THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 797/2021

In the matter between:

ISEDOR SKOG N.O.	**FIRST APPELLANT**
REINETTE SKOG N.O.	**SECOND APPELANT**
HENDRIK COLLINS GERRYTS N.O.	**THIRD APPELLANT**
(In their capacity as Trustees for the time being of the Rein Trust IT2778/99)	

and

KOOS AGULLUS	**FIRST RESPONDENT**
MATILDA AGULLUS	**SECOND RESPONDENT**
HANO AGULLUS	**THIRD RESPONDENT**
MARTONIQUE AGULLUS	**FOURTH RESPONDENT**
RICHARD SYSTER	**FIFTH RESPONDENT**
WILHELMIEN SYSTER	**SIXTH RESPONDENT**
RICHWELL SYSTER	**SEVENTH RESPONDENT**
REGINA PIETERSEN	**EIGHTH RESPONENT**
JEFFREY PIETERSEN	**NINTH RESPONDENT**
CALVIN PIETERSEN	**TENTH RESPONDENT**
HENDRIK SEDRAS	**ELEVENTH RESPONDENT**
SOPHIE WAGNER	**TWELFTH RESPONDENT**

SHARON PAULSE	**THIRTEENTH RESPONDENT**
MINNA WITBOOV/ADAMS	**FOURTEENTH RESPONDENT**
WILMAN ADAMS	**FIFTEENTH RESPONDENT**
LORENZO WITBOOI	**SIXTEENTH RESPONDENT**
FENETIA ADAMS	**SEVENTEENTH RESPONDENT**
ELISEZA ELLIE KOORDOM	**EIGHTEENTH RESPONDENT**
PIETER SMALL	**NINTEENTH RESPONDENT**
MARIA KORDOM	**TWENTIETH RESPONDENT**
ELIZABETH KORDOM	**TWENTY-FIRST RESPONDENT**
SOLOMON MORRIS	**TWENTY-SECOND RESPONDENT**
ELENA MORRIS	**TWENTY-THIRD RESPONDENT**
ILONA MORRIS	**TWENTY-FOURTH RESPONDENT**
KOOS KOORDOM	**TWENTY-FIFTH RESPONDENT**
ALL THOSE HOLDING TITLE THROUGH 1ST - 25TH RESPONDENTS OR OCCUPYING COTTAGES 1, 3, 4, 5, 7, 8, 12, 13 AND THE SHED ON THE REIN HILL ESTATE, REMAINDER FARM NO 1458, DIVISION PAARL, WESTERN CAPE	**TWENTY-SIXTH RESPONDENT**
DRAKENSTEIN MUNICIPALITY	**TWENTY-SEVENTH RESPONDENT**
HEAD: WESTERN CAPE PROVINCIAL DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	**TWENTY-EIGHTH RESPONDENT**

Neutral Citation: *Isedor Skog N.O. & Others v Koos Agullus & Others* (797/2021) [2023] ZASCA 15 (20 February 2023)

Coram: PETSE AP, MOLEMELA and MAKGOKA JJA and BASSON and GOOSEN AJJA

Heard: 07 November 2022

Delivered: 20 February 2023

Summary: Land Reform – eviction under the Extension of Security of Tenure Act 62 of 1997 – whether termination of the occupiers' right of residence on a farm

just and equitable – whether judgment previously granted by a magistrate's court rendered the claim in the Land Claims Court res judicata.

ORDER

On appeal from: The Land Claims Court, Randburg (Ncube J sitting as court of first instance):

1. The appeal succeeds and the cross-appeal is dismissed with no order as to costs in each instance.
2. The order of the Land Claims Court is set aside and replaced with the following order:

'(a) An eviction order is granted in respect of all the occupier respondents, with the exception of the eleventh and twelfth respondents.

(b) The first to tenth respondents and thirteenth to twenty-sixth respondents must vacate the farm known as Rein Hill Estate, situated on the remainder of farm number 1458 in the Drakenstein Municipality, Paarl Division, Western Cape Province on or before 31 August 2023.

(c) Should the respondents mentioned in paragraph (a) and all those occupying the farm under them fail to vacate it on or before 31 August 2023, the sheriff of the court is authorised to evict them from the farm by 15 September 2023.

(d) The twenty-seventh respondent is ordered to provide emergency housing suitable for human habitation with access to basic services (which may be communal) to the respondents mentioned in paragraph (a) above and all those occupying the farm under them, on or before 31 July 2023.

(e) There is no order as to costs.'

JUDGMENT

Molemela JA (Petse AP and Makgoka JA and Basson and Goosen AJJA concurring):

Introduction:

[1] Central in this appeal is whether eight families residing on private property owned by another ought to be evicted from that property on account of conduct which purportedly caused an irretrievable breakdown of the relationship between the former and the latter. In matters concerning eviction, the point of departure is eloquently set out in the following text of two judgments of the Constitutional Court:

'Section 26(3) [of the Constitution] evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat.'[1]

A little more than a decade later, the same Court said the following pertaining to the recurring challenge of evictions of farmworkers from private property:

'[T]he Extension of Security of Tenure Act] 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.'[2]

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[1] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) 2004 (12) BCLR 1268 (CC) para 17.

[2] *Molusi and Others v Voges N O and Others* [2016] ZACC 6; 2016 (3) SA 370 (CC) para 39.

[2] This appeal is directed at the order of the Land Claims Court (LCC), per Ncube J, dismissing an application brought by the first and second appellants in their capacities as the trustees of the third appellant, the Rein Trust, for the eviction of the 1st to the 26th respondents (jointly referred to as the occupiers) from the Trust's property, a farm known as Rein Estate Hill, situated on the remainder of farm 1458, Drakenstein Municipality, Paarl Division, Western Cape (the farm). An issue raised in the cross-appeal is whether the doctrine of res judicata precluded the consideration of the dispute by the Land Claims Court (the LCC) on account of another court having previously refused to evict occupiers from the same property. The appeal is with the leave of the LCC.

Background facts

[3] The salient background facts are largely undisputed. The farm was previously owned by Amen Trust and managed by a Mr Buckle from 1995. Rein Trust (the Trust) purchased the farm in 2010. Several residential cottages were constructed on the farm for the use of farm workers. The occupiers cited in the proceedings resided in nine cottages on the farm, with each cottage being occupied by a former employee and his or her family. Some cottages were made of brick and mortar and had asbestos roofing, while others were made of wood.

[4] The occupiers were former employees or the family members of the former employees of the Trust or its predecessor in title. At the time of the launching of the application in the LCC, the occupiers all resided in nine cottages on the farm and had been living there before the Trust took ownership thereof in 2010. Many households were made up of adults and minor children. In total there were 24 adults and 18 minors at the time when the application was launched. It was averred that the 17th respondent had been living on the farm since 1995 but had never been employed by the Trust. As regards the 18th respondent, it is unclear whether she was ever employed by the Trust, but she and her children have been living on the farm since 1995. Nothing turns on this aspect, as the Trust has not disputed that before the occupants were ordered to vacate the farm on 24 June 2011, they had all lived on the farm with

the Trust's consent.[3] According to the probation officer's report, at the time of the inspection of the farm, the 15th respondent and her dependant were no longer resident on the farm. The 11th and 12th respondents, who were of advanced age and had no children, passed away before the hearing of the appeal.

[5] It is common cause that the employment relationship between the Trust and those occupiers who were in its employ ended on 24 June 2011, on which date they were also ordered to vacate the farm. None of them left the farm. A further notice to vacate the farm was issued on 21 May 2012 but yielded no results.

[6] Aggrieved by the occupiers' refusal to vacate the farm, in 2013, the Trust approached the Magistrates' Court, Wellington (the magistrate court), and sought an order for the eviction of the 1st, 2nd, 6th, 7th, 8th, 13th, 20th and 24th respondents. The application for eviction was premised on the provisions of the Extension of Security of Tenure Act 62 of 1997 (ESTA). The Trust averred that the employment relationship between all the farm workers who were working on the farm had always been regulated by an employment contract concluded between the previous owner and the farmworkers concerned.

[7] According to the Trust, the occupiers were taken over as the Trust's workforce on the same terms and conditions prevailing at the time when they were employed by the previous owner. On the Trust's version, identical employment contracts were subsequently concluded between it and the respective employees. In addition, lease agreements were concluded, setting out the terms and conditions applicable to the occupiers' occupation of the farm. Copies of specimen employment contracts and lease agreements were attached to the Trust's papers as Annexure C and D, respectively. Included in the specimen lease agreement was a list of house rules applicable to employees.

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[3] *Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga and Others* [2012] ZASCA 77; 2012 (5) SA 392 (SCA) para 3.

[8] The Trust asserted that the lease agreements concluded with the occupiers clearly stipulated that the occupiers' tenure as residents in the Trust's cottages was subject to the employment relationship continuing to exist. According to the Trust, the termination of the occupiers' right of residence was on the basis that their occupation of the farm was linked to their employment, which the occupiers had terminated by refusing to render service to the Trust pursuant to an unprotected strike.

[9] The Trust further averred that formal meetings were held in 2016 and all the occupiers cited as respondents in the magistrate's court proceedings were offered jobs and accommodation, but none of them expressed interest in the offer. Two further meetings were held early in 2017. This averment was denied by the occupiers. According to the Trust, a further meeting was arranged in September 2017 but none of the occupiers attended it. The Trust's attorneys contacted the attorney who had previously represented the occupiers in the litigation conducted in the magistrate's court. A meeting was arranged for 3 November 2017 but none of those respondents attended it.

[10] On 23 February 2017 the magistrate court handed down judgment refusing the relief sought. In the judgment, the magistrate took issue with the fact that the employment contracts and the lease agreements concluded between the Trust and the occupiers were not attached to the application that served before him. Instead, the contract of employment and lease agreement furnished reflected Mr Buckle as the employer. The magistrate also recorded that the Trust had conceded that the occupiers had refused to sign the employment contracts and lease agreement that it had presented to them for signature but had failed to attach the unsigned contracts as substantiation of that assertion.

[11] It can be gleaned from the magistrate's judgment that the deponent to the answering affidavit had admitted that he had concluded an employment contract and a lease agreement with the Trust, and merely indicated that the contract and lease agreement attached to the application were not the ones he

had signed. The magistrate held that the Trust had failed to prove the existence of the employment contract and lease agreement specifying the tenure of their occupation of the Trust's farm, that there were disputes of fact pertaining to circumstances that had resulted in the termination of the occupiers' employment and relating to complaints raised in respect of how the occupiers conducted themselves on the property. The magistrate concluded that since the Trust had not shown compliance with the provisions of s 8(1)(3) of ESTA, it had failed to show that the occupiers' right of residence had been lawfully terminated. Accordingly, the court dismissed the application for eviction on the basis that it was not just and equitable to do so. The Trust did not appeal that order.

[12] In May 2018 notices were delivered to every household informing the occupiers that the Trust was considering terminating their rights of occupation and simultaneously calling upon them to make representations as to why they should not be evicted. None of the occupiers responded. In July 2018, notices were delivered to all the occupiers informing them that their rights of occupation had been terminated and affording them thirty days within which to vacate the farm. According to the Trust, it was specifically stated in those notices that the Trust was once again prepared to discuss any reasonable way in which the Trust could assist the respondents, including an offer of assistance in relocating. None of the occupiers vacated the farm or made any approaches to the Trust or to the Trust's attorneys.

[13] On 19 June 2019 the Trust approached the LCC seeking the occupiers' eviction from its farm. The foundation for the proposed eviction was the unacceptable way the occupiers had allegedly conducted themselves on the farm, which, on the Trust's version, led to the breakdown of the relationship between the Trust and the occupiers. In the answering affidavit deposed at the LCC, the stance taken by the occupiers was that the Trust had not proven the existence of written employment contracts and lease agreements regulating the occupiers' habitation of the farm, as the alleged agreements were not annexed to the Trust's application. It was also contended that the Trust had failed to identify the individual occupiers who were guilty of the alleged

misconduct. The occupiers asked for the dismissal of the claim on the basis that the Trust had not made out a proper case.

[14] In a judgment handed down on 18 February 2021, the LCC found that it was wrong to paint all occupiers with the same brush and held that the Trust's house rules had been broken by unknown people. As regards the allegation that the occupiers failed to observe the rules pertaining to reception of visitors and that their visitors were rowdy, the LCC criticised the fact that it had not been specified who, among the occupiers, had invited visitors to the farm. The LCC also concluded that there was no proof that the dogs that were allegedly roaming on the farm and damaging the vineyards belonged to the occupiers. It said:

'[T]he Land Claims Court is a court of justice and equity. It can never be just and equitable to order a mass eviction of families, parents and children from the farm based on a blanket, unfounded and unsubstantiated allegations of breach of a relationship between the occupiers and the Trust. It must be clear who did what.

[T]he Trust must be in a position to say which of the 26 respondents is guilty of the atrocities relied upon for the eviction to succeed.'

[15] On 11 March 2021, the Trust applied for leave to appeal the LCC's judgment. On 7 July 2021 the LCC granted it leave to appeal to this Court. On 2 September 2021, the occupiers applied for leave to appeal the LCC's order dismissing their defence of res judicata, which had been raised as a preliminary point. On 11 November 2021, the LCC granted them leave to cross-appeal to this Court. The filing of the notice to cross-appeal was not in accordance with the rules of this Court, as it was delivered more than a month after the filing of the Trust's Notice of Appeal. Accordingly, an application for the condonation of the late noting of the cross-appeal was filed on behalf of the occupiers.

[16] It is evident from the affidavit filed in support of that application that the root cause of the delay in filing the cross-appeal was the fact that the application for leave to cross-appeal was launched at the LCC only after the Trust had filed its notice of appeal in this Court. The explanation for that delay was that the mandate for the legal representatives who had represented the occupiers in

the LCC had not been automatically extended to the appeal processes. On the other hand, the indigent occupiers were unable to fund the appeal processes and thus had to re-apply to the 28th respondent for funding. The delay in securing legal representation for the application for leave to appeal in turn caused the delay in the filing of the notice to cross-appeal.

[17] Oral arguments in this Court were preceded by an application for condonation of the late noting of the cross-appeal. The Trust's counsel indicated that he had no instructions to oppose the application for condonation. Having considered all the circumstances of the case, this Court granted condonation on the basis that a proper case had been made out. I consider next the merits of the appeal.

Discussion

[18] It is trite that in motion proceedings, the affidavits filed in the application constitute evidence. In such proceedings, the norm is that affidavits are limited to three sets. For this reason, utmost care must be taken to fully set out the case of a party on whose behalf an affidavit is filed. These being motion proceedings, the application fell to be decided in accordance with the principle laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[4] (the *Plascon Evans* principle). In terms of that principle, an applicant who seeks final relief in motion proceedings must, in the event of a dispute of fact, accept the version set up by his or her opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.[5]

[19] It is settled that ESTA requires two consecutive steps to be taken before an eviction order may be granted by a court. Having conducted an overview of various judgments, this Court in *Aquarius Platinum (SA) (Pty) Ltd v Bonene and*

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[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984] 2 All SA 366 (A); 1984 (3) SA 623 (A) at 634E-635C.
[5] *Wightman t/a JW Construction v Headfour and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA); [2008] 2 All SA 512 (SCA) para 12.

Others (Aquarius)[6] described the two-stage procedure mentioned in s 8[7] of ESTA as follows:

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[6]*Aquarius Platinum (SA) (Pty) Ltd v Bonene and Others* [2020] ZASCA 7; 2020 (5) SA 28 (SCA) para 13.

[7]Section 8 provides 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.

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

(3) 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.

(4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and— (a) has reached the age of 60 years; or (b) is an employee or former employee of the owner or person in charge, and as a result of ill health. injury or disability is unable to supply labour to the owner 45 or person in charge, may not be terminated unless that occupier has committed a breach contemplated in section 10(1)(a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.

(5) On the death of an occupier contemplated in subsection (4), the right of residence 50 of an occupier who was his or her spouse or dependant may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependant has committed a breach contemplated in section 10(1).

(6) Any termination of the right of residence of an occupier to prevent the occupier from acquiring rights in terms of this section, shall be void.

(7) If an occupier's right to residence has been terminated in terms of this section, or the occupier is a person who has a right of residence in terms of section 8(5)— (a) the occupier and the owner or person in charge may agree that the terms and conditions under which the occupier resided on the land prior to such termination shall apply to any period between the date of termination and the date of the eviction of the occupier; or (b) the owner or person in charge may institute proceedings in a court for a determination of reasonable terms and

'. . . [B]oth the clear meaning of the language of these sections and their context (the need to protect the rights of residence of vulnerable persons) indicate a two-stage procedure. Section 8 provides for the termination of the right of residence of an occupier, which must be on lawful ground and just and equitable, taking into account, inter alia, the fairness of the procedure followed before the decision was made to terminate the right of residence. Section 8 at least requires that a decision to terminate the right of residence must be communicated to the occupier. Section 9(2) then provides for the power to order eviction if, inter alia, the occupier's right of residence has been terminated in terms of s 8, the occupier nevertheless did not vacate the land and the owner or person in charge has, after the termination of the right of residence, given two months' written notice of the intention to obtain an eviction order. Section 8(2) must of course be read with s 8(1) and provides for a specific instance of what may constitute a just and equitable ground for the termination of a right of residence.'

[20] It is not disputed that the Trust sent separate notices to all the occupiers, terminating their rights of residence and giving them notice of its intention to evict them. That being the case, the pertinent question is whether the termination of their right to reside on the farm was lawful and also whether it was, given all the circumstances, just and equitable.

[21] Regarding the trigger for the termination of the right of residence, the occupiers asserted that they were dismissed pursuant to their refusal to subject themselves to the Trust's more onerous conditions of employment, while the Trust averred that the termination of the occupiers' employment resulted from their participation in an unprotected strike. According to the Trust, all the occupiers were offered reinstatement into their former positions but only two persons (who are not respondents in this matter) accepted the offer. Some of the occupiers accepted employment elsewhere. It bears emphasising that in terms of s 8(2) of the ESTA,[8] the right of residence of an occupier who is an

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conditions of further residence, having regard to the income of all the occupiers in the household.'

[8] In terms of s 1 of the Extension of Security of Tenure Act (ESTA), 'occupier' means 'a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding—
(a) . . .

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 1995.

[22] Regardless of each party's version on how the employment relationship ended, what is common cause is that it ended on 24 June 2011. Suffice it to observe that more than a decade after the employment relationship between the Trust and the occupiers ceased, the occupiers have not sought any legal redress at the Commission for Conciliation Mediation and Arbitration or any other forum.

[23] In its founding affidavit, the Trust highlighted serious breaches of the relationship purportedly committed by the occupiers which, on the Trust's version, rendered the former's continued occupation of the farm untenable. The photographs depicting the damage resulting from non-compliance with house rules substantiate the Trust's assertions. It is of great significance that many material allegations of inappropriate conduct attributed to the occupiers have not been denied. In the main, the laconic affidavit filed on their behalf consisted of bare denials in the face of detailed averments establishing a fundamental breach of the parties' relationship.

[24] Nowhere in the sparse responses in the answering affidavit is the irretrievable breakdown of that relationship denied. Despite this, counsel for the occupiers contended that the occupiers' denial of unruly conduct described in the founding affidavit gave rise to several disputes of fact. He argued that in the face of such factual disputes, the LCC was, in terms of the *Plascon-Evans* principle, enjoined to decide the matter on the facts averred in the occupiers' answering affidavit, as they were the respondents. In my opinion, one of the

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(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and
(c) a person who has an income in excess of the prescribed amount.'

exceptions to the general rule laid down in *Plascon-Evans* does not support counsel's contention because the occupiers' bald denials in the face of detailed averments borne out by photographs did not amount to a genuine dispute of facts. This exception was articulated as follows in *Rail Commuters Action Group v Transnet Limited t/a Metrorail*:[9]

'In assessing a dispute of fact on motion proceedings, the rules developed by our courts to address such disputes will be applied by this Court in constitutional matters. Ordinarily, the Court will consider those facts alleged by the applicant and admitted by the respondent together with the facts as stated by the respondent to consider whether relief should be granted. Where however a denial by a respondent is not real, genuine or in good faith, the respondent has not sought that the dispute be referred to evidence, and the Court is persuaded of the inherent credibility of the facts asserted by an applicant, the Court may adjudicate the matter on the basis of the facts asserted by the applicant. Given that it is the applicant who institutes proceedings, and who can therefore choose whether to proceed on motion or by way of summons, this rule restated and refined as it was in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* is a fair and equitable one.'

In my view, the LCC should have applied the principle set out in this passage in order to reach its verdict. In failing to do so, it materially misdirected itself.

[25] It is of significance that the occupiers have rejected all the Trust's attempts at brokering an amicable resolution of the impasse. Section 8(7)*(a)* of ESTA stipulates that 'if an occupier's right to residence has been terminated . . . the occupier and the owner or person in charge may agree that the terms and conditions under which the occupier resided on the land prior to such termination shall apply to any period between the date of termination and the date of the eviction of the occupier'. I have already alluded to the fact that the Trust's case was that the occupiers had flouted various house rules that had been agreed upon in terms of the lease agreement. One of them, which the occupiers admitted disregarding, was their liability for the payment of rental and the fact that rental had not been paid since the employment relationship ended in 2011. It is undisputed that the occupiers were invited to several meetings

[9] *Rail Commuters Action Group v Transnet Limited t/a Metrorail* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) para 53.

where they were invited to make representations pertaining to their continued occupation of the farm, but none of them attended such meetings.

[26] The answering affidavit made no attempt to respond to the following averments set out in the founding affidavit:

'During May 2018 notices were delivered at every one of the relevant premises by the Sheriff. Essentially 2 separate notices were delivered, one to whichsoever member of the household had previously had a direct right to occupy, and one delivered to each member of his family. In this regard I attach hereto the notices delivered to the first and second respondents marked as Annexures "FA 22(a)" and "FA22(b)" respectively, in which notices, *inter alia*, the following was recorded.

53.1 The facts giving rise to the occupation of the property by the first and the second respondents were reiterated.

53.2 It was recorded that in the event it was alleged by the second respondent that she had in fact received tacit consent to occupy the property that this too would have been subject to the same terms and conditions as the consent afforded to the first respondent.

53.3 *It was recorded that the relationship between the trust and the relevant respondent had broken down.*

53.4 It was recorded that the trust was *considering* cancelling the first and second respondents' right of occupation of the property for the reasons contained in the notices.

53.5 *The many instances of misconduct on the part of the occupiers leading to harm to the trust and to the remaining persons on the property were listed.*

53.6 It was recorded further that the entirety of the right of occupation afforded to them was fair.

53.7 It was noted the relative interests of the parties justify the possible termination of their rights of occupation.

53.8 The letter informed that the trust was considering terminating any such rights as the first and second respondents might allege for the reasons as set out in the letter.

53.9 It was recorded that the consent that the respondents had to occupy the property was fair and the circumstances and that the trust had need for the premises for the conducting of the business of the property.

53.9.1 More correctly in this regard it should be noted that the trust in fact intends using the land where the occupiers currently reside to erect new structures. . . .

53.10 The first and second respondents were afforded an opportunity to deliver, to myself at the property or the trust's legal representatives, representations as to why they believed their consent to occupy property should not be terminated.
53.11 It was reiterated that in the event such representations were not received or in the event same were not deemed compelling, that their rights to occupy could be terminated.
53.12 *An identical notice, mutatis mutandis, was delivered to every respondent*.
53.13 *None of the respondents took the opportunity afforded to them to make representations, and indeed I can record that none of them even approached me in order to discuss the content of these notices and calls for representations*.' (Own emphasis.)

[27] The averments above, which have not been denied, are borne out by the specimen notice attached to the Founding Affidavit. They unquestionably attest to the occupiers' apathy towards the restoration of a social relationship. It is not surprising that the LCC, in its judgment, accepted that all the occupiers were offered to an opportunity to make representations as envisaged in s 8(1)*(e)*. This finding has not been attacked by the occupiers. Considering all the circumstances set out above, I am of the view that the Trust's compliance with all the requirements set out in s 8(1) of ESTA is beyond reproach. The termination of the occupiers' right of residence was therefore lawful. In *Snyders and Others v de Jager and Others*,[10] the Constitutional Court emphasised that the right of termination must also be just and equitable both at a procedural and substantive level. The reason for the termination of the right of residence remains a relevant consideration, in my view. Given the undisputed averments pertaining to how the occupiers conducted themselves on the farm and the gravity of the conduct upon which the right of termination is predicated, I am of the view that the termination of the right of residence was just and equitable both procedurally and substantively.

[28] It is well-established that once an occupier's right to reside has been duly terminated, his refusal to vacate the property is unlawful.[11] The occupiers

[10] *Snyders and others v de Jager and Others* [2016] ZACC 55; 2017 (3) SA 545 (CC)
[11] *Mkangeli and Others v Joubert and Others* [2002] ZASCA 13; [2002] 2 All SA 473 (A); 2002 (4) SA 36 (SCA) paras 12-13.

did not deny that they were, on more than one occasion, asked to vacate the farm. In terms of s 9(2)*(d)*, two months' notice of the intended eviction application must have been given to the occupier following the termination of the right to reside as envisaged in s 8.[12] The Trust's compliance with the service requirements set out in s 9(2)*(d)* has not been challenged. What remains is to consider whether the conditions for an order of eviction as laid down in s 10 or s 11 have been met. Both s 10 and s 11 are applicable, as some of the occupiers took occupation of the farm before 1997 (thus bringing them within the purview of s 10), while others took occupation after 1997 (this bringing them within the purview of s 11).

[29] As regards the occupiers whose occupation commenced before 1997, the Trust relied on s 10(1)*(c)* and s 10(3) of ESTA. Section 10(1)*(c)* provide:

'(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if –

. . .

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

Section 10(3) provides:

'(3) If—

(a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;

(b) the owner or person in charge provided the dwelling occupied by the occupier; and

(c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,

a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her. and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to—

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[12] Ibid.

(i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and

(ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted.'

[30] In *Nimble Investments (Pty) Ltd v Malan*,[13] this Court explained that the factors that must be considered when determining whether an occupier has committed a fundamental breach of the relationship envisaged in s 10(1)*(c)* of ESTA, include the history of the relationship between the parties prior to the conduct giving rise to the breach, the seriousness of the occupier's conduct and its effect on the relationship.

[31] In *Ovenstone Farms (Pty) Ltd v Persent and Another*,[14] the LCC held that a fundamental breach of the relationship between an owner and an occupier contemplated in s 10(1)*(c)* 'relates to a social rather than to a legal relationship' and that this requirement would be met if 'it is practically impossible for the relationship to continue due to a lack of mutual trust'. In the present matter, it is worth noting that the conduct which constitutes a fundamental breach of the parties' relationship was attributed to all the occupiers. The conduct in question was inter alia described as follows in the founding affidavit: 'I in no way in this regard wish to imply that all the [occupiers] are careless as to their treatment of the property, but by virtue of the fact that they are a large and diverse group, there are persons in the group who treat the property with nothing but contempt. . . . [S]ome of the [occupiers] have developed the practice of disposing of household waste by the expedient of either simply disposing of it adjacent to the cottages or by burning same. For obvious reasons *the burning of household waste is strictly prohibited as this can lead to conflagration destructive of the vineyards in the property*. There has in fact already been one case of the fire spreading to the vineyards albeit this was caused by arson as opposed to the burning of household waste. A further health concern is the matter of human waste and waste water.

[13] *Nimble Investments (Pty) Ltd v Malan* [2021] ZASCA 129; [2021] 4 All SA 672 (SCA). para 46-47.
[14] *Ovenstone Farms (Pty) Ltd v Persent and Another* [2002] ZALCC 31.

. . .

As I have said the cottages were clearly designed and are suitable for small family units. Such sanitation as exists is hopelessly inadequate for the inflated number of persons currently resident at the cottages.

. . .

Also, it would appear that household waste water, as well as human waste, is disposed of immediately below the cottages. The cottages are on the top of a slope leading down into the vineyards. There is essentially a constant stream of water flowing from the cottages through the vineyards. Also in the event of rains, accumulated waste simply washes down from the cottages in the vineyard

. . .

For obvious reasons this is wholly unacceptable in the production of grapes.' (Own emphasis.)

[32] The Trust was candid enough to disclose that the only way in which it could identify the culprits was by using cameras activated by means of motion detectors. It asserted that one of the rules pertaining to the occupiers' occupation of the farm clearly stipulated that they were not allowed to own dogs on the farm. The presence of the dogs in the vineyards was substantiated by a photograph. This prohibition was based on the dogs' propensity to damage the vineyards. The Trust asserted that CCTV cameras were not of much benefit because the motion detectors were constantly being set off by dogs. This had led to bulk footage that was impossible to review. For this reason, the Trust asserted that it had to incur the cost of employing night security on the farm.

[33] The occupiers' nonchalant retort was to accuse the Trust of having failed to specifically disclose the identities of the individuals who had committed the various acts of inappropriate conduct. The rationale for the prohibition on keeping dogs (ie that they damage the vineyards) was not disputed. The deponent to the answering affidavit inter alia stated as follows:

'My silence on certain allegations must not be taken as [acquiescence] on my part or on the part of the other [occupiers]. [The Trust's] founding affidavit is voluminous and contains unsubstantiated allegations of criminality on the property . . . [The deponent] mentions CCTV footage as being ineffective as result of dogs roaming freely at the property. He does not mention the owners of the dogs or the owner who lets the dogs

roam around freely. In fact, [the deponent] makes serious allegations about unidentified persons to the exclusion of the employees of the [Trust].'

[34] The responses in the answering affidavit were generally sparse, as the material allegations of misconduct were largely left unchallenged. Some of the responses amounted to untenable rationalisations. For example, responding to the allegation that there were persons defecating in the vineyards, the occupiers stated that the 'simple and acceptable explanation' was that such conduct could be attributed to the failure of the applicant to empty the septic tank.

[35] The Trust's version about the damage to the irrigation system and health risks resulting from the unhygienic conditions prevailing on the farm on account of littering, dysfunctional drainage and sewer systems and the fire risks to which the property is exposed due to the occupiers' refusal to co-operate, are uncontroverted. It was alleged that the sewage system had been destroyed as a result of baby nappies and newspapers, among other things, being flushed down the toilet. These unhygienic conditions are borne out by the heaps of litter close to the cottages as well as burnt household waste as depicted in the photographs. Some of the photographs depicted the damage to the irrigation systems and the damaged electrical systems.

[36] The occupiers did not dispute that they were previously subject to house rules that were embodied in the lease agreement, and that these rules inter alia required them to use specific access points to their homesteads, to maintain the cottages in a clean state and prohibited them from keeping dogs on the farm. They simply contended that the Trust had not shown that they were the owners of the dogs roaming on the property. They also did not deny that the Trust had, on occasions, had to intervene due to altercations among rowdy visitors.

[37] The Trust attached a schedule prepared for the period December 2018 to 1 March 2019 setting out the amounts paid for private security on the farm in an effort to curb theft of grapes and vandalism on the farm, which had a

negative effect on the business of the Trust and had caused the Trust to incur a loss of R3 million in one financial year. This is undoubtedly a relevant factor that serves as an indicator of the hardship that the Trust will be faced with if an order of eviction is not granted.

[38] Tellingly, the occupiers did not deny the Trust's assertion that it was quite clear that the relationship between the parties had 'wholly broken down' due to the manner in which the occupiers had conducted themselves. The Trust averred that 'for many years there has been nothing resembling a relationship between the Trust and the [occupiers]; the [occupiers] essentially form a wholly independent group living on the property which group does not abide by any of the rules on the property'. The occupiers have not asserted otherwise and seemed unperturbed by the Trust's assertions concerning a breakdown of the relationship.

[39] The occupiers seem indifferent to the Trust's hardship of not being able to accommodate its own employees on the farm. In this regard the Trust has had to establish a tented compound in order to accommodate certain of its employees during peak season when their presence on the property is essential. Instead of addressing this hardship, the occupiers suggested that the Trust's own employees were responsible for cutting down fences on the farm. The deponent said: '. . . t]he allegations of vandalism cutting of fences could be caused by the [Trust's] employees as the employees reside outside the property and could be using short cuts on the property'.

[40] In my opinion, the inappropriate conduct complained of is of a serious nature, regardless of whether the occupiers' occupation commenced before or after February 1997 as envisaged in s 10 and 11 of ESTA. To the extent that the allegations were not specifically disavowed by the occupiers, and the damage complained of is borne out by the photographs, it must be accepted that the Trust's assertions have a ring of truth.[15] The damage to the Trust's

[15] *Rail Commuters Action Group v Transnet Limited t/a Metrorail* 2005 (2) SA 359 (CC) fn 5 above para 53.

property cannot be allowed to continue unabated simply because individual culprits could not be identified on CCTV cameras. In my opinion, the Trust could perhaps have alleviated the problems associated with health risks posed by the unsanitary presence of human waste in the vicinity of the vineyards. However, it must be borne in mind that the Trust had to expend money on constantly mending broken fences, repairing the damaged irrigation system, and procuring the services of security guards to prevent unauthorised access to the farm.

[41] What is plain from the record is that there was an unhealthy stalemate following the cessation of the employment relationship. The photographs depicting water flowing from an irrigation hose which was left unattended, litter left lying around in the vicinity of the cottages and the presence of heaps of burnt refuse despite the known risk of fires spreading to the vineyard are all aspects that give credence to the Trust's contention that its property was treated with contempt. This kind of conduct is, in my view, irreconcilable with a cordial social relationship. The blatant non-compliance with the applicable house rules is an issue that could have been amicably resolved at the meetings that were proposed by the Trust. Unfortunately, the occupiers chose not to attend such meetings. The attitude of the occupiers in not showing interest in the restoration of a harmonious relationship was also unhelpful. The founding affidavit attests to the Trust's numerous efforts to regularise the relationship, but these were spurned. The occupiers' uncompromising stance apparently frustrated all efforts to restore the relationship and only served to ruin the social relationship beyond repair.

[42] The circumstances of this case largely match those in *Klaase and Another v Van der Merwe NO and Others (Klaase)*,[16] where the Constitutional Court found that the relationship between the property owners and the occupiers had broken down to such an extent that it could not be salvaged. Notably, the averment that the relationship had irretrievably broken down was not disputed. The fact that the relationship cannot be restored is a major

[16] *Klaase and Another v Van der Merwe NO and Others* [2016] ZACC 17; 2016 (6) SA 131 (CC) para 43.

consideration in respect of those occupiers whose occupation of the farm commenced before 1997.

[43] As alluded to, earlier, the 11th, 12th and 21st respondents were, at the time of the hearing of the application in the LCC, occupiers as contemplated in s 8(4) of ESTA as they had lived on the farm for more than ten years and had reached the age of 60 years. In terms of that provision, their residence could only be terminated if they had committed a breach contemplated in s 10(1)*(a)*, *(b)* or *(c)* of ESTA, the rider being that their mere failure or refusal to provide labour could not be regarded as a breach. As mentioned earlier, the Trust's case was premised on s 10(1)*(c)*.

[44] In *Klaase*,[17] the Constitutional Court held that absconding from work and absenteeism; a history of inappropriate conduct; failure to attend a disciplinary hearing; failure to vacate premises as agreed; and continuing to live on the premises rent-free while being gainfully employed elsewhere, constitutes a fundamental breach for purposes of s 10(1)*(c)* of ESTA.

[45] As mentioned before, the 11th and 12th respondents passed on before the hearing of the appeal. This means that the 21st respondent, who is 63 years old, is the only respondent who is on a different footing than the rest of the respondents and can, as such, only be evicted if she is shown to have committed a fundamental breach envisaged in s 10(1)*(c)*. It bears emphasising that the fact that she had not shown any interest in accepting reinstatement is an irrelevant consideration.

[46] According to the municipality's report, she is healthy and 'does not have special need'. In this regard, I have already indicated that she did not distance herself or members of her household from any of the inappropriate conduct complained of concerning. She could at least have attended one of the meetings to deny involvement in the conduct complained of and to reaffirm her household's commitment to compliance with the house rules. She did nothing

[17] Ibid.

to indicate her interest in the preservation of a harmonious social relationship with the Trust as the owner of the farm. On the contrary, all indications point to her having made common cause with the other respondents. Under the circumstances, the protection of being a long-term occupier as envisaged in s 8(4) cannot avail her. In addition, she has not denied that the relationship between her and the Trust can no longer be salvaged on account of the serious allegations made against all the occupiers, which fall within the ambit of s 10(1)*(c)*. Since the requirements of this provision, have been met, it follows that her eviction from the farm is inevitable.

[47] It is self-evident from the provisions of s 11(3)*(d)* that in circumstances where the commission of a breach by occupiers is the reason for the proposed eviction, such breach will be a relevant consideration even in respect of those occupiers whose occupation commenced after February 1997. I have already expressed the view that a fundamental breach of the relationship on account of inappropriate conduct has been shown in respect of all the occupiers. The strained relationship can, even in respect of the occupiers who occupied the farm after 4 February 1997 (ie those falling within the ambit of s 11 of ESTA), be described as a situation that is 'beyond redemption',[18] given various accusations and counter-accusations evident in the founding and answering affidavits. What is patently clear is that basic house rules relating to the respective occupiers' conduct on the property were fragrantly disregarded. The breach of these rules, which resulted in the financial loss set out in the preceding paragraphs, is the main reason why the Trust seeks an order of eviction.

[48] The pronounced lack of mutual trust between the parties is self-evident. The Trust's attempts to regularise the relationship have come to naught. It is undisputed that the Trust is currently unable to provide its own workforce with accommodation. In summary, the circumstances canvassed above when considered cumulatively, lead me to conclude that the conditions set out in s 9(2) of ESTA have been met. This paves the way for considering whether

[18] Compare *Labuschagne and Another v Ntshwane* 2007 (5) SA 129 (LCC) para 22-23.

justice and equity would be served if an eviction order is granted. In deciding whether it is just and equitable to grant an eviction order, this Court must consider whether suitable alternative accommodation is available to the occupiers (s 11(3)*(c)*) and balance the interests of the Trust *vis-a-vis* those of the occupiers (s 11(3)*(e)*). It is to that question that I now turn.

[49] The LCC directed the 28th respondent, the Department of Rural Development and Land Reform, to submit a probation officer's report as envisaged in s 9(3) of ESTA.[19] In her report, the probation officer suggests that the occupiers not be evicted from the property and requested the LCC to rather order the affected parties to partake in a meaningful engagement process. She fleetingly mentioned that one of the occupiers alluded to the fact that the cottages are in a dilapidated state. Against the clear manifestation of a history of mistrust and a deteriorating strained relationship which none of the occupiers have been interested to mend over the years, coupled with the fact that several of them are already employed elsewhere, I am of the view that any prospect of mutual trust being rekindled is but a chimera. As it is practically impossible for the relationship between the parties to be restored due to a lack of mutual trust, I am of the respectful view that no purpose would be served by an order proposed by the probation officer.[20]

Is an order of eviction warranted under the circumstances of this case?

[50] Section 9(3) forms part of ESTA provisions that impose limitations on evictions and prescribe the circumstances in which an eviction order may be made. The relevant considerations include the availability of suitable alternative accommodation to the occupiers, the effect of an eviction on the constitutional rights of any affected persons, including the rights of children to education, and any hardship that an eviction may cause the occupiers. Another relevant

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[19] Section 9(3) makes provision for submission of a probation report upon request of a court with regard to the following:

(a) the availability of suitable alternative accommodation;
(b) an indication of how the eviction will affect the occupier's constitutional rights, including the rights of children regarding their education;
(c) pointing out any undue hardships which an eviction would cause the occupier; and
(d) reporting on any matter as may have been prescribed by the court.

[20] *Nimble Investments (Pty) Ltd v Johanna Malan and Others* fn 13 above.

consideration in matters of this nature is the comparative hardship to the occupiers and the owner of the property. As aptly stated in *Molusi and Others v Voges N O and Others (Molusi)*,[21] 'a court making an order for eviction must ensure that justice and equity prevail in relation to all concerned. This it does by heeding the considerations specified in s 8 read with s 9, as well as ss 10 and 11 of ESTA, which make it clear that fairness plays an important role.'

[51] On the conspectus of all the facts in this case, it would be unreasonable to expect the Trust to continue to provide the occupiers with housing in the face of undisputed evidence of an unsalvageable breakdown of the parties' relationship. Sympathetic as one may be to the plight of the occupiers, who have considered the farm as their place of abode for many years, the Trust cannot, under the prevailing circumstances, be expected to continue to accommodate the occupiers on its farm indefinitely.

[52] Moreover, the dilapidated cottages appear to be on the verge of being uninhabitable due to their state of disrepair. The Trust's averment that the cottages occupied by the occupiers were in a dilapidated state and warranted to be demolished was not disputed by the occupiers. It was averred that some of the walls were collapsing, with gaps between the asbestos roofing and the supporting wall. The extent of the dilapidation is borne out by the photographs attached to the Trust's founding affidavit. This, in my view, is an aspect which, on its own, seriously militates against the refusal of the eviction order. It simply cannot be in the interests of justice for this Court to sanction continued long-term occupation of uninhabitable dwellings.

[53] Against the afore-stated background, to order the Trust to retain the occupiers on the farm and to expect the occupiers to live indefinitely in dilapidated cottages with asbestos roofing and in crooked wooden houses indefinitely would border on being inhumane. In the same vein, to order the Trust to renovate the cottages and to expect it to bear the costs of such renovations in addition to the costs it has already incurred in managing the

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[21] *Molusi and Others v Voges N O and Others* fn 2 above para 39.

security risks would be to unfairly impose an additional hardship on the Trust. All the more so because the Trust has had to tolerate the occupiers' attitude in circumstances where the occupiers have been staying in the cottages rent free for more than a decade after the termination of the employment relationship.

[54] It is well-established that in the context of justice and equity, the availability or otherwise of alternative accommodation is one of the factors that a court must take into consideration. In *Molusi*,[22] the Constitutional Court held that a municipality is obliged not only in terms of ESTA, but also s 26(3) of the Constitution to provide suitable alternative accommodation. In this matter, the occupiers indicated that they would have no place of abode, should they be evicted from the farm. Some of them had already applied to the 27th respondent (the municipality) for assistance regarding their accommodation needs, but it had been a fruitless exercise for some of them, while a few were put on a waiting list.

[55] The municipality compiled a report on 8 October 2020. In respect of the second respondent, who is the wife of the first respondent, the report acknowledges that she applied for housing from the government in 2013 and confirms that she was registered on the municipality's housing database on 24 June 2013. It also records that the first respondent is suffering from a disability. It states that even though he was dependent on a disability grant, the grant had been suspended. The report also notes that the first respondent's wife and the couple's two children are employed. Surprisingly, it records that 'the housing application has not been flagged as rural dwellers' but does not explain why that was not done. It concludes by mentioning that 'due to the date of the application, the applicant will not be considered for formal housing soon' but does not elaborate on why the application cannot be considered expeditiously.

[56] The municipality's report also divulged that eligibility for emergency housing was governed by the Municipality's Temporary Housing Assistance

[22] *Molusi and Others v Vogel* fn 2 para 43.

Policy (policy). In terms of that policy, only households earning R5 400 per month and below qualified for 'indigent and financial assistance subsidies'.

[57] Following a narration of the challenges the municipality was facing in respect of allocation of housing to indigent communities, the report stated as follows under the heading 'Conclusion':

'Formal Housing

56. The Municipality faces a housing demand of 19 500 applicants which includes unemployed and/or physically challenged persons.

57. Those Respondents who are not registered on the Formal Housing Demand Waiting List Database should visit the Municipality's Housing office to register. If they fail to register, they can never be considered for a formal housing opportunity. All respondents have been advised at the socio-economic inspections, that they need to visit the Municipality offices to update their housing applications and/or to apply for formal housing through the Municipality.

58. Selection for formal housing works on a 60/20/20 principle as set out in the Housing Selection Policy of the Municipality. 20% of each housing project is allocated applicants on the housing waiting list registered as dwellers of rural land, another 20% to special needs persons and 60% to the rest of the registered applicants on the general waiting list.

Emergency Housing

59. The most immediately-available site where emergency housing may be available, is Schoongezicht. However, this presents a limited number of housing opportunities.

60. The Municipality's finding, however, is that 7 households does not qualify for emergency accommodation in terms the Municipality's Temporary Housing Assistance Policy, as none of the households will be rendered homeless in the event of an eviction given their income levels.

61. In this regard, as a rule of thumb, and in applying section 5.1 of its temporary Housing Assistance Policy, the Municipality generally utilises the current threshold determined for household income' in terms of its Indigent Support Policy, being R4500. Naturally, other factors might have a bearing, and this threshold is not rigidly applied. However, in the present instance, no such factors have been identified which would indicate that this rule of thumb should be departed from, and none of the households are at the level where their total income suggests they would qualify for assistance.'

[58] The municipality claimed that it would be unable to provide the occupiers with alternative emergency accommodation if an order of eviction was granted. It is, however, clear from its report that it has an emergency housing assistance policy to accommodate homeless persons with accommodation close to their homes. In terms of that policy, it would be obliged to provide the occupiers with alternative accommodation, should they be rendered homeless.

[59] Under the heading 'Steps Taken by the Municipality in an Attempt to Meet Demand', the municipality enumerated several challenges which stand as obstacles in the provision of accommodation to the occupiers; these include budgetary constraints and unavailability of land to which the occupiers can be relocated. There is nothing in the report suggesting any real prospect of the municipality providing the occupiers with accommodation. The municipality cannot seek to shirk its constitutional responsibility to private citizens.

[60] It appears that the municipality has not considered the fact that the cottages occupied by the occupiers are in a dilapidated state. If it has, it has paid very little regard to that aspect, as no mention whatsoever is made of the condition of the cottages. It has also paid insufficient regard to the fact that several occupiers, including the disabled first respondent, had already formally approached it for the provision of low-cost housing six years prior to the preparation of the report and were placed on a waiting list. These are special circumstances that warrant special consideration. Moreover, s 28(1)*(c)* of the Constitution provides that children have the right to shelter. It is the municipality's responsibility to ensure that the occupiers' children do not end up homeless.

[61] Given the plight of the occupiers, the municipality is duty-bound to provide them with alternative emergency accommodation. Considering the fact that the eviction of the occupiers is linked to the provision of emergency accommodation by the municipality, the eviction of the occupiers is just and

equitable.[23] It follows that the LCC ought to have granted an order of eviction. Counsel for the occupiers argued that, in dismissing the application, the LCC had exercised a true discretion within the contemplation of s 10(1)*(c)* of ESTA. Since the Trust had failed to demonstrate that the LCC did not act judicially in refusing to grant an order of eviction, it was not open to this Court to interfere with the LCC's decision, so it was contended.

[62] It is well-established that where a lower court has exercised a discretion in the true sense, an appellate court is ordinarily not entitled to interfere with the decision of that court unless it is satisfied that its discretion was not exercised judicially, or that it was influenced by wrong principles or wrong application of the facts, or that the lower court had reached a decision which could not have been made by a court properly directing itself to the relevant facts.[24] The question is whether it has been demonstrated, on appeal to this Court, that the LCC did not act judicially, or that it acted on a misapprehension of the facts or on wrong principles.[25] Insofar as the LCC exercised its discretion not to grant an order of eviction on the basis of a wrong application of the *Plascon-Evans* principle, its discretion was influenced by wrong principles and was therefore not properly exercised. This Court is therefore at large to interfere with the LCC's refusal to grant an eviction order. It follows that the appeal ought to succeed. What remains for consideration is a decision on the cross-appeal.

Res judicata

[63] The occupiers' cross appeal amounts to the invocation of a defence of res judicata on the basis that the cause of action and the parties in the eviction application launched in the LCC were the same as those in the litigation previously determined in the magistrate's court. Counsel for the occupiers contended that the LCC should have upheld the defence of res judicata in respect of the occupiers who were cited as respondents in the magistrate's court, because the addition of more respondents in the LCC proceedings did

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[23] See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).
[24] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 88.
[25] *Systems Applications Consultants (Pty) Ltd t/a Securinfo v Systems Applications Products AG and Others* [2020] ZASCA 81 para 50.

not detract from the fact that all the respondents mentioned in the magistrate's court were the same persons mentioned in the LCC proceedings.

[64] It has been held that the doctrine of res judicata has ancient roots as an implement of justice. Its purpose was to protect the litigants and the courts.[26] The defence of res judicata was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause.[27] The gist of the plea of res judicata is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and can therefore not be raised again.[28]

[65] As far back as 1893, this Court in *Bertram v Wood*[29] cautioned that, unless carefully circumscribed, the defence of res judicata could produce great hardship and positive injustice to individuals. With the passage of time, its requirements were relaxed. The label 'issue estoppel' referred to instances where the same cause of action requirement 'was not rigorously enforced' and is thus an extension of res judicata.[30] In *Smith v Porritt and Others*, this Court explained the relaxation of res judicata as follows:

'Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same . . . in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements, those that remain are that the parties must be the same . . . and that the same issue . . . must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed.'[31]

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[26] *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation and Others* [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC) para 111.
[27] *Prinsloo NO & Others v Goldex 15 Pty Ltd & another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) para 10.
[28] Ibid.
[29] *Bertram v Wood* (1893) 10 SC 177.
[30] *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation and Others* [2019] note 18 above para 114.
[31] *Smith v Porritt and Others* 2008 (6) SA 303 (SCA) para 10.

[66] Following *Boshoff* and a line of judgments of this Court, it is now well-established that the requirements of res judicata should yield to the facts of each case[32]. In dismissing the defence of res judicata, the LCC reasoned that the parties cited in that court as respondents, who were occupying the farm, were not the same parties as those who were cited as respondents at the magistrate's court, insofar as the children of those respondents were not cited as parties in the magistrate's court but were cited as parties at the LCC. It found that the issues raised in the litigation in both courts were the same.

[67] It seems to me that even though only the heads of different households were cited as parties in the magistrate's court, the parties in both matters were essentially the same. In *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others*, this Court said:

'As I have mentioned Caesarstone submitted that while the remaining family members were not parties to the proceedings in Israel there was a sufficient commonality of interest between them and WOMAG and Mr Oren Sachs to satisfy the requirements of the plea of *lis pendens*. The argument commences with a reference to *Voet* 44.2.5, where *Voet* gives examples of what is meant by the 'same person' in the context of a plea of *res judicata*. Whilst the rule is often stated as being that it covers only those who are privies in the sense of having derived their rights from a party to the original litigation, it is by no means clear that *Voet* confined it that narrowly..

. . .

It may be that the requirement of "the same persons" is not confined to cases where there is an identity of persons, or where one of the litigants is a privy of a party to the other litigation, deriving their rights from that other person. Subject to the person concerned having had a fair opportunity to participate in the initial litigation, where the relevant issue was litigated and decided, there seems to me to be something odd in permitting that person to demand that the issue be litigated all over again with the same witnesses and the same evidence in the hope of a different outcome, merely because there is some difference in the identity of the other litigating party.'[33]

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[32] Royal Sechaba Holdings (Pty) Ltd v Coote and Another (366/2013) [2014] ZASCA 85; [2014] 3 All SA 431 (SCA) para 19.

[33] *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* [2013] ZASCA 129; 2013 (6) SA 499 (SCA); [2013] 4 All SA 509 (SCA) paras 42 & 43.

[68] Even though I align myself with the sentiments expressed in the passage above, I do not have to make a finding on that aspect. In my opinion, an aspect on which the *res judicata* defence can be conclusively decided upon in this matter is whether the same issue of fact or law determined in the magistrate's court was determined in the LCC. If the same issue was not determined on the merits by the magistrate's court, the upshot would be that an essential requirement for a plea of res judicata would not have been met. In order to come to the result pronounced by the court, careful attention must always be paid to what the court which handed down the earlier judgment was called upon to determine and what must necessarily have been determined.[34] The exercise is not mere mechanical comparison of what the two cases were about and what the court stated as its reasons for the order made.[35]

[69] While the issues that fell for determination in the magistrate's court and the LCC, at first blush, appear to be the same, ie whether an order of eviction was just and equitable, the form and context in which that issue was raised in each court was different. In the magistrate's court the application for eviction was predicated on the Trust's operational reasons on the basis that the employment relationship had ended and that in terms of the lease agreement, the termination of employment in turn led to the termination of the right of residence.

[70] In the LCC, the application was predicated on events post the judgment handed down in 2017. As regards long term occupiers, the contention was that they had committed such a fundamental breach of the relationship between them and the Trust that it was not practically possible to remedy it. As explained by this Court in *United Enterprises Corporation v STX Pan Ocean Co Ltd,*[36] in a slightly different context, the consideration as to whether the same issue raised was previously determined in an earlier judgment depended not on the import of the order granted but on answering the substantive question

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[34] *Democratic Alliance v Brummer* [2022] ZASCA 151 para 15.
[35] *Aon South Africa (Pty) Ltd v Van den Heever NO and Others* [2017] ZASCA 66; 2018 (6) SA 38 (SCA); [2017] 3 All SA 365 (SCA) para 40.
[36] *United Enterprises Corporation v STX Pan Ocean Company Ltd* [2008] ZASCA 21; 2008 (3) SA 585 (SCA); [2008] 3 All SA 111 (SCA) para 9.

pertaining to the nature of the issue of fact or law that was decided by the court in the proceedings, and whether it was finally decided.

[71] To my mind, the circumstances raised in the LCC were of a different hue to those determined by the magistrate. This is because the substantive question of the breach of the relationship was not finally determined by the magistrate, as the magistrate's reasoning was that on the question of the conduct that allegedly gave rise to the breach of the relationship, there was a dispute of fact that was not resoluble on the papers. That this is so, is manifestly discernible from the magistrate's judgment. This view is fortified by the following exposition in *Mkhize NO v Premier of the Province of Kwazulu-Natal and Others (Mkhize)*:
'The pertinent question is therefore whether an order can be considered final when it is concerned with dismissal or discharge of interim or interlocutory orders. In *Cohn*, the finality of a dismissed matter was considered and the Court stated:
"In dealing with the position where an action is dismissed, Spencer Bower says that the answer to the question whether anything can be said to have been decided, so as to conclude the parties, beyond the actual fact of the dismissal depends upon whether . . . *the dismissal itself is seen to have necessarily involved a determination of any particular issue or question of facts or law, in which case there is an adjudication on that question or issue; if otherwise, the dismissal decides nothing, except that in fact the party has been refused the relief which he sought*."'[37] (Own emphasis.)
The remarks above are equally apposite in this matter.

[72] It is well-established that the successful invocation of res judicata requires the party raising that plea not only to show that there was an identity of the parties and of the issues in the former and in the present litigation but must also show that the earlier judgment relied upon was a final judgment.[38]
It is evident from the magistrate's judgment that no final finding was made in respect of the allegations of misconduct against the occupiers, as the magistrate believed that there was a dispute of facts on that aspect. It is trite that where a factual dispute exists, the judicial officer's option is, depending on

[37] *Mkhize NO v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 50; 2019 (3) BCLR 360 (CC) para 41 & 42.
[38] *Transalloys (Pty) Ltd v Mineral-Loy (Pty) Ltd* [2017] ZASCA 95 para 22.

the circumstances of the case, to dismiss the application (where the factual dispute was foreseeable) or to refer the matter for the hearing of oral evidence.

[73] Where the application is dismissed because of the existence of a factual dispute, it would result in untenable hardship for the applicant in a matter of this nature if, in circumstances where an issue was raised but not finally determined, the earlier judgment would entitle the respondent to successfully invoke the plea of res judicata despite that specific issue not having been adjudicated upon. In this matter, the magistrate dismissed the application without making any firm finding on whether or not any misconduct on the part of the occupiers had caused the parties' social relationship to break down irretrievably as contended for by the Trust. As the issue pertaining to the fundamental breach and irretrievable breakdown of the relationship envisaged in s 10(1)*(c)* was not finally determined by the magistrate, the defence of res judicata was therefore not available for the occupiers in the litigation that was initiated in the LCC.

[74] Moreover, as can be gleaned from the founding affidavit, the Trust predicated its claim mainly on circumstances that obtained after the date of the judgment granted by the magistrate court in 2017. When the Trust sent out a notice that it was considering terminating the occupiers' rights of residence, a period of more than a year had elapsed since the handing down of the magistrate's judgment. As correctly submitted by counsel for the Trust during the exchange with the bench, the factual matrix that constitutes a manifestation of the alleged breach of trust and irretrievable breakdown of the relationship between the Trust and the occupiers are events that occurred after the date of the handing down of the magistrate's judgment and continued to fester. Logically, issues that arose after the granting of the magistrate's judgment could not have been previously determined by the magistrate. Thus, nothing barred the applicants from bringing a new application based on those new developments. It follows that the LCC, in dismissing the defence of res judicata, granted the correct order. The cross-appeal must therefore fail.

[75] To sum up, I am of the view that on the conspectus of all the circumstances of this case, an order of eviction was inevitable, as all the

relevant provisions of ESTA had been complied with. Nothing precluded the LCC from granting the eviction order.[39] Insofar as the LCC refused to grant that order on the basis that it was not just and equitable to do so, it erred.

[76] The next enquiry is to consider the date by which the occupiers should have vacated the farm and the date on which the eviction order must, on their failure to do so, be executed. In terms of s 12 of ESTA, a court that considers it just and equitable to grant an eviction order shall determine a just and equitable date on which the occupier shall vacate the land and determine the date on which an eviction order may be carried out if the occupier has not vacated the land on the date they were ordered to do so. In considering this aspect, I have also considered whether the municipality would be in a position to provide emergency accommodation within a short space of time, I can see no reason why the municipality would not be in a position to, in compliance with this Court's order, provide emergency housing to all the occupiers in this matter within a period of six months.

Costs

[77] The default position in the LCC is not to grant an order of costs of the litigation instituted in that court. The circumstances of the case do not warrant

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[39] Section 9(1) and (2) of ESTA provide as follows:
'(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.'

a deviation from that position. As regards the costs of appeal, it bears noting that in this matter, the indigent occupiers were granted state funding both in the LCC and in this Court. This Court stated as follows in *Haakdoringbult Boerdery CC & others v Mphela & others*:[40]

'That leaves the costs on appeal. This Court has not yet laid down any fixed rule and there are judgments that have ordered costs to follow the result and others that have made no orders. I believe that the time has come to be consistent and to hold that in cases such as this there should not be any costs orders on appeal absent special circumstances.'

I agree.

Notably, s 18*(b)* of ESTA clothes a court with the discretion to make such orders as to costs as it deems just. Having considered all the circumstances of this case, I am of the view that justice dictates that the occupiers not be mulcted with a costs order on appeal.

Order:

[78] In the result, the following order is granted:

1. The appeal succeeds and the cross-appeal is dismissed with no order as to costs in each instance.
2. The order of the Land Claims Court is set aside and replaced with the following order:

'(a) An eviction order is granted in respect of all the occupier respondents, with the exception of the eleventh and twelfth respondents.

(b) The first to tenth respondents and thirteenth to twenty-sixth respondents must vacate the farm known as Rein Hill Estate, situated on the remainder of farm number 1458 in the Drakenstein Municipality, Paarl Division, Western Cape Province on or before 31 August 2023.

[40] *Haakdoringbult Boerdery CC & others v Mphela & others* 2007 (5) SA 596 (SCA) para 76.

(c) Should the respondents mentioned in paragraph (a) and all those occupying the farm under them fail to vacate it on or before 31 August 2023, the sheriff of the court is authorised to evict them from the farm by 15 September 2023.

(d) The twenty-seventh respondent is ordered to provide emergency housing suitable for human habitation with access to basic services (which may be communal) to the respondents mentioned in paragraph (a) above and all those occupying the farm under them, on or before 31 July 2023.

(e) There is no order as to costs.'

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M B Molemela
Judge of Appeal

Appearances:

For first to third appellants:	L F Wilkin
Instructed by:	Meyer and Sarkas, Cape Town
	Claude Reid Attorneys, Bloemfontein
For first to twenty-sixth respondents:	L X Dzai
Instructed by:	Wakaba & Partners Attorneys, Johannesburg
	Maduba Attorneys, Bloemfontein