



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG**

- (1) REPORTABLE: No
 (2) OF INTEREST TO OTHER JUDGES: No
 (3) REVISED.

SIGNATURE

DATE:

[Handwritten Signature]
23/12/2022

**CASE NO: LCC68/2022
Magistrate's Court Number: 417/2020**

In the matter between:

NAPIER GRUNDSTÜCKS GMBH

First Appellant

NAPIER VINEYARDS (PTY) LT

Second Appellant

COENRAAD LEON BESTER

Third Appellant

and

GERSHWIN FREDERICKS

First Respondent

BRENWIN FREDERICKS

Second Respondent

MELANEY FREDERICKS

Third Respondent

**ALL PERSONS RESIDING WITH OR UNDER THE
FIRST AND SECOND RESPONDENTS ON THE
FARM NAPIER VINEYARDS, WELLINGTON**

Fourth Respondent

DRAKENSTEIN MUNICIPALITY

Fifth Respondent

**DEPARTMENT OF LAND REFORM AND
RURAL DEVELOPMENT**

Sixth Respondent

JUDGMENT

COWEN J

1. On 4 April 2022, Magistrate Saptoe of the Wellington Magistrates Court dismissed an application to evict the first and second respondents from a farm known as Napier Vineyards in Wellington (the farm). The application was instituted in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA).¹ An appeal against the decision was argued in this Court on 8 August 2022. Mr Montzinger appeared for the appellants. There was no appearance for the respondents.
2. The appellants are Napier Grundstucks GMBH,² the owner of the farm, Napier Vineyards (Pty) Ltd,³ the lessee of the farm and Coenraad Leon Bester. Mr Bester, the deponent to the founding affidavit, is the person in charge of day to day farming operations, human resources, employment and housing matters on the farm.
3. The respondents are residing on the farm together with their mother and step father (Mrs Maria Fredericks and Mr Koos Fontein), who are both ESTA occupiers. Mr Fontein is a long-term occupier as contemplated by section 8(4) of ESTA, having lived on the farm since about 1998. He retired some years back, before the first applicant

¹ The farm is more described as No 14369, Wellington and situated in the Drakenstein Municipality, Paarl Division, Western Cape. The third respondent vacated the farm during 2019 and relocated to Villiersdorp and there is no party affected by the citation of the fourth respondent. For convenience, I refer to the first and second respondents collectively as the respondents. I refer to the fifth respondent as the Drakenstein Municipality and the sixth respondent as the Department.

² Registration number 2017/058337/10).

³ Registration number 2015/178484/07.

purchased the farm. Mrs Fredericks arrived on the farm in about 2010 with the respondents, who are twins and who were then both about 14 years old. Mrs Fredericks and Mr Fontein currently live in a unit known as Flat 8B on the farm which is in a section used for retired employees. Flat 8B is a three roomed unit, with one bedroom. Mrs Fredericks is about 50 years old. At present, the respondents live with them in Flat 8B. According to the appellants, the respondents were employed by the appellants but are no longer so employed. The appellants contend that the respondents both derived their consent to reside on the farm through their employment.

4. The first respondent was employed from 19 May 2017 as a general farmworker, although a written contract of employment was signed only in April 2019. A housing contract was signed at the same time. Clause 6 of the written contract of employment regulates housing in the following terms:

‘6. Behuising

Indien daar behuising aan die werknemer beskikbaar gestel word is dit onderhewig aan die diskresie van die werkgewer en die reëls en regulasies soos uiteengesit in Aanhangsel 3.

Huur is wekliks betaalbaar en sal van die werknemer se weeklikse loon verhaal word.

Die werknemer se reg op behuising word uitdruklik gekoppel aan die werknemer se werkgereg. Die werknemer het slegs die reg om die huis te bewoon en te huur terwyl hy / sy in diens is van die werkgewer. Die werknemer moet ook volgens Artikel 28(2) van die Sektorale Vasstelling 13, die behuising ontruim (een) maand na diensbeëindiging.’

5. The housing contract records that house number 7 is allocated to the first respondent. It records further that Mrs Fredericks, Mr Fontein, the second respondent and the third respondent may reside in the house as family members.
6. According to the appellants, the first respondent's employment was terminated during 2019 in circumstances where he was allegedly abusing drugs and the appellants have a zero tolerance policy on illegal substances. The appellants set out the disciplinary process followed over several months, which they say, culminated in the conclusion of a settlement agreement on 13 June 2019. However, that agreement records, amongst other things, that the first respondent's services are voluntarily terminated by mutual agreement and neither party made any admissions on related conduct.
7. The second respondent commenced employment in February 2017 and allegedly absconded the following month. The second respondent did not refer any dispute in that regard to the appropriate body for resolution in accordance with the Labour Relations Act 66 of 1995.⁴ There was no written contract concluded in respect of second respondent's employment. The appellants contend that his right of residence was dependant on his employment.
8. The appellants say that they terminated the respondents' respective rights to reside on the farm after they followed a process requesting

⁴ See section 8(3) of ESTA.

representations. They served a letter requesting representations on 31 October 2019. The letter refers specifically to house number 7 and the recorded reason for the termination is 'operasionele benodighede en vooruitgang van die plaas/besigheid.' Neither the first nor the second respondent made any representations and on 7 November 2019, the appellants terminated their rights of residence in respect of house number 7. The appellants instituted the eviction application some ten months later, in August 2020. The founding affidavit focuses on the first respondents' history of drug use, which allegedly led to the disciplinary process and ultimately the termination of his employment. The appellants supply evidence of positive drug tests from 2019. It is alleged that the circumstances that led to the termination of rights included complaints from other occupiers about both respondents' drug use and resultant aggressive behaviour. Concerns about the impact on minor children living on the farm are raised.

9. The respondents opposed the application. They were represented by the Stellenbosch Law Clinic but only during the process in the Magistrates Court. The second respondent deposed to an answering affidavit in April 2021, which is confirmed by the first respondent. The second respondent explains that he and the first respondent are twins. In April 2021, they were 24 years old and they are both employed as gardeners earning a salary of R2600 each per month.
10. As indicated, they live in Flat 8B together with their mother and stepfather, Mrs Fredericks and Mr Fontein. Mrs Fredericks works as a

general worker at Groenberg Wassery earning a salary of R3 600. Mr Fontein is now about 67 years old. He worked on the farm for about 26 years and retired at the age of 60. He has lived on the farm since his employment commenced. He receives a state pension in an amount of some R1 800 per month and does casual work as a gardener about two days a week earning R150 a day.

11. The respondents explain that they are not refusing to vacate the property out of spite or malice but because they do not have alternative accommodation at their disposal. Their financial circumstances do not enable them to rent or buy alternative accommodation while also providing for their daily needs. They have looked for alternative accommodation but to date have not been successful finding a place that they can afford. They say that they do not have friends or family members with space on their properties to accommodate them and their parents are the only people who can assist them. Their current employer cannot assist them. Their names are not independently on the Municipality's housing list, but they explain that they have been advised to register their names, which they will do. They are registered on the housing list as dependants of their mother, Mrs Fredericks, who has applied for housing.

12. The respondents explain their history of residence on the farm. Consistent with the appellant's evidence, they explain that they arrived on the farm with their mother when they were 14 years old. They say that from that time, they resided in house number 7. It is common

cause that the appellants commenced employment with the appellants in early 2017, and they say that their right to reside in house number 7, indeed, arose from that employment. They occupied house number 7 with their parents based on the housing contract.

13. The respondents deny that they have displayed aggressive behaviour towards other occupiers on the farm or that they have abused illegal drugs since January 2021. They admit that they occasionally use cannabis, but that it does not make them aggressive. It is common cause that they do not contribute to the farming activities on the farm. They do not pay rent, but say that they have not been asked to and note that they are living with their parents.

14. Importantly, however, the respondents explain that they relocated to Flat 8B during 2019 when their parents did. The appellants, they say, were aware of this and did not at any stage say that they were not allowed to occupy that Flat with their parents. By April 2021, they had resided there for some two and a half years with the appellant's knowledge. The respondents explain that they did not consider it necessary to make any representations in respect of the notice of termination of residence rights sent in October 2022 as by then their right to reside derived from their parents who are, to date, occupying Unit 8B.

15. In a replying affidavit of September 2021, the appellants, amongst other things, dispute that the respondents moved to Unit 8B when their

parents did and say that they moved there after 'the employment relationship' came to an end. Although no date is provided for their parent's location, it is suggested that this occurred when the respondents commenced employment in 2017. They dispute that they moved into Unit 8B with their knowledge or permission and say that they commenced eviction proceedings when it came to their knowledge that they were living there. The appellants, furthermore, take issue with a number of the respondents' claims. Pertinently, they say that they have failed to substantiate their claims regarding the unavailability of suitable alternative accommodation and point out that their names are not on the housing list some two years after the application was instituted. They say that Flat 8B is not large enough to accommodate a family of four, being only 27 square metres. The minimum requirement for family accommodation is, they say, 30 square metres according to guidelines described as the Sustainable Agriculture in South Africa guidelines. However, the origin and status of those guidelines is not explained and Mr Montzinger could not shed light on that during argument. Moreover, the appellants put up various affidavits from other farmworkers in order to corroborate their concerns about drug use and loud or confrontational behaviour. The affidavits confirm weekend use of marijuana post 2021 and, in 2020, also of mandrax. They refer to an incident at about 9pm on a Sunday evening in September 2021 in which the respondents were apparently 'stoned' on marijuana and involved in a loud argument and fight between themselves.

16. The appellants also take issue with the reason offered for not responding to the request for representations, by saying:

‘the letter itself calls for reasons why they should not be evicted. It is common sense that their occupation of the flat would not be allowed to continue if they failed to provide sufficient reasons why it should.’

17. The appellant’s difficulty is that the letter refers specifically to their occupation of house number 7 stating that the reason for termination is operational and the furtherance of the farm. It does not mention Flat 8B.

18. The fifth respondent, the Drakenstein Municipality delivered a report on possible and emergency accommodation, dated 7 July 2021. The report records that there was engagement between the parties on 19 May 2021. At this meeting, the Department confirmed that it cannot provide accommodation. The respondents’ representatives confirmed that while they have family in Paarl, the area is unsafe and the family uses illegal substances. Their inability to afford rental accommodation was confirmed, as was their willingness to move to alternative accommodation should any be available. The Drakenstein Municipality explains its housing and emergency housing policy in its report. It confirms that the respondents were not at that stage on any housing list, which in any event have long backlogs. At best, emergency accommodation would be available in one of its emergency sites, Schoongezicht in mid-2022 and in the interim, building material could be supplied to erect an informal structure on private property.

19. The probation officer's report is dated 12 June 2021. It recommended that no eviction order be granted and that the respondents be permitted to continue to live as a family with their mother and step father on the farm, as at present they do not have any alternative accommodation.

20. The Magistrate agreed with the appellants that the respondents had, since 2017, derived consent to reside from their employment contracts. However, the Magistrate concluded that the respondents' right to reside on the farm had originated several years earlier and derived from their parents' right to a family life protected in section 6(2)(d) of ESTA. That right, it was held, is currently being exercised in respect of Flat 8B and has never been terminated. The Magistrate refers to the decision of the Constitutional Court in *Hattingh*,⁵ which gave content to the section 6(2)(d) right to a family life, holding that:

'the purpose of the conferment of this right on occupiers was to ensure that, despite living on other people's land, persons falling within this vulnerable section of our society would be able to live a life that is as close as possible to the kind of life that they would lead if they lived on their own land. This means as normal a family life as possible having regard to the landowner's rights.'⁶

21. The Court continued:⁷

'Living a family life may mean the occupier living with his or her spouse or partner only or living with one or more of his or her children or with one or more members of his or her extended family, depending upon what the result

⁵ *Hattingh and Others v Juta* [2013] ZACC 5; 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC).

⁶ At para 35.

⁷ At para 37.

is when one balances the occupier's living with any one or more of these persons with what the owner of the land is also entitled to. If, in a particular case, the balancing produces a result that is unjust and inequitable to the owner of the land, the occupier's right to family life may be appropriately limited. If, however, the occupier were to live with his or her spouse or partner and with one two or more of his children or other members of the extended family and this would not result in any injustice or unfairness and inequity to the owner of the land, the occupier would be entitled to live with those members of his or her family.'

22. Moreover, the Constitutional Court held that 'the attainment of the age of majority or being independent of parents' does not 'take a person out of the ambit of his or her parents' family.'⁸

23. The Magistrate considered a range of factors in this regard concluding in all the circumstances, that, on the grounds advanced by the appellants, it would not be just and equitable to terminate this right in terms of section 8 of ESTA⁹ or grant an eviction order in terms of section 9.

⁸ At para 34.

⁹ Section 8 is titled 'Termination of right of residence' and provides:

(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.

24. The Magistrate appears to have assumed that any right to reside that flowed from the respondents' employment was terminated in accordance with section 8 of ESTA.¹⁰ To that extent, the application was then decided with reference to section 9 of ESTA. The decision then turned on the application of section 11 of ESTA, which is applicable to the case on the common cause facts. The Magistrate considered various factors arriving at the conclusion that it would not be just and equitable to grant an order for eviction. The question whether suitable alternative accommodation is available to the respondents was a highly material, if not decisive consideration:¹¹ the Magistrate concluded that he was unable on the information at hand to find that the issue was addressed.

25. The appellants appeal on a series of grounds. They say that the Magistrate erred in how he exercised the discretions that vest with a Court seized with an ESTA eviction, both as a matter of law and fact. This includes incorrectly applying the concept of justice and equity. A concern that frames these features of the appeal is that the landowners' circumstances are said to be wholly dismissed. The Magistrate is also said to have only focused on those portions of the probation officer's report that support the respondents¹² and to have incorrectly applied *Hattingh*. In respect of factual matters, the Magistrate is said to have both made incorrect factual findings and had no regard to other facts.

¹⁰ At para 16.

¹¹ Section 11(2)(c).

¹² In conflict with this Court's decision in *Glen Elgin Trust v Titus and another* [2001] 2 All SA 86 (LCC).

26. I agree with the Magistrate's decision regarding the application of *Hattingh*. It is common cause that the first and second respondents are residing with their mother and step-father in Unit 8B. They do not require consent to do so, but if they did, on the respondents' version,¹³ they have occupied that flat with the appellants' knowledge and without objection since they moved there in 2019. As indicated above, the letter of termination refers only to house number 7. Any ESTA occupier residing in that flat enjoys a right to family life under section 6(2)(d) of ESTA, albeit subject to the balancing of rights with those of the owner as contemplated by section 6(2) and *Hattingh* itself.

27. In my view the Magistrate correctly found that those rights have not been terminated. They are rights that, at least, vest in Mrs Fredericks and Mr Fontein whose status as occupiers is not in question. The appellants have not taken any steps to terminate their rights and they are not parties to these proceedings. Moreover, the appellants have not sought to terminate the respondents' rights to reside, as family members, with their parents. The letter seeking representations does not reference these rights nor Flat 8B: it is quite clear that what the appellants were purporting to terminate is the right to occupy house number 7 as an incident of employment, which the respondents have in any event vacated. In my view these considerations are decisive of the appeal.

¹³ Which must be accepted applying the principles in *Plascon Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634H-635C and *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) at para 13.

28. In any event, I do not think, on the evidence before us, that the Magistrate's order can be disturbed on principles of justice and equity as contemplated by section 11(2), or when the right to family life is balanced with the rights of the owner and persons in charge. The latter enquiry too is to be infused with considerations of justice and equity.¹⁴ In this regard, I have considered each of the issues traversed in paragraphs 5 and 6 of the notice of appeal, which, according to the appellants, concern facts the the Magistrate incorrectly found (paragraph 5) or failed to have regard to (paragraph 6). I am not persuaded that the issues, to the extent factually sustained, can alter the balance in the appellants' favour. Moreover, I am satisfied that the Magistrate was, on the evidence to hand and at the relevant times, entitled to treat the absence of suitable alternative accommodation as a weighty matter. While it would have put any doubts to rest if the respondents had supplied the Court with more information of the actual costs of alternative accommodation available in the area, which they say that they cannot afford, the information they provided, in context of their salary and specific circumstances, sufficed.

29. In the result, the appeal stands to be dismissed. The appeal is unopposed, but in any event, there is no basis to depart from the usual approach whereby this Court only makes costs orders in special circumstances, of which there are none.

¹⁴ *Hattingh*, supra at para 32.

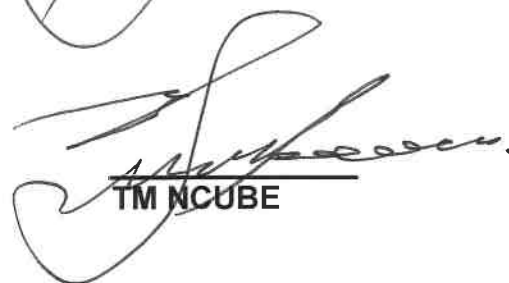
30. I make the following order:

30.1 The appeal is dismissed.

I agree



SJ COWEN



TM NCUBE

Appearances:

Appellants: Mr Montzinger instructed by Terblanche Attorneys

Respondents: No appearance