THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 1008/13

In the matter between:

SOPHY MOLUSI	**FIRST APPELLANT**
DAVID MAMAGALO	**SECOND APPELLANT**
ISAAC SELOLWANE	**THIRD APPELLANT**
K L TWARISANG	**FOURTH APPELLANT**
JOSEPH RAMOKANE	**FIFTH APPELLANT**
FRANS MOKANSI	**SIXTH APPELLANT**

and

FRANCOIS DANIËL JAMES VOGES NO	**FIRST RESPONDENT**
FREDERIKA MARIA CHRISTINA VOGES NO	**SECOND RESPONDENT**
THE HEAD OF THE NORTH WEST PROVINCIAL OFFICE OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	**THIRD RESPONDENT**
THE RUSTENBURG LOCAL MUNICIPALITY	**FOURTH RESPONDENT**

Neutral citation: *Molusi v Voges NO* (1008/13) [2015] ZASCA 64 (08 May 2015)

Coram: Mpati P, Ponnan, Bosielo, Shongwe and Saldulker JJA

Heard: 20 February 2015

Delivered: 08 May 2015

Summary: Land – eviction of peri-urban occupiers from leased property – one ground of termination of lease relied on in notice of termination and founding affidavit no bar to owner relying on common law ground of ownership of leased property when ownership alleged in founding papers – reliance on common law ground of ownership not constituting new cause of action – interpretation of relevant provisions of Extension of Security of Tenure Act 62 of 1997.

ORDER

On appeal from: Land Claims Court, Randburg (Sidlova AJ sitting as court of first instance):

1 The appeal is dismissed.

2 The appellants and all other persons occupying under or through them are ordered to vacate Portion 81 (a portion of Portion 65) of the farm Boschfontein 330-JQ, Rustenburg (the farm), on or before 7 June 2015.

3 Failing compliance with the order in 2 the Sheriff for the district of Rustenburg is authorised to evict the appellants and all other persons occupying under or through them from the farm 10 days after the date contemplated in 2 above.

JUDGMENT

Shongwe JA (Bosielo JA concurred)

[1] The question of land, the right of ownership and the right of occupiers has reared its ugly head once again. Clearly this is a thorny, sensitive and emotive issue particularly in the context of the spatial development of the then apartheid South African government. It is a painful but a known fact that the property laws of the apartheid regime were geared towards denying Blacks, Africans in particular any form of secure tenure to land. Amongst these obnoxious laws were the Group Areas Act 41 of 1950 and the Prevention of Illegal Squatting Act 52 of 1951 (PISA). It is this PISA which resulted in many people, Africans in particular being arbitrarily thrown into the wilderness and

rendered homeless. Driven by its quest to restore people's rights to equality and human dignity as encapsulated in s 1 of the Constitution, our new government introduced some new and revolutionary Acts, including Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and Extension of Security of Tenure Act 62 of 1997 (ESTA), first, to put a stop to arbitrary evictions of people, and secondly, to ensure, where an eviction is justified, that it is done with compassion and dignity – Ubuntu – Botho. The authors S Woolman and Bishop *Constitutional Law of South Africa* 2 ed (2013) set out the legislature's intentions when introducing ESTA to be:

'The State's constitutional obligation to promulgate legislation dealing with the promotion of secure tenure was in part fulfilled with the enactment of ESTA in 1997. The aims of the Act are threefold: to promote long-term security of tenure; to regulate eviction; and to introduce a set of rights and duties in relation to both occupiers and land owners.'

The authors referred to *Prize Trade 44 (Pty) Ltd v Isaac Tefo Memane* (LCC) 35/07 (unreported judgment 21 August 2003) which confirmed that one of the main functions of ESTA is to ensure that evictions are conducted equitably in the interests of both parties.

[2] This appeal is against the judgment and order of the Land Claims Court (Sidlova AJ), ordering the appellants and all persons occupying under or through them to vacate Portion 81 (a portion of portion 65) of the farm Boschfontein 330 – JQ, Rustenburg ('the property'). The appellants are occupiers as defined in ESTA. The appeal is before us with the leave of the court a quo.

[3] The first and second respondents (hereinafter the respondents), in their capacity as trustees of the Voges Family Trust, are nominal owners of the

aforesaid property. No relief is sought against the third and fourth respondents, who are cited by virtue of the provisions of s 9 of ESTA and they abide the decision of the court.

[4] Let me conveniently mention at this stage that none of the appellants are employed by the respondents or their predecessors in title. Further that it is common cause that none of the appellants have resided on the property for 10 years and has reached the age of 60. All of the appellants have been resident on the property after 4 February 1997, except for the first appellant who is said to have resided there since 1995. Nothing really turns on this.

[5] It is common cause that in or about October 2001, the respondents concluded written lease agreements with some of the appellants and oral lease agreements with others. The respondents' case as reflected in the founding affidavit is that the appellants were in breach of a material term of the lease agreements in that they failed or refused to pay rental. As a result, the respondents cancelled the lease agreements. See Vol. 1 – Founding affidavit para 4.5; 5.5; 6.5; 7.5, 8.5; 9.5; 10.5; 11.5; 12.5; 13.5; 14.5; 15.5 and 17.5. All these paragraphs read:

'The basis for cancellation was that the 1st respondent failed to perform in terms of the lease agreement between her and the applicants, in that she failed to pay the agreed monthly rental since May 1998, which amounted to a substantial breach of the lease agreement, and or failed to rectify the position after receiving due demand, in terms of which agreement her right of residence was terminated. '

Paragraph 17.1 reads somewhat differently but in essence is the same. The appellants dispute that they failed to pay the monthly rental. They allege that when they tendered payment of rental during May 2008, the respondents

refused to accept it because they were going to demolish the structures occupied by the appellants. Furthermore, the appellants deny that they received the notices to terminate.

[6] Although the notice of termination and the founding affidavit allege that, despite demand, the respondents refused or failed to pay rental, no such demand was attached to the papers. Importantly, all the respondents denied that they failed or refused to pay the rental. To the contrary, they all alleged that the applicant wrongfully refused to accept their payments.

[7] The court a quo considered the conflicting rights of the respondents, in particular, the right of ownership as opposed to the protection of the rights of the appellants as occupiers. It also pertinently recognised the fact that should it decide to grant the eviction order it would ineluctably render the appellants homeless.

[8] The court a quo reasoned that in exercising its discretion on whether or not to grant an eviction order, it was duty bound to consider whether the right of occupation of the appellants had been properly terminated in accordance with ESTA and whether the procedural requirements of ESTA had been met. The court a quo recognised that it had to consider whether or not it was just and equitable to order the eviction of the appellants. In this regard it mentioned that it had to consider the interests of the parties, the fairness of the procedure followed, as well as the availability of suitable alternative accommodation. This list is not exhaustive. Regarding the consideration of suitable alternative accommodation the court a quo said that a probation officer's report mentioned

that there was no suitable alternative accommodation available to the appellants. No such report was included in the record before us.

[9] Furthermore, the judgment is silent regarding any engagement by the court with the third and fourth respondents who in terms of s 26(1) of the Constitution have a constitutional obligation to ensure that everyone has access to adequate housing read with s 25(1) which prohibits arbitrary deprivation of property – the third and fourth respondents were parties to these proceedings. It is not clear to me why they were before court if the intention was not to engage them and ensure that, even when the eviction is finally granted, at least the court is assured that these important government departments will ensure that the evictees are not rendered homeless.

[10] As alluded to above, the appellants contended that they did not receive the notice of termination of their right of occupation. Their version is that the deputy sheriff (Mpho Letlhake), together with another person, arrived at their place of residence on 18 May 2009. The deputy sheriff told them that the respondents had obtained an eviction order against them (appellants). He also indicated to them that they have only eight days to vacate the property. When the deputy sheriff handed over the documents to them, which they examined and discovered that there was no official court stamp. They then refused to accept service thereof and requested documents with a proper court stamp. The deputy sheriff and his colleague then left with the documents.

[11] The following day, 19 May 2009 the deputy sheriff returned to the property with what appeared to be the same documents as the ones produced the

previous day. It also appeared that the said documents were in fact the s 8 notices and not eviction orders as alleged. The appellants aver that had the nature and effect of the documents been properly explained to them, they would have accepted them on 18 May 2009.

[12] The appellants contended, first that the lease agreements were not properly and effectively cancelled as required by s 8(1) of ESTA, and secondly that the court a quo erred in deciding the application in favour of the respondents on a new ground that was not relied upon by the respondents in their notices of termination and founding affidavit. In both the letters of termination and the founding affidavit the respondents had alleged that the appellants were in breach of a material term of the lease in that they had failed to pay the agreed rental fees.

[13] On the other hand, the respondents contended that as this lease was periodic, a mere notice of cancellation/termination of the lease was sufficient. The law does not require the owner to give reasons for termination of the lease. Based on this it was contended first that the fact that the landlord purported to give reasons for termination which were wrong was irrelevant, and secondly the fact that the landlord relied on cancellation of the lease, notwithstanding the fact that it was never pleaded, was of no moment. Essentially it was contended that the notice was reasonable in the circumstances.

[14] This case requires a proper understanding of the philosophy underpinning ESTA. I now turn to deal with the legislative framework relevant to this matter.

This necessitates that I quote in full the preamble of ESTA, which reads as follows:

'To provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land; and to provide for matters connected therewith.
WHEREAS many South Africans do not have secure tenure of their homes and the land which they use and are therefore vulnerable to unfair eviction;
WHEREAS unfair evictions lead to great hardship, conflict and social instability;
WHEREAS this situation is in part the result of past discriminatory laws and practices;
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, 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.'

[15] It is clear that ESTA seeks to regulate the conditions under which the rights of people to reside on another's land may be terminated. ESTA does not say that people may not be evicted from properties. However, it seeks to avert situations where people may be evicted arbitrarily without any intervention by courts and in circumstances where such evictions may lead to great hardship, conflict and social disruption with concomitant instability. Essentially ESTA seeks to ensure that evictions, when they are inevitable, must be done humanely and not with a sledgehammer. Hence ss 8 and 9 which provide as follows:

‘**8 Termination of right of residence.** – (1) Subject to the provisions of this section, an occupier’s right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to –

(a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;

(b) the conduct of the parties giving rise to the termination;

(c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;

(d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and

(e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence…

‘**9 Limitation on eviction –** (1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.

(2) A court may make an order for the eviction of an occupier if-

(a) the occupier's right of residence has been terminated in terms of section 8;

(b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;

(c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and

(d) the owner or person in charge has, after the termination of the right of residence, given-

(i) the occupier;

(ii) the municipality in whose area of jurisdiction the land in question is situated; and

(iii) the head of the relevant provincial office of the Department of Rural Development and Land Reform, for information purposes not less than two calendar months' written notice of the intention to obtain an order for eviction,

> which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.'

[16] In terms of s 8(1), the right of an occupier to a residence can only be terminated when first, there are lawful grounds for such termination, and secondly, when it is just and equitable to do so. To my mind, these are the jurisdictional requirements that have to be met before an eviction can be sanctioned under ESTA.

[17] I now turn to the facts of this case. First, the appellants deny receiving the notices to terminate the lease. Against this the respondents failed to file a confirmatory affidavit by the sheriff or any other witness to gainsay this allegation – not even a replying affidavit was filed to counter this allegation. Undoubtedly this is a dispute of fact which could not be resolved on the papers. On the authority of *Plascon Evans-Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) the case should have been decided on the respondent's version or referred to oral evidence or to trial on this disputed issue. Secondly and most crucially they contended that the court a quo decided this matter on a totally different cause of action than the one alleged in the founding affidavit.

[18] It is common cause that the founding affidavit alleged that the respondents terminated the lease on the basis that the appellants failed to

perform in terms of the lease agreement in that they failed to pay the agreed monthly rental since May 2008. This conduct, it is alleged, amounted to a serious and fundamental breach of the lease agreement. This allegation is disputed by the appellants pertinently and unequivocally. Instead of dealing with this serious dispute, the respondents' counsel raised a new ground of termination at the hearing. It is not disputed that, this new ground was never raised in the papers nor in the respondents' heads of argument. The court a quo even commented on the sudden change and reliance on a new ground of termination.

[19] To my mind this is trial by ambush. It may well be that when dealing with a periodic lease, the law permits the owner to terminate by reasonable notice without giving reasons. But I do not think that this would be so to the extent of allowing a landowner to mislead an occupier, be it wittingly or unwittingly by advancing a different cause of action which when seriously disputed he or she can just abandon and rely on a different cause of action. In *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) para 21-22; Harms DP commented as follows about such conduct:

'The onus can arise only after the issue itself has arisen … the plaintiff's case was that his arrest and detention were unlawful because he had not been drunk and disorderly. His case on the pleadings was not, … <u>Cases by ambush are not countenanced.</u>' (My emphasis.)

[20] It is settled law that the purpose of pleadings is to define the issues for the parties and the court. In application proceedings, the affidavits do not only constitute evidence, but they also fulfil the purpose of pleadings. In other words they must set out the cause of action in clear and unequivocal terms to enable the respondent to know what case to meet. This is the reason why an applicant is never permitted to change colours which he/she has pinned to the mast and

plead a new cause of action in a replying affidavit. (See *Diggers Development (Pty) Ltd v City of Matlosana & another* [2012] 1 All SA 428 (SCA) para 18 – *Naidoo v Sunker* [2012] JOL 28488 (SCA)). A party is duty bound to allege in his or her affidavit all the material facts upon which it relies. I find the observation by Mhlantla JA in *Minister of Safety and Security v Slabbert* (supra) to be apposite where she stated:

'It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'

(See *Moaki v Reckitt and Colman (Africa) Ltd* 1968 (3) SA 98 (A) at 102A.)

[21] Explaining the crucial role played by affidavits in motion proceedings, Joffe J said in *Swissborough Diamond Mines v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 323F-324C:

'It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.' (My emphasis.)

The above case was referred to with approval by this court in *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) para 28. (See also *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 849B.) Based on what happened in this case, I am unable to find that the appellants knew what case they had to meet.

[22] Section 9(2)*(d)* 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 s 8 and the owner or person in charge has, after the termination of the right of residence given the occupier, the municipality and the head of the Department of Rural Development and Land Reform, not less than two calendar month's written notice of the intention to obtain an order for eviction, which notice <u>shall</u> (My emphasis) contain the prescribed particulars and set out the grounds on which the eviction is based. One must ask the question: what would be the need of setting out the grounds on which the eviction is based if the owner can come to court and do a volte-face. In my view it would make no sense. It follows, on the facts of this case that the respondents failed to comply with s 9(2)*(d)* as the case they argued in court is not the one they pleaded in their notice to terminate and founding affidavit. The court below should not have granted the eviction order. See also D L Carey Miller and A Pope *Land Title in South Africa* (2000) at 502 para 9.4.7.3 – where the writers observed that:

'<u>The notice must contain the prescribed particulars and state the grounds on which eviction is sought</u>, it must be given by the owner or person in charge to the occupier, the municipality with jurisdiction over the land and, for information purposes, the head of the relevant provincial office of the Department of Land Affairs.' (My emphasis)

(See also *Lategan v Koopman en andere* 1998 (3) SA 457 (LCC) at 463B-D.)

[23] On the above reasons the application in the court a quo should have been dismissed. I would accordingly uphold the appeal.

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J B Z SHONGWE
JUDGE OF APPEAL

Mpati P (Ponnan and Saldulker JJA concurring):

[24] I have had the privilege of reading the judgment of my Colleague, Shongwe JA, but regret that I am unable to agree with the conclusion he has reached. The appellants were part of 11 occupiers[1] of certain rooms on the farm Boschfontein, situated in the district of Rustenburg (the farm), owned by the respondents as nominal owners in their capacities as trustees of the Voges Familie Trust. In those capacities the respondents concluded periodical leases – some verbal, others reduced to writing – with each of the 11 occupiers, who agreed to occupy the individual rooms and to pay a monthly rental. Most of the occupiers took occupation during October 2001, although it appears to be undisputed that the first appellant lived with her mother in a room rented by the latter before 1997, but concluded her own lease agreement with the respondents in 1999. On 16 April 2009 the respondents launched an application for the eviction of all 11 occupiers (and those occupying under or through them). It was alleged in the founding affidavit that on 19 May 2009 notices of cancellation of the lease agreements were served on each one of the occupiers. An eviction order in respect of all of them was issued by the Land Claims Court (LCC) (Sidlova AJ) on 18 January 2013. Leave to appeal to this Court against that order was granted on 12 November 2013, but only five of the 11 occupiers are before us.

[25] The basis for the cancellation of the occupiers' leases was an alleged failure by them to pay the monthly rentals due in terms of their lease agreements since May 2008. In their answering affidavit, deposed to by the second

[1] The names reflected as third and fifth appellants are the different names of the same person.

appellant,[2] the appellants (and the other occupiers) disputed the ground for cancellation of their leases and averred that in May 2008 they had offered payment of their agreed rental amounts, but that the respondents refused to accept the payments. They also denied that notices of cancellation of their leases were served on them as alleged by the respondents. They stated that on 18 May 2009 a Mr Mpho Letlhake[3] and another gentleman from the Sheriff's office attempted to hand to them certain documents, which Mr Letlhake (Deputy Sheriff) and his companion said were eviction orders. He also told them that they should vacate the leased rooms. Because they could not see any official stamp on the documents they refused to accept the documents and told the two officials to bring documents 'with [a] proper Court stamp'. The Deputy Sheriff and his companion then left with the documents. Had the nature and effect of the documents - which now appear to have been notices in terms of section 8(1) of the Extension of Security of Tenure Act 62 of 1997 (ESTA)[4] - been explained to them, the occupiers would have accepted them, so it was alleged in the answering affidavit.

[26] In a letter addressed to the respondents' attorneys, dated 7 March 2014, the appellants' attorneys, seeking permission to omit certain documents from the appeal record in terms of rule 9 of the Rules of this Court, mentioned that the only issue for determination by this Court was whether the respondents were entitled to rely, at the hearing before the LCC, on the common law ground of reasonable termination of a lease agreement. Accordingly, parts of the record not relevant to that issue were omitted from the record that served before us on appeal. However, in their heads of argument the appellants squarely raised the

[2] All the other occupiers deposed to confirmatory affidavits.
[3] He was the Deputy Sheriff for the Magistrate's Court, Rustenburg.
[4] That the provisions of the Extension of Security of Tenure Act 62 of 1997 (ESTA) are applicable in this case and that the appellants are occupiers as defined in ESTA are common cause.

issue of the alleged non-service of the notices of termination of their lease agreements and their counsel argued the point in this Court. In effect, then, the case for the appellants was that they were never given notice, or proper notice, of termination of their lease agreements.

[27] The LCC held, however, that s 9(2)(*a*) of ESTA had been complied with 'as the principal reason for termination [of the lease agreements] is that the applicants need the land for further development.'[5] Section 9, which places a limitation on the eviction of an occupier from leased premises, has been quoted in full in the judgment of Shongwe JA. Its text shall therefore not be repeated here. It suffices to mention, for present purposes, that it provides that an occupier may be evicted only in terms of an order of court issued under it (subsec (1)), which may be made if the occupier's right of residence has been terminated in terms of section 8 (subsec (2)(*a*)) and the occupier has not vacated the land within the period of notice given by the owner or person in charge (subsec (2)(*b*)).

[28] The second issue for determination in this appeal is whether the respondents, having grounded their termination of the leases on the appellants' breach of a material term of each of the agreements, being failure to pay the agreed rentals, were entitled, at the hearing before the LCC, to rely on the common law ground of reasonable termination of the leases. With regard to this issue the LCC said the following:

'In the course of argument the applicants did not pursue the reason for termination of the leases mentioned on the notices of termination, but instead argued that as owners they have the right to terminate a lease agreement if notice is given timeously. It is advanced by

[5] Para 16 of the judgment.

applicants that a periodic lease can be terminated on reasonable notice by either the lessor or the lessee and the tenancy of the 1st to 12th respondents was provided only as an interim measure susceptible to termination at any time by either party on one (1) month's written notice.'[6] (Footnote omitted.)

And further:

'The application raises the issue as to whether it is just and equitable as required by section 8(1) of [ESTA] for the applicants to terminate the lease agreements of the respective respondents. The applicants allege that they terminated the lease agreements because of non-payment. This however is disputed by the respondents. It has also been noted that in the heads of argument and during oral argument the applicants did not pursue this argument and instead chose to rely on their need to develop their property as the reason for termination.'[7]

The LCC was not persuaded by the argument advanced on behalf of the appellants that the respondents were not entitled to rely on the common law ground of termination of the lease agreements.

[29] I proceed to consider the first issue. It was submitted on behalf of the appellants that the legal position regarding the return of service of a Sheriff or Deputy Sheriff is that it is never conclusive, but only constitutes prima facie proof of service of a particular legal document, which can be rebutted. It was further contended that in the present case the appellants conclusively disproved the correctness of the contents of the returns of the Sheriff.

[30] Section 8(1) of ESTA is in the following terms:

[6] Para 8 of the judgment.
[7] Para 12.

'(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to –

(a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;

(b) the conduct of the parties giving rise to the termination;

(c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;

(d) the existence of a reasonable expectation of the renewal of the agreement from which the right to 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.'

It must be noted that the section does not require the notice of termination of a right of residence to be in writing, nor that it must be 'served' on the occupier concerned. What would be necessary is that the termination must be communicated to the occupier, for obvious reasons.

[31] In their answering affidavit the occupiers alleged that in May 2008 they 'tried to pay their rental to the first [respondent]' but that he refused to accept the payments. They went further to allege that the first respondent's reason for refusing to accept the rental payments was 'that he was going to demolish the structures [they] were occupying' and that they had stopped paying rental because the respondents refused to accept it. The common law position is that a

periodical lease, such as the leases in issue in this appeal, can be terminated by reasonable notice by either party.[8] But to constitute a valid termination the notice must be clear and unequivocal.[9]

[32] The written notices, which the occupiers denied having received, appear to have been prompted by an earlier skirmish. From the judgment of the LCC it appears that on 26 March 2009 the occupiers obtained an interim order against the respondents,[10] in terms of which the latter were directed to rebuild leased rooms from which corrugated iron roof sheets had been removed. The allegations that were made by the occupiers in seeking the order were that the respondents' actions of removing corrugated iron sheets from the roofs of the leased rooms had amounted to constructive eviction. These actions (of removing corrugated iron sheets from the roofs of the leased rooms), though unlawful (see ss 9(1) and 23(1) of ESTA), were probably resorted to, I should think, because of the occupiers' failure to vacate their leased rooms after notice of termination of their leases had been given. Indeed, the deponent to the answering affidavit stated that the respondents had told them to vacate the farm. But no mention was made of such notices in the papers before the LCC and I am willing to decide the matter without reference to them.

[33] As to service of the written notices the appellants and the other occupiers averred that on 18 May 2009 the occupiers were told by the Deputy Sheriff that the documents he attempted to serve on them were eviction orders and that they refused to accept them after they had examined them. But, except in respect of the second appellant, it was alleged in the founding affidavit that the lease

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[8] *Tiopaizi v Bulawayo Municipality* 1923 AD 317.
[9] *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and other Related Cases* 1985 (4) SA 809 (A) at 830E.
[10] According to the answering affidavit the interim order was made final on 9 April 2009.

agreements were cancelled on 19 May 2009, which was the date on which the notices of cancellation were allegedly served on the occupiers. With regard to the second appellant, the averment was that cancellation of his lease agreement occurred on 18 May 2009. In the only return of service that forms part of the record on appeal – the others were omitted because the question of service of the notices was not in issue at the time of the preparation of the record – the Deputy Sheriff stated that on 19 May 2009, at 17h36, he served the 'process' on the first appellant personally, by handing to her a copy thereof 'after exhibiting the original and explaining the nature and exigency of the said process.' It was alleged in the answering affidavit that the Deputy Sheriff returned to the farm the next day (19 May 2009) and told the occupiers that since they had refused to accept the 'eviction papers' the owner of the farm was going to demolish their homes. But the answering affidavit did not deal with the stated fact in the return of service, that the 'process' was served on the occupiers on that day. Nor, critically, did it dispute the assertion in the return of service that the nature and exigency of the process had been explained to them. In those circumstances, on these aspects of the matter a replying affidavit was hardly necessary. The same, it must be said, goes for a confirmatory affidavit from the Deputy Sheriff. I am thus satisfied that the termination of the individual appellants' right of residence (and of the other occupiers) was communicated to them on 19 May 2009. In any event, the occupiers, on their own version, had known from the day the respondents refused to accept payment of their rental, that they were required to vacate the property. In terms of the notices of termination they were given a period of two months to vacate the premises. To my mind, the notices were reasonable.

[34] The basis for the termination of the appellants' right of residence, as contained in each notice was that they had failed to perform in terms of their

lease agreements 'in that they failed to pay the monthly rental since May 2008, which amounted to a fundamental breach of the lease agreement . . . .'[11] In their answering affidavit the appellants denied the allegation that they failed to pay rental due to the respondents – an issue I deal with in para 36 below - but did not suggest that the basis for the termination of their right of residence was not lawful. Failure by a lessee to pay the agreed rental on due date is indeed a lawful ground for the termination of a right of residence.[12] In this instance, the rent was payable on or before the first day of each month.

[35] The next question to consider is whether the termination was just and equitable. The submission was made in the answering affidavit that the termination of the lease agreements was unfair, unjust and inequitable, because 'there was no wrong-doing' on the part of the occupiers and that the respondents had 'never even demanded payment of arrear rental' from them. In considering whether the termination of an occupier's right of residence is just and equitable a court is enjoined to have regard to all relevant factors and, in particular, those enumerated in items *(a)* to *(e)* of s 8(1) of ESTA.[13] In *Brisley v Drotsky* 2002 (4) SA 1 (SCA) this Court, with reference to s 26(3) of the Constitution, held that the circumstances a court is required to consider before issuing an eviction order can only be relevant if they are *legally* relevant.[14] The lease agreements concluded between the respondents, on the one hand, and the first and second appellants, on the other, were reduced to writing. A copy of the agreement involving the first appellant forms part of the record. A perusal thereof reveals no unfairness in its terms and none was suggested by the

[11] Clause 8 of the written lease agreement provided that in the event of the lessee failing to comply with the terms of the agreement of lease and remains in breach, the lessor may ('kan') give to the lessee 24 hours' notice to vacate the property irrespective of the day and the date of the month.
[12] Cf *Goldberg v Buytendag Boerdery Beleggings (Edas) Bpk* 1980 (4) SA 775 (A).
[13] *Mkangeli & others v Joubert & others* 2002 (4) SA 36 (SCA) para 11; *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) para 12.
[14] Para 42.

appellants (s 8(1)*(a)*). It must be accepted that the written agreement relating to the second appellant contained similar terms. There is no reason to think that the terms of the verbal agreements were any different.

[36] As to s 8(1)*(b)* I have mentioned (in para 32 above) the skirmishes between the parties. It is common cause that the appellants (and other occupiers) did not pay the agreed rental to the respondents for a period of a year since May 2008. On the authority of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C, it must be accepted that in May 2008 the occupiers attempted to pay their rentals and that the respondents refused to accept the payments. However, the occupiers continued to occupy their leased rooms for a year and there is no suggestion in the papers that in that time they tendered payment of the rentals. No tender had been made by any one of the appellants to pay arrear rental (or the rentals as and when they fell due), to which the respondents were entitled. Thus, the fact that the respondents refused to accept payment of the rentals in May 2008 did not exonerate the occupiers from liability to pay the rentals for the rooms they occupied and, insofar as the appellants are concerned, still occupy, it being well-settled that the appellants (as lessees) were under an obligation to pay (or at the very least tender to pay or signify readiness to pay) the rental agreed upon.[15]

[37] On the occupiers' own version the respondents informed them when they (respondents) refused to accept payment of the rentals that they wished to demolish the structures. In its judgment the LCC stated that the respondents 'outlined details on which the property is to be utilized upon vacation' by the occupiers. Clearly, the respondents would be unable to utilize the property as

[15] Cf *Ford Agencies v Hechler* 1928 TPD 638 at 641 - 642

they wish if the appellants' right of residence was not terminated. The appellants (and the other occupiers) did not suggest any hardship that they would endure as a result of the termination of their right of occupation (s 8(1)*(c)*).

[38] Section 8(1)*(d)* is not relevant in this case. As to subsec (1)*(e)*, the procedure followed by the respondents in giving written notices of the termination of the right of residence and affording the occupiers two months to vacate the premises was, to my mind, fair. Nothing to the contrary was advanced on behalf of the appellants. The discussions in paragraphs 34 and 35 above also cover the requirement to consider all relevant factors as enjoined by ESTA. In my view, the termination of each appellant's right of residence was just and equitable. I agree, therefore, with the LCC that there was compliance with the provisions of s 8(1) of ESTA. Subsections (2) to (7) are not applicable here.

[39] It is now convenient to deal with the point of my disagreement with the conclusion reached by my colleague, Shongwe JA. In his judgment Shongwe JA upholds the argument on behalf of the appellants that the respondents, having based their case in both the notice of termination and the founding affidavit on the allegation that the lease agreements were terminated because of non-payment of rent by the appellants, impermissibly argued their case on a totally different basis. The different basis referred to is, as mentioned by the LCC in its judgment, that as owners the respondents had the right to terminate the lease agreement and obtain an order of eviction if timeous notice of the termination had been given.[16] Shongwe JA states, correctly so with respect, that

[16] See para 28 above.

affidavits do not only constitute evidence, but also fulfil the purpose of pleadings and that they must set out the cause of action in clear and unequivocal terms to enable the respondent to know what case to meet (para 20). He then refers to the decision of this Court in *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA), where the following was said:

'It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'

Shongwe JA observes that instead of dealing with the serious dispute of whether or not the appellants failed to perform in terms of the lease agreement counsel for the respondents 'raised a new ground of termination at the hearing' (para 18). That, he says, constitutes a trial by ambush, since a different cause of action was advanced and relied upon and the seriously disputed one was just abandoned (para 19).

[40] With respect, the ground for the termination of the lease agreements was not the cause of action. The cause of action upon which the respondents relied in seeking the eviction order was cancellation of the lease agreements,[17] elaborated upon as follows: (1) that on 18 or 19 May 2009 the respondents cancelled the lease agreements they had concluded with each one of the occupiers; (2) that a notice of cancellation was served on each occupier; (3) that each occupier's right to occupy the property terminated on 19 May 2009; and (4) that the occupiers have failed to vacate the property. The respondents' case boiled down to this: their cancellation resulted in the occupiers' right of residence being terminated and, on termination the occupiers, as lessees, were under a duty to vacate the leased property.

[17] See s 9(2)(*a*) of ESTA and *Potgieter & another v Van der Merwe* 1949 (1) SA 361 at 366.

[41] The contentions advanced on behalf of the respondents before the LCC, namely, that under the common law a periodical lease can be terminated on reasonable notice by either party; that the tenancy of the occupiers was only an interim measure susceptible to termination at any time by either party on one month's notice; that therefore cancellation of the lease agreements did not depend on breach or good reason and that reasonable notice of cancellation sufficed, are exactly that: contentions advanced during the course of argument in support of the relief sought, namely, the eviction of the occupiers. And to my mind, counsel for the respondents was perfectly entitled to rely (as he did) on such common law grounds as availed the respondents in support of the pleaded claim for eviction. What mattered was whether a proper foundation for such argument had been laid in the founding affidavit. In my view, the answer is in the affirmative. In this regard it is perhaps important to distinguish between a proper factual foundation in support of the relief sought, on the one hand, and legal argument, on the other and to appreciate that it is ordinarily impermissible for legal argument to be raised in an affidavit. It thus seems to me that the notion of a trial by ambush is misplaced when, as happened here, a single cause of action is relied upon, which finds support in the pleaded case. Properly understood, the respondents' case was that the lease agreements had come to an end either because they had been validly cancelled for non-payment of rentals or, alternatively, as the respondents were entitled to, at common law, they had given reasonable notice of termination of the lease agreements to the occupiers. In either event the result was termination of the lease agreements, with the consequence that the occupiers were obliged to vacate the leased property.

[42] In their founding affidavit the respondents averred that in their capacities as trustees of the trust they are the nominal owners of the property (the farm); that on particular dates they concluded lease agreements with the individual occupiers; that on 18 or 19 May 2009 they cancelled the agreements in writing; that the occupiers' right to occupy their respective rooms therefore terminated on 19 May 2009 and that the occupiers had (as at the date the founding affidavit was deposed to) failed to vacate the property. Whether the notice of termination was reasonable, clear and unequivocal are matters to be determined by a court. I have already held that the notice of termination was reasonable. To my mind, it was also clear and unequivocal. Thus, reliance on the common law ground of termination of the lease agreements was covered in the papers and the appellants (and the other occupiers) were neither misled, nor ambushed at the trial. I might mention, in any event, that in *Putco* this Court said the following:

> 'Where a party seeks to terminate an agreement and relies upon a wrong reason to do so he is not bound thereby, but is entitled to take advantage of the existence of a justifiable reason for termination, notwithstanding the wrong reason he may have given (cf *Matador Buildings (Pty) Ltd v Harman* 1971 (2) SA 21 (C) at 28A; *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 953G.)'[18]

I must make it clear, lest it be suggested that the allegation, in the founding affidavit, of failure by the occupiers to pay rental was an inadequate ground for termination of the lease agreements, that, in my opinion, it was adequate as I have attempted to show above.

[43] I should mention further that on my reading of the judgment of the LCC the respondents did not abandon the ground of termination of the lease agreements as contained in the notice of termination. Counsel for the

[18] At 832D.

respondents simply chose to argue the case on another basis, which, as I have mentioned, he was perfectly entitled to do. That basis was that it was not necessary for the respondents to set out the ground they did in the founding affidavit and, to the extent that they did so, that was simply surplus to their cause of action. As long ago as *Graham v Ridley* 1931 TPD 476 at 479 it was stated:

'One of the rights arising out of ownership is the right to possession; indeed *Grotius* (Introd. 2, 3, 4) says that ownership consists in the right to recover lost possession. *Prima facie*, therefore, proof that the appellant is owner and that respondent is in possession entitles the appellant to an order giving him possession, i.e., to an order for ejectment. When an owner sues for ejectment an allegation in his declaration that he has granted the defendant a lease which is terminated is an unnecessary allegation and is merely a convenient way of anticipating the defendant's plea that the latter is in possession by virtue of a lease, which plea would call for a replication that the lease is terminated. It is the defendant and not the owner-plaintiff who relies on the lease, and if the lease itself is denied by the defendant, as in the present case, the allegation of the lease is surplusage.'[19]

What is of importance is that, unlike the case in *Brisley v Drotsky,* in the present matter the right of the owners to possession of their property and to an order of ejectment against an unlawful occupier are limited by the provisions of ESTA. Thus, reliance on the common law does not exonerate the owners from compliance with the provisions of s 8 of ESTA, to mention but one section.[20] I have already dealt with the requirements of s 8 and it is not necessary to do so again. The LCC did so too and found 'that section 9(2)*(a)* was complied with as the principal reason for termination is that the applicants need the land for further development.' It also found that s 9(2)*(b)* had been complied with in that 'the occupiers had not vacated the land within the notice period.'

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[19] This was an extract from an earlier unreported judgment in *Gordon v Kamaludin* (T.P.D. 15.9.27), referred to with approval in *Graham v Ridley*.
[20] Compare *Brisley v Drotsky*, para 43.

[44] As to s 9(2)*(c)* the LCC's finding that the provisions of s 11 apply to all the occupiers was not challenged in this Court. There was no suggestion that, in dealing with the provisions of s 11, particularly whether it was just and equitable to grant an order for eviction (s (9)(2) and (3)), and in exercising its discretion against the occupiers by granting such order, the LCC erred. Counsel for the appellants put all his efforts on the issues of the alleged introduction of a new ground for the termination of the lease agreements, which, according to his submission, was wrongly allowed by the LCC, and the alleged non-service of the notice of termination and, therefore, denial of receipt thereof. There is, in my view, no reason to interfere with the exercise of its discretion by the LCC. For, on either of the two legs advanced by the respondents, they would, at common law, have been entitled to the relief sought. And, as I have shown, they have, in addition, satisfied the further requirements for an eviction set by ESTA.

[45] The LCC ordered the occupiers, including the appellants, to vacate the farm by 31 March 2013, failing which the Sheriff was authorised to remove them on or after 3 April 2013. Its order was issued on 18 January 2013. It was not suggested that these dates were not just and equitable (s 12(1) and (2) of ESTA). As at 20 February 2015 (the date this appeal was heard) the appellants had been living on the farm, occupying their leased rooms, for a further period of two years. In my view, it would be reasonable for the appellants to be given a further period of one (1) month to vacate the farm from the date of the order of this Court.

[46] In the result I would make the following order:

1 The appeal is dismissed.

2 The appellants and all other persons occupying under or through them are ordered to vacate Portion 81 (a portion of Portion 65) of the farm Boschfontein 330-JQ, Rustenburg (the farm), on or before 7 June 2015.

3 Failing compliance with the order in 2 the Sheriff for the district of Rustenburg is authorised to evict the appellants and all other persons occupying under or through them, from the farm 10 days after the date contemplated in 2 above.

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L MPATI
PRESIDENT

Appearances

For the Appellant:	J J Botha Instructed by: Matshitse Attorneys, Potchefstroom; Matsepes Inc, Bloemfontein.
For the Respondent:	A Vorster (with him I Oschman) Instructed by: Frese Moll & Partners, Johannesburg; Webbers, Bloemfontein.