THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 20816/2014

In the matter between:

ABRAHAM SNYERS	**FIRST APPELLANT**
KATRINA SNYERS	**SECOND APPELLANT**

and

MGRO PROPERTIES (PTY) LTD	**FIRST RESPONDENT**
MOUTON CITRUS (PTY) LTD	**SECOND RESPONDENT**

Neutral citation: *Snyers v Mgro Properties (Pty) Ltd* (20816/2014) ZASCA 151 (30 September 2016)

Coram: Mhlantla, Leach, Willis, Zondi and Mathopo JJA

Heard: 19 November 2015

Delivered: 30 September 2016

Summary: Land – Extension of Security of Tenure Act 62 of 1997 (ESTA) – notice given of eviction in terms of s 8 of ESTA not valid if given before CCMA makes determination on labour dispute – failure to satisfy the requirements for a valid notice of eviction in respect of an occupier previously employed by landowner – notice properly given to spouse – right to family life in terms of s 6(2)(d) of ESTA prevents eviction of one spouse while the other remains.

ORDER

On appeal from: Land Claims Court, Cape Town (Meer J sitting as court of first instance):

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and is substituted with the following:
'The application is dismissed with costs.'

JUDGMENT

Mathopo JA (Mhlantla, Leach, Willis and Zondi JJA concurring):

[1] This appeal concerns the eviction, under the Extension of Security of Tenure Act 62 of 1997 (ESTA), of a farm worker and his family and whether the referral of a labour dispute between the first appellant and the employer (first respondent) was still pending when the employer issued and served a notice to vacate upon him in terms of s 8(3) of ESTA. The Land Claims Court (Meer J) held that there was no proper dispute pending before the Commission for Conciliation, Mediation and Arbitration (CCMA) and dismissed the appellant's appeal. This appeal is with the leave of this court. At the hearing of this matter counsel indicated to us that a similar matter likely to affect our judgment, *Klaase & another v Van der Merwe NO & others,* was pending in the Constitutional Court. Consequently we reserved judgment to await the outcome of that matter. The Constitutional Court handed its judgment in *Klaase*[1] on 14 July 2016 and this judgment has been prepared with the benefit of its reasoning.

[1] *Klaase & another v Van der Merwe NO & others* 2016 ZACC 17.

Background facts

[2] The facts giving rise to this appeal are as follows: During November 1981 the first appellant, Mr Abraham Snyers (Snyers), commenced employment as a farm labourer at Hexrivier Citrus for the previous owners of farm Houtkaprug, Citrusdal in the Western Cape (the farm) which produces citrus fruits and tea. Snyers was subsequently promoted to the position of senior foreman ('senior spanleier') in terms of a written contract which he entered into during February 1982. During 2000, he was transferred to the farm where he acquired tenancy as a housing allowance stemming from his employment. His contract of employment stipulated that his tenancy on the farm was conditional to his continued employment and thus would terminate concurrently and automatically with his employment. Snyers' wife, Mrs Katrina Snyers (the second appellant) and their two children – one of whom is still in school – reside with him on the farm through his tenancy.

[3] On 2 November 2010, Mgro Properties (Pty) Ltd and Mouton Citrus (Pty) Ltd, the first and second respondents respectively, represented by Mr Johan Abraham Mouton (Mouton), acquired ownership of the farm and concluded a new employment contract with Snyers on 9 November 2010 in similar terms to those Snyers had concluded with his previous employer. It was a term of their agreement that it would be terminated by either party on four weeks' notice. Allied to this agreement was the housing agreement, which was inextricably linked to the employment agreement in the sense that if the employment contract terminates the housing agreement would likewise be terminated. In that case Snyers and his family would be required to vacate the farm on two months' notice being given by the respondents (the owners).

[4] About a month later, on 17 December 2010, Snyers tendered his resignation to the respondents in which he indicated that he would work until 17 January 2011. In it, he cited inter alia: the respondents' management style and human relations on the farm as his reasons for resigning. In essence the letter created the impression that Snyers had felt in the circumstances of his work, that he could no longer contribute

meaningfully to his employment considering his many years of experience. The respondents accepted his resignation.

[5] Four weeks later, on 13 January 2011, Snyers ceased working on the farm. On the same day he referred a constructive dismissal dispute to the CCMA. The referral form indicates that it was signed by Snyers at Citrusdal on 13 January 2011 and it mentions that same date as the date upon which the dispute arose.[2] However, quite contrary to the aforementioned reasons given for his resignation, the nub of his referral was that he had sought his pension proceeds in respect of his previous employment at Hexrivier and he alleged that he had been induced by the respondents who had told him that he could not access his pension proceeds unless he resigned. In the course of his long service on the farm, beginning from Hexriver, Snyers had accrued a substantial pension over the course of 29 years before the respondents became the owners of the farm. His pension was carried over from his former employer. Rightly or wrongly he entertained an apprehension that he might not get his pension moneys. In the referral form to the CCMA, Snyers described the dispute as follows:

'Ons het gewerk vir Hexrivier Sitrus. Plaas is oorgeneem deur Mouton Citrus. Ons moes ons pensioenskema fondse ontvang het en was eerstens genome ons moet dit kry, maar is later deur Mouton Citrus ingelig dat ons eers moet bedank voor ons ons geld kan kry.'[3]

He went on as follows in relation to the internal grievance procedure he had taken before making the referral to the CCMA:

'Ek het eers met Hexrivier gepraat wat genoem het [dat] ons kan ons pensioenskema geld kry omdat die twee polisse van mekaar verskil. Die eienaar Ouas Mouton het aan ons genoem dat ons ons geld kan kry asook die kontak person van Verso. Ons is later deur Hennie die personeel beampte asook die finansiele bestuurder meegedeel dat ons nie ons geld kon kry nie.

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[2] As shall be discussed more in detail later in the judgment, in terms of s 190(1) of the Labour Relations Act 66 of 1995, the date of dismissal is the earlier of either the date on which the contract of employment terminated (subsec (1)*(a)*); or the date on which the employee left the service of the employer (subsec (1)*(b)*).

[3] Loosely translated this stated: 'We worked for Hexriver Citrus. The farm was taken over by Mouton Citrus. We had to receive our pension scheme funds and were first told that we would receive them, but later were informed by Mouton Citrus that we had to first resign before we could receive our money.' (My translation)

Ek het hul vele male geraadpleeg en het hula an my genoem dat ek eers moet bedank voor ek die voordeel van die polis kon kry.'[4]

On any additional special features which the CCMA had to be made aware of, the following was stated:

'Ek het my pensioenskema geld nodig gehad. Die bestuurder en werkgewer het geweet dat ek enigiets sou doen om net my geld in die hande te kon kry. Ek gereeld deur hul kantoor toe geroep oor die aangeleentheid waar hul van my verwag het om te besluit. Hul motief was dus van die begin af dat ek moet bedank om vir die pensioen te kon kwalifiseer dan sou hul nie verder werk vir my meer het nie. Hul motief was dus om van my ontslae te raak en het hul misbruik gemaak van die pensioenskema aangeleentheid.'[5]

Finally, in relation to the outcome sought from the CCMA, the following was stated in the referral form:

'Mouton Citrus se personeel beampte en Henk du Plessis het my herhaalde kere kantoor toe geroep en gevra of ek wil bedank. Ek wou nie bedank nie, maar wou net my pensioenskema geld het. Ek het nie bedank om werk te verloor nie ek het bedank omdat ek aanhoudend hul ingelig was dat ek moet besluit wat ek wil doen. Ek eis dus my werk terug.'[6]

[6] On 7 March 2011 the respondents, purporting to act in terms of s 8(3) of ESTA, served a notice on Snyers giving him a period of two months within which to vacate the farm. Under ESTA, an owner's right to apply for eviction is dependent on a number of

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[4] Which may be translated thus: 'I first spoke with Hexriver which mentioned that we could get our pension scheme money because the two policies differed. The owner Ouas Mouton mentioned to us: that we could get our money; as well as the contact person of Verso. We were later told by Hennie, the human resources officer and financial manager, that we could not get our money. I have consulted them many times and they called me in to inform me that I have to resign before I could get the pension proceeds.' (My translation.)

[5] Which may be translated as follows: 'I needed my pension scheme money. The employer knew that I would do just about anything just so that I could get my money. I was often called to their office on the matter where they expected me to decide. Their intention from the beginning was that I should resign in order to qualify to have my pension and then they would no longer have me working for them anymore. Their purpose was thus to get rid of me through their manipulation of the pension scheme issue.' (My translation.)

[6] Which may be translated: 'Mouton Citrus human resources officer and Henk du Plessis called me repeatedly to the office and asked if I would like to resign. I did not want to resign, but only wanted my pension scheme money. I have not resigned to squander my job, I resigned because I was constantly informed that I had to decide whether I wanted to do so. I therefore claim back my work.' (My translation.)

prerequisites, one of which is that the right of occupation should be validly terminated in terms of s 8.[7] Sections 8(2) and (3) of ESTA provide the following: [8]

'The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act [66 of 1996].

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*.' (My emphasis.)

[7] The case made out in the CCMA referral form was thus that Snyers sought his pension proceeds in respect of his previous employment at Hexrivier. He had initially been advised that he would receive his pension proceeds in that regard, but he was later informed by the respondents to first resign in order to receive his pension moneys. The tenor of his referral suggests that the real reason for his resignation was that he was told repeatedly by the respondents that this was the only way through which he would access his pension.

[8] When the aforementioned notice to vacate was served on him as mentioned in para 6 above, Snyers refused to vacate the premises contending that he was awaiting the outcome of the dispute which he had referred to the CCMA.

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[7] Section 3(1) of ESTA provides that: 'Consent to an occupier to reside on or use land shall only be terminated in accordance with the provisions of section 8.' See also

[8] Section 8 comprehensively sets out the requirements for termination of an occupier's right of residence. In subsec (1) the following is inter alia provided: '[s]ubject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to—
(a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
(b) the conduct of the parties giving rise to the termination;
(c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
(d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and
(e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.'

[9] On 18 March 2011, when Snyers enquired from the CCMA about the progress of his referral, he was informed that he had to apply for condonation as his referral had been made out of time. However, in terms of the referral forms extensively quoted above, Snyers had shown that the dispute had arisen on 13 January 2011, the same day on which he had made the referral. This was thus the first time he had ever learned of any delay in his referral. The relevant condonation application forms were then sent to him and he was told to complete and send them back within two weeks. It is not clear on what basis Snyers' referral was thought to have been out of time. Section 191(1)*(b)*(i) of the Labour Relations Act 66 of 1996 (LRA) provides that an aggrieved employee should refer a dispute relating to unfair dismissal to the CCMA or bargaining council having jurisdiction within 30 days;[9] and s 190(1) of the LRA stipulates that the date of dismissal is the earlier of either the date on which the contract of employment terminated, or the date on which the employee left the service of the employer.[10] It is common cause, in this instance that without prejudging his labour dispute, Snyers' contract of employment was terminated on 17 January 2011 as a result of his resignation letter. In consequence that he had time until 17 February 2011 within which he could refer his dispute to the CCMA. Nevertheless, on the advice he had been given, Snyers completed the condonation forms in which he stated that he only learnt upon following up on his referral, that he had been 53 days late in making it. He further stated in the condonation application that the reason for his unfair dismissal were his enquiries relating to his pension. Quite clearly, given the fact that the referral was made on 13 January 2011, there was no need to file a condonation application. It would seem to me

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[9] Section 191(1) of the LRA provides in relevant part:
'*(a)* If there is a dispute about the fairness of a dismissal . . . the dismissed employee . . . may refer the dispute in writing to—
(i) a [bargaining] council, if the parties to the dispute fall within the registered scope of that council; or
(ii) the [CCMA], if no council has jurisdiction.
(b) A referral in terms of paragraph *(a)* must be made within—
(i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal'.

[10] Section 190 of the LRA provides:
'**Date of dismissal**
(1) The date of dismissal is the earlier of-
(a) the date on which the contract of employment terminated; or
(b) the date on which the employee left the service of the employer.'

that Snyers had no option but to accede to the advice given to him by the CCMA officer concerned. As to why he was so advised, one can only speculate.

[10] The respondents, yet again, served a notice to vacate on Snyers during May 2011. He still persisted with his defence that the employer could not evict him while the dispute before the CCMA was still pending. I shall revert to the validity of the notices to vacate the premises later in the judgment.

Litigation background

[11] On 1 June 2011 the CCMA gave an order in respect of which it refused Snyers condonation and ruled that it consequently lacked jurisdiction to entertain the dispute which he had referred to it. Despite the order of the CCMA, Snyers persisted in his refusal to vacate the farm and on 31 October 2011, the respondents further caused a notice to vacate the farm to be served on Mrs Snyers. Although she had previously been employed as a seasonal labourer on the farm during the period before the respondents took ownership, she (together with their children) had been occupying the farm through Snyers.[11] The respondents thereafter proceeded with prescribed steps including giving notice to the relevant local authority, the Cederberg Municipality, Citrusdal, in terms of ESTA in order to evict Snyers and his family from the farm. The respondents brought an eviction application in the Land Claims Court, Cape Town which was served by the sheriff personally on both Snyers and Mrs Snyers on 31 January 2013.

[12] In the court a quo, the case advanced on behalf of Snyers was that he was forced to resign under the pretext that he would receive his pension money. As a result of that promise, so it was contended, he was constructively dismissed by the respondents. Mouton, on behalf of the respondents, disputed Snyers' version. He stated that it had been explained to Snyers that he would only be entitled to receive his pension upon his death, resignation or dismissal. Mouton emphatically stated that Snyers resigned of his own free will as was evidenced by the reasons Snyers had given

[11] See para 22 below on Mrs Snyers' right to reside on the farm.

in his letter of resignation. But an examination of that letter indicates that the factors alluded to by Snyers and its tone of exasperation[12] were precursors leading up to circumstances related to his allegations of constructive dismissal. Although nothing is mentioned in his resignation letter itself about his being forced to resign, such allegations were apparent in the CCMA referral and condonation application. The court a quo (Meer J) accepted the version of Mouton on the probabilities and held that because a dispute was referred to the CCMA late on 18 January 2011, there was no dispute pending when the first notice to vacate and terminating the appellants' right of residence was given on 7 March 2011. The LCC then held that both notices were, in fact, valid.

[13] Before us, it was contended on behalf of the appellants that the Land Claims Court (LCC) erred when it granted the order evicting Snyers because the notices to vacate which had been served on him in terms of s 9(2)*(b)* of ESTA were invalid as they preceded the termination of his right of residence in terms of s 8. The latter would only take effect, so it was argued, when his labour dispute against the respondents was determined by the CCMA on 1 June 2011. In support of his argument, counsel urged upon us to accept that the referral was sent to the CCMA on 13 January 2011. Once again, it was contended that the LCC erred when it held that the application was out of time. We were urged to accept that, prior to determination of the condonation application, any notice served during that period is defective and invalid and further that no fault could be laid at the door of Snyers if the CCMA misplaced his original referral form, which had been sent timeously to them.

[14] The nub of the appellant's case is that he was forced to resign under the pretext that he would receive his pension money. As a result of that pressure or promise he contends that he was constructively dismissed by the respondents and that as the

[12] The resignation letter scribed in Afrikaans mentions the following as the reasons for Snyers' resignation: 'Management style – I do not know with whom I work; Communication with people leaves much to be desired; Unidirectional management – the team leader is not given an opportunity to select and lead, he must just accept your unit and is treated like a mere worker on Mouton Citrus. New employees are regarded as nothing by the management. There is no sense in submitting employees' ratio. There are just a lot of reasons, but in the circumstances I would just like to say that on Friday 17 December I am resigning. I shall thus work from 17 December 2010 to 17 January 2011.' (My translation.)

dispute was still pending before the CCMA, the respondents' notices of 7 March 2011 and May 2011 were invalid in terms of s 9(2)*(b)* of ESTA.

[15] The respondents contended that Snyers resigned of his own accord and disputed the fact that he was forced to resign. The contention continued that the employer was not aware nor advised of any pending dispute before the CCMA and thus that there had been no dispute pending in terms of the LRA when the notices were served. This submission found favour with the LCC, which held that it was incumbent upon Snyers to make out a case that there was a dispute pending to bring s 8(3) into feature. The LCC held that on the probabilities, Snyers had failed to discharge the onus that there was a timeous referral of the dispute to the Labour Court.

The approach to ESTA

[16] As mentioned at the outset, we held back from delivering this judgment pending Constitutional Court judgment in *Klaase* which is now to hand. At para 51 of that judgment the Constitutional Court said the following on the interpretative approach to be adopted in relation to ESTA:

'As this Court said in *Goedgelegen* [2007 (6) SA 199; [2007] ZACC 12 (CC)], ESTA is "remedial legislation umbilically linked to the Constitution". It seeks to protect people, like Mrs Klaase, whose tenure to land is insecure. In construing the provisions of ESTA a "blinkered peering" at the language in the legislation must be avoided. An approach that will "afford [occupiers] the fullest possible protection of their constitutional guarantees" must be adopted. This Court, in *Goedgelegen*, per Moseneke DCJ, remarked:

"[W]e must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole, including its underlying values."' (Footnotes omitted.)

On this same score, in *Molusi & others v Voges NO & others* [2016] ZACC 6; 2016 (3) SA 370 (CC), the Constitutional Court held the following (para 39):

'The pre-reform-era land law reflected the common-law based view that existing land rights should be entrenched and protected against unlawful intrusions. The land reform legislation – ESTA in this case – changed that view. It highlights the reformist view that the common law principles and practices of land law, that entrench unfair patterns of social domination and marginalisation of vulnerable occupiers in eviction cases, need to change. ESTA requires that the two opposing interests of the landowner and the occupier need to be taken into account before an order for eviction is granted. On the one hand, there is the traditional real right inherent in ownership reserving exclusive use and protection of property by the landowner. On the other, there is the genuine despair of our people who are in dire need of accommodation. Courts are obliged to balance these interests. A court making an order for eviction must ensure that *justice and equity* prevail in relation to all concerned. It does so by having regard to the considerations specified in section 8 read with section 9 as well as sections 10 and 11 which make it clear that fairness plays an important role.' (My emphasis; footnote omitted.)

[17] In *Molusi*, the Constitutional Court when interpreting what is 'just and equitable' in terms of s 8 of ESTA held as follows in para 31:

'The emphasis on the phrase "just and equitable" in sections 8 and 11 of ESTA, to borrow the words used by Sachs J in *PE Municipality* [*v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC)], "underlines the central philosophical and strategic objective of [the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)]". The Court said that the phrase makes it plain that the criteria to be applied are not purely of a technical kind that flow ordinarily from the provisions of land law. It remarked:

"The emphasis on justice and equity underlines the central philosophical and strategic objective of PIE. Rather than envisage the foundational values of the rule of law and the achievement of equality as being distinct from and in tension with each other, PIE treats these values as interactive, complementary and mutually reinforcing. . . .

The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process."

These remarks were made in a case relating to PIE but they are equally apposite in this case.' (Footnotes omitted.)

The validity of the notices to vacate

[18] In my view, when the respondents served the notice to vacate on Snyers, his labour dispute in the CCMA had not yet been determined. That contravened the provisions of s 8(3) requiring that where there is a labour dispute relating to the termination of the occupier's right of residence, the termination only takes effect when such dispute is determined in accordance with the LRA. In *Karabo & others v Kok & others* 1998 (4) SA 1014 (LCC) para 14, the LCC, in a judgment by Gildenhuys J (Moloto J concurring), correctly held that:

'The right of residence of a person which arises solely from an employment agreement, may be terminated if the person resigns from his or her employment or is dismissed in accordance with the provisions of the Labour Relations Act. Any dispute over whether a person's employment has been lawfully terminated must be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect only when that dispute has been determined in accordance with that Act.' (Footnotes omitted.)

In para 15, the LCC went on to say:

'In this case, there is a dispute over the validity of the termination of the employment of the labourers, and this dispute is being dealt with under the provisions of the Labour Relations Act. Because the dispute is still pending, the termination of the employment for purposes of the Tenure Act [ESTA] has not yet taken effect.'

And in para 22, the LCC held:

'It was submitted on behalf of the [farm owners] that the phrase "dispute over whether an occupier's employment has been terminated as contemplated in [subsec] (2)" refers to a dispute on whether a termination actually occurred, and not to a dispute over the lawfulness of the termination. I do not agree with the submission. Subsection (3) refers back to [subsec] (2), which provides that the right of residence of an occupier may be terminated if he or she resigns or is dismissed in accordance with the provisions of the Labour Relations Act. The termination of the occupier's employment as envisaged in [subsec] (3) must, under the provisions of [subsec] (2), be in accordance with the provisions of the Labour Relations Act. This means that the validity of the termination is at issue. It is so, as pointed out on behalf of the [farm owners], that such an interpretation would oblige the owner of land to continue housing dismissed employees while a dispute on the validity of the dismissal is pending. Such a dispute may take months to resolve. The interpretation I have given to s[ubsec]s (2) and (3) is, in my view, the only possible interpretation. I cannot deviate from it because the consequences are

alleged to be unfair. The fairness or otherwise of a legal provision is for Parliament to decide. I should point out, however, that in suitable circumstances, the owner or person in charge may be entitled to relief under s 15 of the Tenure Act.'[13]

[19] Determination of the disputed labour matter is thus clearly a pre-condition for terminating the occupier's right of residence under ESTA. Given the objects of ESTA stated in the above dicta of the Constitutional Court, it necessarily follows where an occupier's tenancy is subsidiary to his or her employment on a farm, that where a dismissal is disputed, the dispute over its fairness must be finally determined before the subsidiary tenancy is terminated. Accordingly, ESTA does not countenance notice given in terms of s 8 while a labour dispute remains undetermined. The validity of the notice so given is vitiated by the lack of determination of the labour matter. For these reasons, and as s 9(2)*(a)* of ESTA makes the granting by a court of an eviction order subject to the prior termination of the right of residence in terms of s 8,[14] the notices given by the respondents to Snyers were invalid and consequently vitiated the entire eviction proceedings against him.

[20] As in the instant case, *Klaase* involved the eviction under ESTA of a farm employee and his family from a farm where the employee had obtained tenancy on the farm by virtue of his employment. The important difference between this case and

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[13] Section 15 of ESTA provides:
'**Urgent proceedings for eviction**
(1) Notwithstanding any other provision of this Act, the owner or person in charge may make urgent application for the removal of any occupier from land pending the outcome of proceedings for a final order, and the court may grant an order for the removal of that occupier if it is satisfied that—
(a) there is a real and imminent danger of substantial injury or damage to any person or property if the occupier is not forthwith removed from the land;
(b) there is no other effective remedy available;
(c) the likely hardship to the owner or any other affected person if an order for removal is not granted, exceeds the likely hardship to the occupier against whom the order is sought, if an order for removal is granted; and
(d) adequate arrangements have been made for the reinstatement of any person evicted if the final order is not granted.
(2) The owner or person in charge shall beforehand give reasonable notice of any application in terms of this section to the municipality in whose area of jurisdiction the land in question is situated, and to the head of the relevant provincial office of the Department of Rural Development and Land Reform for his or her information.'

[14] Section 9(2)*(a)* of ESTA provides that a 'court may make an order for the eviction of an occupier if the occupier's right of residence has been terminated in terms of section 8.'

Klaase however – and on which the latter case turned – is that in *Klaase* the wife of the farm employee had not been joined in the eviction proceedings and the court held that further proceedings should be suspended, including the execution of the eviction order, pending the determination of Mrs Klaase's rights in terms of ESTA; and that proceedings in her case be consolidated with the eviction proceedings against her husband.[15]

[21] The majority in *Klaase* (per Matojane AJ with whom Moseneke DCJ, Cameron, Madlanga, Nkabinde JJ and Wallis AJ concurred) held inter alia that the spouse of the farm labourer in similar circumstances to those of Mrs Snyers in this case had to be joined in the proceedings because she had a 'direct and substantial interest in the litigation' in that she had continuously and openly lived on the farm for at least 30 years with the farm owner's knowledge. The majority thus held that the LCC had failed to have regard to the presumption in s 3(4) of ESTA, which applied in Mrs Klaase's favour (para 46);[16] and that Mrs Klaase should have accordingly been joined in the eviction proceedings against her husband (para 47). It was therefore held that she had made out a case that she was an occupier in terms of ESTA and thus entitled to the protection afforded by the Act (para 65). Consequently, the majority upheld Mrs Klaase's appeal. However, it dismissed Mr Klaase's appeal and refused his application for the suspension of the execution of the eviction order against him pending the determination of Mrs Klaase's rights (para 68).

[22] The minority (per Zondo J with Mogoeng CJ and Van der Westhuizen J concurring), on the other hand, held that in a situation where family members occupied land 'under' or 'through' someone else; in event of the valid termination of the right of the person under or through whom they occupy the land then the family members' right to occupy also comes to an end (paras 84-86). For purposes of this judgment, both the

[15] *Klaase* para 15.

[16] Compare *Zorgvliet Farm and Estate (Edms) Bpk v Alberts en 'n ander* [2001] 1 All SA 62 (LCC) para 14, where Gildenhuys AJ had held: 'Die tweede respondent woon in die huis uit hoofde van haar familieverwantskap met die eerste respondent, en haar bewoningsreg hoef nie afsonderlik beëindig te word nie.' Which essentially means that an occupier who lives together in a family relationship with a farm labourer who has tenancy solely by virtue of employment on the farm need not have their right of occupancy be terminated separately under s 8. This accords with the minority judgment in *Klaase*.

majority and minority judgments in *Klaase* acknowledge,[17] as does ESTA (for example, in the definition of 'occupier' in s 1(1) and s 6(2) of ESTA),[18] that there are two types of occupiers: (a) occupiers whose tenancy arises solely from their employment; and (b) those who have the 'right in law' to reside on the land other than through employment.[19] For those falling in the latter broad category, an occupier's right of occupation can be self-standing and independent – arising from the presumptions created by s 3 in which case the occupier would be presumed to have the consent of the owner and thus enjoy the full breadth of ESTA's protection; Mrs Klaase was found by the majority in *Klaase* to have fallen in this category.[20] The occupier's right can also stem from someone else's right of occupation which nevertheless falls short of the presumptions created in s 3. Thus while full protection under ESTA would not extend to the secondary occupier whose right stems from another person (the primary occupier), ESTA would afford full protection to the primary occupier under or through whom the secondary occupier at least procedurally would be afforded some protection.[21]

Mrs Snyers' right to reside on the farm

[23] In relation to Mrs Snyers' situation it should be noted that the Constitutional Court in *Klaase* referred with approval to its earlier decision in *Hattingh & others v Juta* [2013] ZACC; 2013 (3) SA 275 (CC)[22] in which it affirmed the right to family life under s 6(2)*(d)* of ESTA and held it to be undesirable to separate families. On that basis alone despite Mrs Snyers having been given proper notice terminating her right to occupy the farm in terms of s 8, due to the irregular eviction proceedings brought against Snyers, if an application for eviction were allowed against her, while it is refused against her

[17] Paragraph 62-64 of the majority judgment and paras 84-87 in the minority judgment in *Klaase*.
[18] Section 1(1) of ESTA defines an 'occupier' as a person residing on land which belongs to another person, with the latter person's 'consent or another right in law to do so'.
[19] See the presumptions created by ESTA under s 3; compare with s 8(2). See also *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC); and *Venter NO v Claasen en andere* 2001 (1) SA 720 (LCC) para 11.
[20] Paragraphs 49-66. See also *Conradie v Hanekom* 1999 (4) SA 491 (LCC) para 20.
[21] See s 12(1), (2) and (4) of ESTA and *Ntai & others v Vereeniging Town Council & another* 1953 (4) SA 579 (A) at 584-590. See the discussion of the meaning of "consent" by Juanita M Pienaar & Koos Geyser '"Occupier" for purposes of the Extension of Security of Tenure Act: The plight of female spouses and widows' (2010) 73 *THRHR* 248.
[22] Paragraphs 62. See also para 121 of the minority judgment.

husband: the result would be to divide their family. In *Hattingh*, Zondo J held as follows for the unanimous Court (paras 35 to 37):

'it seems to me that the reference to "family life" in section 6(2)*(d)* suggests that the purpose of the conferment of this right on occupiers was to ensure that, despite living on other people's land, persons falling within this vulnerable section of our society would be able to live a life that is as close as possible to the kind of life that they would lead if they lived on their own land. This means as normal a family life as possible, having regard to the landowner's rights. Most people who fall into this section of our society are people who, under apartheid, were denied certain rights by landowners including the right to live a normal family life with their family. In this regard, I note that the preamble to ESTA does suggest that ESTA seeks to deal with a situation that "is in part the result of past discriminatory laws and practices". The object was to give this section of our society human dignity which they were denied under apartheid.

Although I have said that the purpose of section 6(2)*(d)* was to ensure that, as far as possible, an occupier could enjoy a life that is as much of family life as is possible, the extent of that family life in any specific set of facts will depend upon striking a fair balance between enabling the occupier to enjoy family life and enabling the owner of the land to also enjoy his rights as owner of the land. In this regard I also note that the preamble to ESTA includes a statement that it is desirable that "the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners".

Living a family life may mean the occupier living with his or her spouse or partner only or living with one or more of his or her children or with one or more members of his or her extended family, depending upon what the result is when one balances the occupier's living with any one or more of those persons with what the owner of the land is also entitled to. If, in a particular case, the balancing produces a result that is unjust and inequitable to the owner of the land, the occupier's right to family life may be appropriately limited. *If, however, the occupier were to live with his or her spouse or partner and with one, two or more of his children or other members of the extended family and this would not result in any injustice or unfairness and inequity to the owner of the land, the occupier would be entitled to live with those members of his or her family. The purpose of section 6(2)(d) is to enable occupiers to live as full a family life as possible including engaging in cultural activities or practices, as long as that does not offend the equitable balance of the occupier's rights with the rights of the landowner as required by section 6(2)(d).*' (My emphasis.)

In view of the authority of *Hattingh*, despite Mrs Snyers' notice of termination of her right to reside on the farm having been validly given, it would infringe on Snyers' right to

family life and it would be undesirable to allow her eviction while Snyers remains on the farm pending the determination of his labour dispute.

Order

[24] In the result, the following order is made:

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and is substituted with the following:

'The application is dismissed with costs.'

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R Mathopo
Judge of Appeal

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