and (2)).

167. In these circumstances it is apparent that the purpose and intention of ESTA is at the very least to prevent homelessness- with homelessness comes an abandonment of the most significant constitutionally protected rights of the individual.

Accordingly a court must be satisfied an ESTA occupier and resident family members are not rendered homeless so as to ensure that their core constitutionally protected rights are not rendered worthless or placed at great risk through a court order. Our social compact requires the court to determine the length of time the responsibility of providing shelter for the ESTA occupier and family members falls on the landowner's shoulders and by when government bodies must assume the ultimate responsibility of providing suitable alternative accommodation for them.

168. There are Constitutional Court and Supreme Court of Appeal ("*SCA*") judgments which have adopted and applied the *ratio* of PIE decision to ESTA. *Ms Julius* on behalf of Legal Aid South Africa ("*LASA*") referred the court to two, namely *Baron and others v Claytile* [2017] ZACC 24; 2017 (5) SA 329 (CC) at paras 41 to 47 and *Goosen v The Mont Chevaux Trust* [2017] ZASCA 89 at 31 to 35;

169. I accept that section10(3) of ESTA postulates a situation where the court may grant an eviction order in circumstances where suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of the right of residence under Section 8, where the owner has already been responsible for providing the dwelling and where the efficient carrying on of any operation of the owner (or person in charge) will be seriously prejudiced unless

the dwelling is available for occupation by another person employed or to be employed by the owner.

170. But even in such circumstances the court must still determine whether it is just and equitable to evict having regard to the following considerations:

> *"(i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and*
>
> *(ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted"*

It is possibly in this situation where the distinction between providing suitable alternative accommodation and not rendering the occupier homeless becomes relevant. I would suggest that both these subsections direct a court not to render an occupier homeless.

171. The one situation which poses difficulties is where the employee has been found guilty of serious misconduct which puts the lives and well-being of either the owner, person in control or other occupiers at risk. The disruptive nature of the conduct is inimical to the basic right of freedom and security of person, human dignity, privacy and freedom of movement of all those who the occupier by his or her conduct threatens or endangers and where the only solution is to grant an eviction.

172. This also means that in cases where the occupier has not taken adequate steps to find alternative accommodation, a court should be slow to say that he or she is able to be accommodated by relatives or anyone else.

The Land Court is acutely aware that many if not most ESTA occupiers come from historically disadvantaged backgrounds, may through no fault of their own have

limited formal education, feel inadequate to engage the landowners or their legal representatives and therefore do not respond to requests for meetings with landowners or their lawyers. They certainly cannot be faulted for failing to comprehend how a landowner's legal representative can fairly mediate or facilitate a fair settlement. It would be natural for them to regard the legal representative as safeguarding the interests of the landowner.

173. Furthermore, ESTA legislation may have provided default situations where the occupier does not respond to notices. If the reality is that this amounts to a deeming provision then at best it can only be *prima facie* and a court remains entitled to itself investigate the reason why the occupier did not respond to requests for meetings or to make representations. This would be by reference to the occupier's level of comprehension of such notices, accessibility to competent advice or representation before engaging with the landowner or that person's legal representative and any other relevant consideration (bearing in mind that some areas are completely isolated and the occupiers may not have independent means of transport).

174. Ultimately, I believe a court should be slow to find that there is no responsibility at any stage on the part of either the landowner or the government to provide either suitable alternative accommodation or emergency type housing to any ESTA occupier or family member who may otherwise be rendered homeless.

175. To render any person homeless seems to be unconstitutional. If it is not, then it may require exceptional circumstances, where the constitutional rights which would be affected by homelessness are not disproportionate to the constitutional rights of the other affected parties, in order to be justified under the limitation of rights provisions under s 36 of the Constitution[48]. I respectfully suggest that this is the proper characterisation of the issues facing a court when the spectre of homelessness must be confronted, as opposed to other situations where the court

[48] None of the occupiers in the present set of cases can be said to jeopardize the safety or security of others.

has properly satisfied itself on the facts that homelessness will not arise in the case before it.

176. The result is that either the landowner must endure providing occupation for the ESTA occupier for a longer time until a structural order, or an order directing mediation between all affected parties, enables the provision of alternative accommodation by the authorities within the framework of the separation of powers and the Court's Constitutional obligations.

177. This brings me to consider the tension between the rights of the owner to free and undisturbed use of his or her property and the s 25 and 26 Constitutional responsibilities of the State.

It also has a bearing on the adequacy of the report which the Municipality and, when called on, the Provincial Government should produce.

THE TENSION BETWEEN THE OWNER AND GOVERNNMENT IN RELATION TO PROVIDING ACCOMMODATION

178. The starting point must be ss 25 and 26 of the Constitution. These provisions place the responsibility of providing adequate housing and in cases where s 25(4), (5) and (6) apply, to provide legally secure tenure or enable citizens to gain access to land on an equitable basis.

179. ESTA is the remedial legislation referred to in ss 26(5) and 25(5), (6) and (8) of the Constitution. It imposes responsibilities on government to secure the realisation of these rights, albeit in a progressive manner having regard to available resources.

Nonetheless the ultimate responsibility is that of government which cannot abdicate its responsibility to the private landowner. This is clear from *Blue Moonlight*.

180. Since s 26 finds content in PIE and ESTA and applies to both pieces of remedial legislation, the responsibilities of the State remain to secure these rights in a way that does not result in the owner of land continuing to bear the responsibility of still providing accommodation to occupiers for a lengthy period in cases where their occupation has been lawfully terminated but where they would otherwise be rendered homeless (or possibly unable to obtain suitable alternative accommodation).

Confining the issue to ESTA, the Courts are expressly tasked to resolve these situations by providing a time by when the occupiers must vacate and the State is obliged to take over the responsibility of providing them with adequate accommodation. While mindful of not offending the separation of powers, the court remains Constitutionally tasked with giving effect to ESTA. In PIE cases this has been achieved *inter alia* through structural orders.

181. However, the Constitutional Court in *Blue Moonlight* appreciated that a person who purchases property for commercial purposes should be aware that there are people who have been in occupation over a long time and must therefore recognise the possibility that they are protected under PIE "*for some time*" albeit that it cannot be for an indefinite period. [49]

The court added:

> "*But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted .... An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity inquiry mandated by PIE.*"[50]

182. Nonetheless the Constitutional Court recognised the tensions and juxta-positioning of the respective rights and obligations and said:

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[49] Per van der Westhuizen J in *Blue Moonlight* at para 40.
[50] Id para 40

" *In order to conclude whether eviction by a particular date would in the circumstances of this case be just and equitable, it is mandatory to consider where the land has been made available or can reasonably be made available". The City's obligations are material to this determination"*[51]

183. Pretorius AJ in *Baron* recognised that under certain circumstances, ESTA places a positive obligation on a private landowner and noted that it did not spell out who is responsible for making available suitable alternative accommodation, although identifying the State as the logical role player.

Baron concerned the application of section 10(2) where an ESTA occupier has somewhat greater protection than under section 11. The court concluded that;

> *"... within this narrow scope of evictions under that section it might therefore be appropriate to expect the private landowner to assist with the finding of, or, failing that, in truly exceptional circumstances, to provide suitable alternative accommodation. This must be a contextual inquiry having due regard to all relevant circumstances."*

Zondo J (at the time) in a qualified concurring judgment preferred not to express any view on the duties of private owners as set out in this part of the judgment but agreed with the conclusion reached that the appeal should be dismissed. [52]

184. In another section of the judgment, Pretorius AJ drew attention to the fact that ESTA does not only deal with the rights of occupiers but also recognises the rights of landowners to apply for eviction under certain conditions and circumstances. In

[51] Id at para 41.
[52] *Baron* at paras 35 to 37 and 56

applying those circumstances to the facts of the case the court summed up as follows;[53]

> *"The applicants have enjoyed free accommodation since 8 December 2012, when their right of occupation was terminated, until 2017, almost five years. The first respondent has had a temporary restriction on its property rights for that period and it cannot, in fairness, be expected to continue granting free accommodation to the applicants where its current employees are disadvantaged. Therefore, the applicants must be evicted to enable the first respondent to accommodate its current employees."*
>
> *The applicants' concerns about what made the initial accommodation ill-suited have been addressed by the City to the best of its ability. Cognisant that the duty is one of progressive realisation, I accept that the housing units at Wolwerivier qualify as suitable alternative accommodation which is provided by the City within 'its available resources'. The applicants cannot delay their eviction each time by stating that they find the alternative accommodation offered by the City unsuitable. Specifically, their remaining concerns regarding the schooling of the children have also been addressed by the offer of transport by the first respondent."*

185. In *Baron* the eviction order was made effective three months after the date of the judgment.

186. In ESTA cases the responsibility of the various spheres of government arises by reference to the subsidy provisions of s 4 which are intended to facilitate the long term security of tenure for ESTA occupiers[54], the provisions of ss 9 (2)(d) and (3), 10(2)(a) and (3), 11(3)(c), and also s 26 of ESTA which deals with expropriation for the purposes of providing on-site or off-site developments for the benefit of ESTA

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[53] *Baron* paras 49 and 50

[54] Section 4(4) in particular is recognises that, in order to be effectively facilitated and implemented, tenure grants may require agreements to be concluded with a Provincial Government or a Municipality

occupiers- all as understood by the responsibilities which the State has under ss 25 and 26 of the Constitution.

187. The application of PIE cases to ESTA means that a Land Court can be informed, without having to reinvent the proverbial wheel, by cases dealing with structural orders, *Olivia Road* [55] in relation to meaningful engagement and *Blue Moonlight* in respect of the type of reporting which the authorities must provide, the tension between the owner and the relevant government entity as well as the acknowledgement that the State is ultimately responsible to provide adequate housing having regard to available resources in order to achieve the progressive realisation of such right.

188. Inevitably the responsibility to provide accommodation must fall on government. The question is whether there is a sufficient budget to provide the necessary accommodation immediately. It is difficult to comprehend that under proper oversight the erection of structures or the provision of building material and public utilities or the acquisition or opening up of unused State land cannot be done expeditiously if funding is available.

MUNICIPAL AND PROVINCIAL DEPARTMENT REPORTS

189. The Glen Oaks case involves the Breede Valley Municipality. The probation officer's report by Beerwinkel which was mentioned earlier, and which was provided under s 9(3), stated no more than that the Municipality was then (in April 2021) busy with the Trans-Hex housing project which was in its early stages and was intended to provide housing opportunities to residents in areas that included Worcester. The recommendation was that the municipality assists van Wyk and her daughter with alternative accommodation. This could only have been in relation to providing accommodation for them in the Trans-Hex project.

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[55] *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others* [2008] ZACC 1; 2008 (3) SA 208 (CC)

190. Some five months later, in September 2021, the Municipality filed a report which identified three Trans-Hex housing projects. The report was provided in response to an order from the Magistrate requiring the Municipality to furnish a full report on *inter alia* whether the land has been or could reasonably be made available for van Wyk by either the Municipality, other organs of State or another landowner.

191. The September report advised that homes in the first two of the Trans-Hex housing projects had already been allocated to beneficiaries and that beneficiaries for the third project were in the process of being approved in respect of its first phase on a first come first served basis. The report stated that van Wyk had still not put her name down on the housing list.

This report effectively poured cold water over the optimism expressed in the first report concerning the Municipality's ability to assist van Wyk.

192. The report then dealt with the possibility of providing emergency accommodation in the form of a 30 square metre makeshift structure of corrugated iron or wood in the form of a kit which the recipient would be given to put up. However there were no available vacant plots on which the structures could be erected.

The report mentioned that other emergency accommodation was also not available within the following two years. The one was the provision of rental units where there was already a waiting list of close to 5900 applicants, some of whom have been waiting since the 1980s to obtain accommodation. Such housing, which would be in flats, is provided to households earning less than R4500 monthly. The other emergency housing was of an extremely temporary nature in community halls and is provided in case of disasters or other life-threatening situations.

The report mentioned that the Tran-Hex housing project was about to enter its second phase, with contractors still to be appointed and occupation would only occur later in 2021 or in 2022. Ultimately some 8480 units would be constructed

193. Mention was also made in the report of individual housing subsidies which would enable evictees to buy an existing house. It referred to a subsidy provided by the Western Cape Government's Department of Human Settlements which is known as the Finance Linked Individual Housing Subsidy.

In order to be eligible, an applicant would have to be over the age of 60 and be registered on the Municipal Housing list. At that time only those who were on the list for at least 10 years had prospects of qualifying. The subsidy is currently in an amount of R168 853 which is paid directly in settlement of the property acquired

194. Earlier in the judgment I mentioned that the Municipality's report of September 2021 contained insufficient detail with regard to future developments of sub-economic housing, whether there was funding for the development of adequate housing and whether government-owned land was available.

195. In terms of s 9(3) of ESTA the reports should deal with the availability of suitable alternative accommodation, indicate how an eviction will affect the constitutional rights of any affected person, including a child's right to education, should point out any undue hardships which an eviction would cause the occupier and deal with any other matter that may be prescribed. The regulations have not prescribed any additional matters.

196. However, as *Mr. Montzinger,* on behalf of the various owners submitted, in *Blue Moonlight* the Constitutional Court indicated that a report on the availability of housing should address;

a. the adoption of policies, plans, strategies and programs including setting targets for delivery;

b. the extent to which the implementation of applicable National and Provincial legislation as well as bylaws is its focus;

c. the preparation, approval and implementation of budgets to realise these obligations;

d. anything else which it should do within its legislative and executive competence to achieve its obligations under sections 25 and 26 of the Constitution.

197. I agree that the reports submitted to the Court do not adequately address these issues. In particular there is no indication of available budgets or the source from which funding may be derived, nor the availability of State land to provide alternate accommodation, nor a comprehensive plan, concept, initiative or program to deal with the anticipated number of ESTA evictions and the special needs of persons who may only have known the four corners of a farm and where his or her experience and skills are confined to one or other limited aspect of farming.

198. In *Blue Moonlight* the court had regard to Chapter 12 of the Housing Code when considering a municipality's obligations, and by extension the type of reporting that is required in cases such as the present, where a court must, *before* it can grant an eviction order, determine what is just and equitable by reference to the availability of alternative accommodation.

199. Ms Julius in a comprehensive set of heads on this topic reminded the court that section 9 of the Housing Act 107 of 1997 obliges municipalities, as part of the process of integrated development planning, to take reasonable and necessary steps within the framework of National and Provincial housing legislation and policy to ensure that the inhabitants within their respective areas have access to adequate housing on a progressive basis and that the responsible authorities initiate, plan, coordinate, facilitate, promote and enable appropriate housing developments in their area of jurisdiction. It was pointed out that s 2(1) of the Housing Act provides that the National, Provincial and Local spheres of government must give priority to the needs of the poor in respect of housing development.

200. Ms Julius also referred to s 73(1) of the Municipal Systems Act 32 of 2000 which places a general duty on municipalities to give priority to the basic needs of the local community, promote its development and ensure that its members enjoy access to at least the minimum level of basic services.

In addition s 23 (1) of that Act places an obligation on municipalities to undertake developmentally orientated planning in order to ensure that, together with other organs of State, they contribute to the progressive realisation of the fundamental rights contained in ss 25 and 26 of the Constitution and that they are obliged to engage in planning to ensure the provision of access to adequate housing.

Under the emergency housing program, municipalities must initiate, plan and formulate applications for projects relating to emergency housing situations. *Blue Moonlight* noted that this required the Municipality to plan proactively for emergency situations, and that evictees who may otherwise be rendered homeless constituted an emergency situation for which accommodation was to be provided.[56]

201. With this in mind, I return to *Blue Moonlight* which, in dealing with the manner Chapter 12 of the Housing Code is to be interpreted and applied together with other relevant legislation, summarised the position in the following way:

> "Chapter *12 must be interpreted in light of the relevant Constitutional and statutory framework of which it is a part. For example, section 9 of the Housing Act requires municipalities to take all reasonable and necessary steps to ensure access to adequate housing. Sections 4(1) and 8(2) of the Municipal Systems Act empower municipalities with a degree of general, financial and institutional autonomy to carry out their functions, and section 4(2) places the duty on them to provide for the democratic governance and efficient provision of services to their communities. Section 4(2)(j) requires them to 'contribute together with other organs of state to the progressive*

[56] Respondents' HoA paras 30-31

realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution. It would hardly be possible for the City to carry out its constitutional and legislative applications without being entitled or obliged to fund itself in the sphere of emergency housing "[57]

202. *Blue Moonlight* then had regard to *Grootboom* in the context of the need for a national policy in respect of the right of access to adequate housing from a legislative and budgetary perspective. At para 56 the court cited the following passage from *Grootboom*:[58]

> "*Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nationwide housing program. Recognition of such needs in the nationwide housing program requires it to plan, budget and monitor the fulfilment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately. Such planning too will require proper coordination between the different spheres of government.*"

The court added that the budgetary demands for a number and measure of emergency occurrences are at least to some extent foreseeable, especially with regard to evictions.[59]

203. Concluding on the topic of the planning and budgetary responsibilities of municipalities in relation to the provision of emergency housing situations, the court in *Blue Moonlight* referred to ss 12.4.1 and 12.6.1 (b) read with (c) of Chapter 12. These provisions require municipalities to initiate, plan and formulate applications for projects relating to emergency housing situations and that the provision for possible

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[57] *Blue Moonlight* at para 53

[58] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)

[59] *Blue Moonlight* at para 63

emergency housing needs must be identified through proactive planning or in response or reaction to a request for assistance from other authorities or the public. The court added that these provisions indicate a legislative purpose that a municipality ought to plan proactively and budget for emergency situations in its yearly application for funds.[60]

204. There however remained an appreciation that it would be inappropriate for an organ of State to be ordered to do something which is impossible. Due consideration must therefore be given to any assertion that there are no available resources.

In *Blue Moonlight* the City of Johannesburg had provided information relating specifically to its housing budget, but did not provide any concerning its general budget situation. The court dealt with this as follows at para 74:

> *"We do not know exactly what the City's overall financial position is. The court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfillment of its obligations"*

205. I have attempted, as best as possible, to distill these considerations in order to address the limitations in the reports provided by the Breede Valley Municipality.

206. Prior to doing so it is necessary to mention that before hearing argument this court had requested an updated report. It was provided by the Project Coordinator. In addition the court received an affidavit on behalf of the Provincial Director: Agriculture, Land Reform and Rural Development signed by its Acting Chief Director, Mr. Andrew Booysen.

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[60] *Blue Moonlight* at para 66

207. The first report updated the court with regard to the personal circumstances of van Wyk. It noted that van Wyk was now unemployed but that her daughter was employed, earning R 4000 a month at the Leipzig farm. At that time her five month old son attended a daycare centre on the Leipzig farm

208. The report mentioned that the applicants were presented with an option that the Department purchase the area of land where van Wyk and other occupiers reside. This was declined because of concerns regarding safety and security as well as the management of the farm. The report stated that this is a particular and valid concern of most landowners in rural areas and considered that this option could not be explored further.

209. The report continued that the Department should be able to apply the provisions of s 4 of ESTA to assist in providing tenure security but accepted that it is subject to internal approval processes and a valuation of property. It also relied on the contribution of other parties to the dispute, including the applicants and the Municipality. The report indicated that van Wyk had still not applied for housing at the Breede Valley Municipality and advised that the Trans-Hex housing project, which was still in its early stages, is intended to provide housing opportunities for those living in the Worcester area.

210. The recommendation was that the Municipality assist van Wyk and her daughter with alternative accommodation and that all the parties, including the Department of Agriculture, Land Reform and Rural Development and the Municipality, work together to find a house to purchase in the area of Worcester and secure the tenure of van Wyk and her family.

211. In relation to the explanatory affidavit filed on behalf of the Western Cape Department of Land Reform by Mr. Booysen, the court wishes to expresses its appreciation to him and to the Department's counsel, Ms Davis, for taking a proactive role in assisting it to understand the involvement of the various governmental bodies in relation to the provision of adequate housing and its funding.

212. The first aspect dealt with by Mr. Booysen concerns s 4 of ESTA which deals with the granting of subsidies in order to facilitate long term security of tenure for ESTA occupiers.

213. Mr. Boyson explained that all the affected respondents were entitled to the rights and protection afforded under ESTA. When the Department is notified of an imminent eviction, its officials in the ordinary course will commence a process of engagement. This is done by first conducting an inspection of the land, convening meetings with municipal officials, the occupiers and landowners, including their legal representatives. At this stage the purpose is to determine whether the Department can contribute or assist the relevant municipality in providing suitable alternative accommodation for the occupiers. A determination is then made.

214. In the case of Glen Oaks meaningful engagements had occurred in September 2021 and Mr. Beerwinkel of the municipality considered providing a donation or purchasing a portion of the land and that a Community Property Association ("*CPA*") as envisaged in Act 28 of 1996 be formed. This was not approved by the landowner. However Mr. Boyson explained that the formation of a CPA would allow the affected landowner to become an *ex officio* member and therefore be able to participate in the management and oversight of the CPA.

215. Mr. Booysen then explained some of the other problems and believed that these could be resolved, particularly in relation to the possible influx of unlawful occupiers.

216. The Department's interest in acquiring a portion of Glen Oaks arose because some 18 households could then acquire security of tenure. Such on-site development was also preferred by the Department as it did not require the occupiers to relocate to unfamiliar areas.

217. Mr. Booysen then explained the s 4 process, which generally requires the landowner's acceptance. If there is acceptance then the Department itself will take steps towards the development of the land.

218. The alternative solution would entail the Department and the Municipality finding a house in the Worcester area for van Wyk to acquire. Although viable, it was not considered ideal since the mandate of the Department is rather to acquire land under s 4 for the benefit of all occupiers who are similarly affected by the prospect of evictions from farms within this same area

219. In relation to the occupiers at Ideal Fruits' packhouse, Mr. Booysen had ascertained that there may be up to 20 households whose occupiers do not have secure tenure. The Department's Project Officer in Caledon, Mr. Tinnie, to whom the court is also grateful for the report he provided, considered the acquisition of land from Ideal Fruits under s 4 of ESTA to be viable.

However the landowner was not amenable to this. Alternative land was then considered and the Municipality was requested to accommodate Mr. van der Merwe in a development in the area. The Municipality's responded that it did not have any available spaces. In the meanwhile it appeared that the landowner may be willing to consider contributing towards an off-site development

220. At the time Mr. Booysen provided the report which is contained in his explanatory affidavit, the respondents in the Reuvers Plase case were unemployed and had no offer of alternative accommodation. The landowner was not amenable to consider similar proposals to donate to the purchase of the land, or allow the Department to purchase it for the planning and implementation of an on-site development,

221. Mr. Boyson then dealt with the Provincial budget available to assist ESTA occupiers. The following appears significant;

a. the Department receives an annual budget from the National Department and its Tenure Office has an annual target for securing long-term land tenure. Its target for 2023 was the acquisition in the Western Cape of 100 hectares of land;

b. the target is difficult to attain because most farms in the Western Cape are privately owned and landowners are unwilling to donate or sell their land to the State;

c. in the event that the Department exceeds its annual budget, it may approach the National Department for more funding;

d. the constitutional obligation of the local and provincial spheres of government to provide suitable alternative or temporary emergency accommodation to ESTA occupiers was recognised. However it was noted that the Provincial Department of Human Settlements had not been joined in the proceedings. It has the mandate to provide housing, housing subsidies and housing programs for eligible persons in the Province;

   The distinction between the two departments was explained as follows; the Department of Agriculture, Land Reform and Rural Development has a different and distinct mandate which does not include the provision of alternative or temporary emergency housing. Its mandate is to acquire land for the benefit of ESTA occupiers for their long-term tenure;

e. during the engagement process, the Land Reform Department consults and engages with affected municipalities in order to assess whether there are opportunities to secure land tenure and how the Department and the Municipality can collaborate to assist vulnerable ESTA occupiers. Such assistance will extend beyond the initial purchase of the land; for instance, where the Municipality may be required to provide water or basic services on the acquired land;

f. the Municipality itself may collaborate with the Department by identifying land which may be purchased for such development for the benefit of ESTA occupiers;

g. it was contended that if the Municipality indicates that it does not have suitable alternative accommodation or temporary emergency housing available for ESTA occupiers, then the Department is not automatically obliged to make provision for such housing since the s 4 subsidy process is an application process requiring various levels of approval, expert assessments and investigations before final approval can be given;

h. of significance is that it can take up to three years to process an application- although it may on occasion be as soon as 18 months. It is for this reason that Mr. Booysen considered that s 4 is not a practical solution in situations where vulnerable occupiers are faced with the threat of imminent eviction

222. Mr. Booysen then tabulated the three recent acquisitions made by the Department of Land Reform under s 4.

In the one, land tenure was acquired for R450 000 as an on-site development in the area occupied by the ESTA evictees who then registered the property in a family trust.

In the other case, land tenure was purchased for R150 000 and similarly it was an on-site development where the occupiers have registered the property in a family trust. In both cases the Department was in the process of planning the development of the land.

In the last case, land tenure was purchased for R6.4 million. This was on an off-site development for occupiers who had previously been evicted and found themselves out on the street. The Department was able to obtain permission from the Deputy Minister to accommodate the occupiers temporarily prior to purchasing the farm. However the occupiers had not yet moved onto the land because the requisite application for zoning permission and clearing the land for development had not yet been finalised.

223. Mr. Boyson then identified the difficulties experienced in respect of s 4 acquisitions from private sellers. Firstly, private sellers are usually keen to sell their properties quickly but the process which involves obtaining final approval for funding or subsidies can be lengthy. Furthermore, developers have a set asking price for residential housing units while the Departmental valuation report indicates a lower market value and developers are not prepared to engage in negotiations to try and find an objective resolution.

224. In conclusion, Mr. Boyson reiterated that the Department does not retain any form of housing, accommodation or rental units which could accommodate ESTA evictees. It is however able to offer assistance by encouraging the relevant parties to identify appropriate land which the landowner is prepared to donate or sell to the Department or which the Municipality can identify.

225. It therefore appears that there exist difficulties in enabling s 4 of ESTA to achieve its legislative promise and objective despite the Department of Land Reform appearing to have the capability of fulfilling its mandate and the commitment to do so. But these difficulties appear to arise because the process gets bogged down during various phases or because of the lack of co-ordination between various Departments and bureaucratic red tape which includes identifying off-site land, the failure to expedite the necessary zoning permissions or to accelerate the provision of services on earmarked sites.

226. What the court can address at this stage is the possibility of identifying Provincial land, or other State owned land, and perhaps undertaking a fuller audit of available Government owned land within the municipalities themselves.

227. In cases where the only issue between a landowner and the obtaining of either on- site or off-site land is the fair market value, then it appears that s 26 of ESTA may be utilised with the involvement of the Minister, and that both these possibilities are capable of exploration within the process of mediation which was sanctioned by

the relevant legislation (including s 21 (b) of the National Housing Act and s 8(1)(e) of ESTA) even prior to the introduction of the Land Court Act in April 2024 and the amendments to ESTA. [61]

In mentioning this, the court is acutely aware that it may be extremely difficult to excise a parcel of land from a farm where it constitutes an integral part of the farming operation or may otherwise impact on its efficiencies or the long-term planning of the farming operations.

228. The next question is what constitutes suitable alternative accommodation. It is difficult to comprehend that with the enormous backlog in providing even basic shelter, that the State must provide the equivalent dwelling to that from which the ESTA occupier has been evicted.

But it must mean more than a skin and bones structure. It would contemplate a shelter for a person who has legitimately lived, generally with his or her family, in an environment where brick and mortar accommodation with at least proper communal ablution facilities and access to running water and electricity is the norm. It does not appear that a structure which would result in a significant diminution to the existing standard of accommodation meets the threshold of suitable alternative accommodation. This must be so if the objective of ESTA is to be given content: Reference is again made to the preamble of ESTA which envisages that ESTA occupiers should enjoy "*long term security of tenure… where possible through the joint efforts of the occupiers, landowners and government bodies* " and which may include extending the rights of occupiers provided due recognition is given to the rights duties and legitimate interests of owners.

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[61] ESTA has always provided a framework of meaningful engagement between all the parties and relevant organs of State concerned with land reform and human settlement. Reference may be its Preamble (*"And whereas it is desirable… 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, landowners, and government bodies"- emphasis added*).

Various provisions of ESTA have either required a court to take into account whether there has been meaningful engagement or expressly facilitates such a process. Aside from s 8(1)(e), see also ss 10(3) (i), 11(3)(c) and 21

229. There is a further consideration which is unique to ESTA occupiers. PIE occupiers would generally appreciate that their occupation is extremely tenuous and therefore may place their names on housing lists even prior to receiving eviction notices.

Such considerations do not necessarily apply to ESTA occupiers. While their tenure is recognised not to be secure, which renders them vulnerable to eviction, nonetheless there would generally be no need to put their names down for housing. This is because of the length of time they have lived on the farm and the general way in which the ESTA occupiers continued occupation of housing has evolved (save possibly where the next generation takes over occupation or the farm is sold).

Realistically, it is difficult to place an onus on ESTA occupiers to put their name down for a housing project at a time when there is no direct threat of eviction.

230. This again poses the question as to whether ESTA occupiers facing eviction should be placed in a separate category which allows them to leapfrog onto housing lists. The court is not called on to decide this; unlike the case of *Blue Moonlight* where the court was compelled to consider whether the failure to recognise evictees within the emergency housing framework was discriminatory. This court therefore does no more than raise the issue. Up to here

231. It is also not possible at this stage to consider what the quality of that alternative accommodation should be at the emergency phase and whether it is dependent on an ESTA application of s 4 while placing a longer restraint on the owner before an eviction order can be implemented.

232. However a concern, borrowing from one of the *Ekurhuleni* cases, is that temporary emergency housing in what is no more than a Wendy house or a communal hall may be of relatively long duration and require further litigation. See

City *of Ekurhuleni Metropolitan Municipality v Unknown Individuals Trespassing and Others* [2023] ZAGPJHC 265; [2023] 2 All SA 670 (GJ) at paras 35 to 39. [62]

233. It does not appear that the intention of the ESTA legislation was to extend or dilute the meaning of suitable alternative accommodation to temporary emergency shelter save for a very short period of transition. But in such a case, ESTA requires the court to again find the appropriate balance between the rights of the owner, the ESTA occupiers, the other occupiers and the responsibility of organs of State having regard to their available resources.

In *Baron* the Constitutional Court expressly retained the qualifiers that the nature of suitable alternative accommodation for ESTA evictees must have regard to the resources available to the municipality and that the duty imposed is one of progressive realisation [63]. On the facts the court found that all the concerns about the suitability of the accommodation which was made available to the ESTA evictees had been addressed.

234. The issue which appears to be unresolved is, in a competition for budgetary allocations, whether ESTA occupiers are entitled to a different quality of accommodation to PIE evictees at the immediate eviction phase and, if not, for how long can they be housed in a most rudimentary shelter before being entitled to the differentiation which appears to afford them the right to be housed in "*suitable alternative accommodation*" relative to that enjoyed prior to the termination of their residence rights.

235. The answer to these issues may result in ESTA occupiers being placed in a situation which requires differentiated treatment by reason of the wording in ESTA and the additional considerations enumerated in s 25 of the Constitution which have

[62] See also the follow up *Blue Moonlight* cases after the Constitutional Court's initial decision.
[63] See earlier extract from *Baron* at para 49

no application to PIE evictees[64]. Once again the issue is not ripe for adjudication at this stage of the hearings.

236. Earlier I mentioned that ESTA requires the court to find the appropriate balance between the rights of the owner, the ESTA occupiers, the other occupiers and the responsibility of organs of State having regard to their available resources.

I am of the view that these have not been properly dealt with in the papers before the court and that the reports received, including those in affidavit form from the Acting Chief Director of the Provincial Department of Land Reform, indicate that the mediation process contemplated in ESTA has not been properly exhausted. In this regard reference may be had to the application of *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at paras 35 and 36 (see also paras 42, 43 and 45) in *Maluleke N.O. v Sibanyoni and Others* [2022] ZASCA 40 per Carelse JA (at the time) at para 12 as to the appropriateness of mediation in ESTA cases. This case was decided prior to the April 2024 ESTA amendments and the introduction of the Land Court Act.

237. If regard is had to that these cases and that part of the Preamble to ESTA which reads:

> " *And whereas it is desirable... 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, landowners, and government bodies*" (emphasis added)

then it appears that meaningful engagement (as contemplated by s 8(1)(e)), if not actual mediation, should commence as early as possible between all three of the parties so mentioned and not left to the post- termination of residence phase.

[64] It will be recalled that the trigger which entitled the occupier in *Blue Moonlight* to a structural order was that the City of Johannesburg housing policies failed to cater for the situation of PIE evictees from private land.

238. In relation to what ESTA identifies as suitable alternative accommodation, one must have regard to the definition contained in s 1. It is unlikely that temporary emergency shelter satisfies these requirements, at least in the medium to long term. The section defines "*suitable alternative accommodation*" to mean:

> "*alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to—*
>
> *(a) the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services;*
> *(b) their joint earning abilities; and*
>
> *(c) the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active;*

239. The definition does not have the qualification that it must also have regard to the available resources of the State. Nonetheless, as stated earlier our case law implies this qualification by reference to the provisions of s 26 (see for instance *Baron*). This may also be necessary considering that the expectations in relation to the attainment of the second and third-generation rights set out in the Bill of Rights may have appeared more readily attainable at the time it became law in 1997. The outstanding question therefore remains: "*For how long can a temporary interim solution for housing ESTA occupiers withstand scrutiny before falling foul of the definition contained in the statute itself?*"

LEGAL REPRESENTATIVES

240. I do not believe that this judgment could have taken so many of the factors that have been raised into account without the dedication of counsel, their attorneys and the assistance they gave the court in their comprehensive heads of argument and submissions made in open court.

Each has in their own way brought a perspective which required consideration and analysis. In the case of Ms Davis, her attorney and their client, they provided the court with a comprehensive understanding of the involvement of departments within the Western Cape government and in particular the workings of its Department of Land Reform and the quite distinct functioning of its Department of Human Settlements and the necessity for its involvement in any possible development of land processes for ESTA evictees.

STRUCTURAL ORDERS

241. In *Propshaft Master (Pty) Ltd and others v Ekurhuleni Municipality and others* 2018 (2) SA 555 (GJ) at para 10 the court observed that a structural interdict consists of some five elements. It continued

> " *First the court declares the respects in which the violators conduct falls short of its constitutional obligations, second the court orders the violator to comply with its constitutional obligations, third the court orders the violator to produce a report within a specified period of time setting out the steps it has taken, 4th the applicant is afforded an opportunity to respond to the report and finally the matter is enrolled for a hearing and, if satisfactory, through report is made an order of court. In Myburgh N.O. and others v Burlec Electrical Distribution Pty Ltd and others Roelofse AJ observed that this passage may not have been intended to be prescriptive (at para 6).*

242. At this stage the court is minded to facilitate a resolution by reference to ascertaining the availability of alternative Municipal or other State-owned land, to introduce the Department of Human Settlement into the process and, if need be, on application by one or other of the parties to obtain further information with regard to the farming activities and the historic nature of the occupation of the ESTA respondents and their families.

243. I do not believe that at this stage such orders and directions would offend the separation of powers or result in a structural order which requires justification in the respects identified in *Propshaft*. Moreover the involvement of the Provincial Department of Land Reform in the form of the affidavit provided by Mr. Booysen renders it premature at this stage to devise a structural order of the nature contemplated in *Propshaft*.

APPROPRIATE ORDER

244. The following order is therefore made:

In of each the cases LCC 20R/2022, LCC09R/2023 and LCC 14R/2023:

1. *In terms of section 19(3)(b) of the Extension of Security of Tenure Act, 62 of 1997 ("ESTA") the Magistrates' Court order for eviction are set aside in whole;*

2. *In terms of section 19(3) (c) of ESTA the Magistrates' Court order for eviction is substituted in whole for the following:*

    a. *By 15 November 2024 the respondent Municipality shall provide written details in an affidavit deposed to by a duly authorised official of all municipal owned land and, if known any and all State-owned*

land within the Municipality, which is undeveloped or vacant and to identify whether any development plans exist for any such property;

b. *By 15 November 2024 the Provincial Director of the Department of Agriculture, Land Reform and Rural Development (the "PD; Land Reform") shall provide written details in an affidavit deposed to by a duly authorised official of all land in the Western Cape which is owned by the Western Cape Government and, if known any and all State owned land within the Western Cape, which is undeveloped or vacant and to identify whether any development plans exist for any such property;*

c. *By 15 November 2024 each adult ESTA respondent shall provide written details in an affidavit of such persons:*

    i. *Gross and net monthly salary and wages together with copies of the last three pay slips;*
    ii. *Nature of employment and whether it is permanent, seasonal or temporary. and if so for how long;*
    iii. *Other available financial resources including any savings or investments;*
    iv. *Assets;*
    v. *Liabilities;*

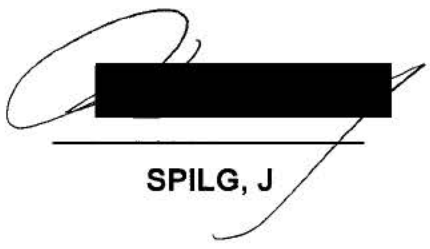
3. *By 29 November 2024 the parties shall present written submissions to the Land Court identifying any land, or part of land, they contend can be earmarked for acquisition on behalf of the ESTA respondents under section 4 of ESTA;*

4. *By 14 October 2024 the parties shall indicate to the Land Court in writing whether they are prepared to abide by the decision of the Full Court or any appeal thereafter in respect of whether the amendments to the Land Court Act and ESTA in relation to incomplete proceedings will bind them or whether they wish to be parties to those proceedings*

5. *A pretrial conference and hearing in respect of the joinder referred to in the next subparagraph will be held virtually on 4 December 2024 at 09.30 at which the court will deal inter alia with when the parties, including the Provincial Director of the Department of Human Settlements are to meet to attempt to resolve the matter by negotiation.*

6. *The Provincial Director of the Department of Human Settlements is to show cause at 09.30 on 4 December 2024 at the virtual hearing as to why it should be joined as a party to each of the proceedings. If such person or duly authorised representative fails to attend, then he or she will be ipso facto joined as a respondent.*

7. *Each party is to pay its own costs*



SPILG, J

DATE OF JUDGMENT: 30 September to 1 October 2024

FOR APPLICANT LANDOWNERS
(Glen Oaks) Mr. Bester

	Bester Attorneys, Worcester
(Ideal Fruits and Reuvers Plase):	Adv A Montzinger Otto Theron Attorneys Inc
FOR RESPONDENT OCCUPIERS:	Ms AG Julius Legal Aid South Africa
FOR BREEDE VALLEY MUNICIPALITY:	Adv C Carolissen and Mr F Davids HSG Attorneys Inc
FOR THEEWATERSKLOOF MUNICIPALITY:	Adv GJ Gagiano and Mr N Smith Enderstein Malumbete Inc
DIRECTOR-GENERAL and DEPARTMENT OF AGRICULTURE: LAND REFORM & RURAL DEVELOPMENT	Adv ML Davis State Attorney; Cape Town