



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 186/15

In the matter between:

KAREL SNYDERS First Applicant

SOFIA SNYDERS Second Applicant

MINOR CHILDREN Third Applicant

and

LOUISA FREDERIKA DE JAGER First Respondent

WILLEM BREDA Second Respondent

**FAMILY MEMBERS OF SECOND RESPONDENT
RESIDING WITH HIM ON THE STASSEN FARM** Third Respondent

**ANY OTHER PERSON RESIDING WITH
THE SECOND RESPONDENT AND HIS FAMILY
ON THE STASSEN FARM** Fourth Respondent

Neutral citation: *Snyders and Others v de Jager and Others* [2016] ZACC 55

Coram: Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J,
Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J,
Nkabinde J, and Zondo J

Judgments: Zondo J (majority)

Heard on: 2 February 2016

Decided on: 21 December 2016

Summary:

Extension of Security of Tenure Act, 1997 — eviction of ESTA occupier — appeal of eviction order granted by the Magistrate’s Court and confirmed by the Land Claims Court — section 19(3) of ESTA — appeal lies to the Supreme Court of Appeal — termination of employment but no termination of right of residence — no compliance with substantive and procedural requirements of termination of right of residence — appeal upheld with costs — eviction order of lower court set aside — eviction order granted against current occupant of property

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Land Claims Court):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Land Claims Court, the Supreme Court of Appeal and the Magistrate’s Court for the district of Ladismith are set aside and that of the Magistrate’s Court is replaced with the following:

“(a) The application is dismissed with costs.”
4. Mr Willem Breda, his partner or common law wife and children are ordered to vacate the dwelling or house which was occupied by Mr Karel Snyders and his family before 1 October 2015 within 14 calendar days from the date of this judgment.
5. Should Mr Willem Breda and his family still be in occupation of the house or dwelling referred to in 4 above after the expiry of the period, the Sheriff is authorised and ordered to immediately evict him and his family or anyone occupying the house through him from the dwelling or house previously occupied by Mr Karel Snyders and his family on the farm owned by Mr F L Stassen.

6. The orders in 4 and 5 do not authorise or order the eviction of Mr Willem Breda and his family from the farm owned by Mr F L Stassen and managed by Ms Louisa de Jager.
7. Ms Louisa de Jager must pay the costs of the application for leave to appeal and the appeal in this Court, the Supreme Court of Appeal as well as the costs of the proceedings in the Land Claims Court.

JUDGMENT

ZONDO J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Mhlantla J and Nkabinde J concurring):¹

Introduction

[1] There will be two main issues for determination in the appeal in this matter if we grant the applicant leave to appeal. The first is whether an appeal lies to the Supreme Court of Appeal or the Land Claims Court where a Magistrate's Court has granted an eviction order under the Extension of Security of Tenure Act² (ESTA) and the Land Claims Court has confirmed that order in automatic review proceedings under section 19(3) of ESTA.³ The second is whether the eviction order against the applicants or its confirmation by the Land Claims Court was correct. There is also a subsidiary issue of whether a certain Mr Willem Breda and his family must be joined in these proceedings. However, this latter issue has been dealt with in a separate judgment that is being handed down simultaneously with this one. Pursuant to that judgment, Mr Breda and his family have been joined in these proceedings as second and further respondents.

¹ The reason why Froneman J's name does not appear among the Judges who concur in this judgment and yet is part of the coram is that he has written a separate judgment in which he indicates that he agrees with this judgment except on the issue of joinder and the grant of the eviction order. See *Snyders and Others v de Jager* [2016] ZACC 54 at para [24].

² 32 of 1997.

³ See [36] below.

The parties

[2] The first applicant is Mr Karel Snyders. He is illiterate and is only able to write his name. His mother tongue is Afrikaans. The second applicant is Mrs Sofia Snyders. The first applicant is the second applicant's husband. The first respondent, Ms Louisa Frederika de Jager, is an adult woman who is employed as the manager of a farm owned by Mr FJN Stassen in Voorbaat in the Ladismith Magisterial district in the Western Cape Province. For convenience I shall call the farm the "Stassen Farm". The second respondent is Mr Willem Breda who is employed on the Stassen Farm and occupies a house on that farm that was previously occupied by Mr Snyders and his family.

Background

[3] Mr Snyders was born in 1962 and has spent his entire working life in the Voorbaat area in the Ladismith district in the Western Cape. He married the second applicant while he was working on the "Matroos and Jan Crawford" farms in Voorbaat. In 1992 he was employed on the Stassen Farm. At that stage the farm was owned by a Mr de Klerk. He began working on the farm about a week before the birth of his son, Karel.

[4] Mr Snyders says that they - by which he must be referring to himself and his wife - "were granted the right to occupy a labourer's house on the farm" by Mr de Klerk. He says that about two years later Mr de Klerk sold the farm to Mr Stassen Snr. This would have been about 1994. He continues:

"My contract of employment was transferred from Mr de Klerk to Mr Stassen Senior on exactly the same terms and conditions [and] my employment on the farm continued unbroken and I remained in residence with my family in a labourer's house."

[5] Mr Snyders says that he had a very “happy and harmonious working relationship with Mr Stassen Snr and with his wife, the current owner’s mother. He says that they were like parents to him. In 2000 Mr Stassen Snr passed away. Mr Stassen Jnr, the current owner of the farm and son to Mr Stassen Snr, became the owner of the farm. After the death of her husband, Mrs Stassen left the farm and went to live with her daughter in Pretoria. Mr Snyders says that his working relationship with Mr Stassen Jnr was also good. He says that, as with Mr de Klerk and Mr Stassen Snr, there would be small disagreements from time to time but there were no major problems.

[6] In 2007 Mr Stassen Jnr appointed Ms de Jager as the farm manager. Mr Snyders says that he found Ms de Jager “difficult to get along with, as did others who worked for her on her own land and at the Stassen farm”. He continued about her:

“She seemed not to approve of the caring and harmonious relationship between Mr Stassen and his workers. Mr Stassen would look after his workers by assisting with advances on their wages when they required funds owing to some or other emergencies, and [Ms de Jager] would make it clear to me that she did not approve of this.”

Mr Snyders goes on:

“[Ms de Jager] did not seem to like or trust farmworkers at all, and would repeatedly accuse us, without justification, of being intoxicated at work. Whilst the working atmosphere on the Stassen farm had always been a happy one, she appeared to assume that cheerful workers were intoxicated workers, and she began issuing numerous written warnings to workers on the farm, threatening the security of our employment.”

He went on:

“Within less than a year of [Ms de Jager’s] appointment, after 16 years of working on the farm, I was dismissed at her instance in April 2008. I was highly aggrieved and attempted to have the fairness of my dismissal adjudicated upon by the Commission for Conciliation Mediation and Arbitration. However, that body refused my application for condonation when the dispute was referred to it on 1 July 2009, and it found that too much time had passed since my dismissal.”

[7] Mr Snyders was dismissed after a disciplinary inquiry which, according to Ms de Jager, he did not attend. It is, however, not clear from the record what allegations he faced in the disciplinary inquiry and what misconduct he was found guilty of. According to Ms de Jager, Mr Snyders was informed of his dismissal by way of a letter dated 18 April 2008. The letter was to the effect that his contract of employment was terminated and it informed him that he was required to vacate the house he was occupying within one calendar month. Mr Snyders’ version is that Ms de Jager gave him a certain letter on 18 April 2008 the contents of which she did not explain to him other than to tell him that he was dismissed. Mr Snyders says that Ms de Jager never told him that his right of residence was also being terminated. Since Mr Snyders is illiterate, he obviously would not have been able to read the letter to understand its contents. One expects that Ms de Jager must have known that Mr Snyders could not read.

Eviction proceedings: Magistrate’s Court

[8] For a year after Mr Snyders had been dismissed, Ms de Jager did not take any steps to get Mr Snyders and his family to vacate the house on the farm. It was only at about the end of March 2009 that she instituted an application in the Magistrate’s Court, Ladismith, for their eviction. Mr and Mrs Snyders opposed the application and deposed to affidavits in support of their opposition.

[9] Ms de Jager’s case against the applicants as set out in her affidavit was that Mr Snyders’ right of residence on the farm was dependent upon his continued

employment and that, since he had been dismissed, he no longer had a right to reside on the farm. She did not say in the affidavit what it was that Mr Snyders had done that led to his dismissal. Ms de Jager also said that she was in need of the house then occupied by Mr Snyders and his family as she had a new employee that she wanted to accommodate in that house.

[10] Ms de Jager also said that the applicants could get alternative accommodation in Zoar in the district of Ladismith. Mr Snyders denied this. In any event it appears that Zoar was too far from Voorbaat because it is about 20 km away. She said that she had notified the Department of Land Affairs, by registered post, of her intention to have Mr Snyders evicted. Ms de Jager said that she wanted the Court to give the applicants 14 days after the issuing of the eviction order to vacate the premises. She also sought that, if the applicants failed to vacate the house within the 14 days, the Court should authorise the Messenger of Court or Sheriff to evict Mr Snyders and his family.

[11] In her affidavit Ms de Jager averred that the applicants had enjoyed rights of occupation of the farm from some date after 17 February 1997. In his answering affidavit Mr Snyders denied the averment. He said that they had enjoyed the right of occupation on the farm from 1992. At the hearing, Ms de Jager's legal representative asked the Court to allow Ms de Jager to give oral evidence on her need for the accommodation and the availability of alternative accommodation. The basis for this request was that a lot of time had lapsed since the time when Ms de Jager's affidavit had been deposed to – which was a year earlier – and it was desirable that the Court should be updated on the position on this issue.

[12] The Court permitted oral evidence to be led on Ms de Jager's need for accommodation and on the availability of alternative accommodation. Ms de Jager gave evidence and was cross-examined. Her evidence-in-chief was confined to her need for the house occupied by the Snyders family and to the issue of availability of alternative accommodation. Mr Snyders' attorney confined his cross-

examination to these issues as well. Although in her evidence-in-chief, Ms de Jager had referred to accommodation that she said was available to the Snyders in certain places including at the local town, under cross-examination, she conceded that that accommodation was practically unavailable to Mr Snyders because he could not afford it. In the result she did not persist in saying that there was alternative accommodation available to Mr Snyders.

[13] In the course of giving evidence Ms de Jager went beyond the scope of the evidence permitted by the Court. Instead of confining herself to evidence relating to the availability of alternative accommodation and her need for the house occupied by the Snyders family, she began to give evidence on what she was unhappy about with Mr Snyders' occupation of the property. She said that he did not behave properly on the farm. She said that he would be drunk while on duty, he kept animals that he was not allowed to keep and failed to make sure that the animals did not go beyond the premises where he stayed. She testified that Mr Snyders also did not turn up for his disciplinary inquiry. She complained that, as the farm was a fruit farm, when there was fruit, his geese ate her fruit. However, it appears that some of the things to which Ms de Jager testified had happened after Mr Snyders had been dismissed.

[14] The Magistrate's Court subsequently handed down its judgment. It granted an order declaring that it was just and equitable for Mr Snyders and his family to vacate the Voorbaat Farm as described in the application on or before 20 December 2012. It also ordered that, if Mr Snyders (and his family) did not vacate the premises within that time, the Sheriff should execute the order at or after 12h00 on 31 December 2012. The order was suspended pending its confirmation by the Land Claims Court in automatic proceedings in terms of section 19(3) of ESTA. The judgment appears to have been handed down on 14 November 2012.

[15] The Magistrate's Court dealt with the matter on the basis that Mr Snyders had started living on the farm in 1992 and not after 17 February 1997 as Ms de Jager had said was the case. The Court conducted an inspection *in loco* on the premises

occupied by other workers on the farm and made certain findings. It accepted that at a practical level there was no alternative accommodation available to Mr Snyders and his family in Zoar and / or in Ladismith.

[16] The Court went on to say that there was only one point of dispute between the parties that needed to be decided. It said that that was whether section 10 of ESTA had been complied with by Ms de Jager. The Court said it had no doubt that Mr Snyders' right to occupy the house he occupied was dependent upon his continued employment on the farm. It pointed out that that meant that, once that employment had come to an end, his right to occupy the house also came to an end. The Court also relied on the fact that Mr Snyders was keeping certain animals on the premises which it said he was not entitled to keep.

[17] The Court held that there had been compliance with section 10(1), (2) and (3) of ESTA.⁴ With regard to section 10(1), the Court said that, as an occupier, Mr Snyders had prejudiced Ms de Jager through the damage caused by the geese he was keeping. The Court also said that he built a pigsty in such a manner that it interfered with the proper operations of the farm. It also relied upon the fact that Mr Snyders had brought other people to stay on the farm with him without Ms de Jager's permission. The Court said that by so doing Mr Snyders was in breach of section 6(3) of ESTA.⁵

[18] With regard to section 10(2), the Court found that there was no evidence of available alternative accommodation. However, it said that a lot of time had lapsed since Mr Snyders' dismissal. It said that Ms de Jager had a worker who needed to occupy the house Mr Snyders had previously occupied and his occupation of the house was prejudicial to Ms de Jager. With regard to the official report required by section 9(3) of ESTA, the Court said that the Department of Land Affairs had not

⁴ See [59] below for quote of section 10(1), (2) and (3) of ESTA.

⁵ See [55] below for quote of section 6(3) of ESTA.

submitted the report. The Court said that it was not prepared to delay the matter further simply because the Department had failed to comply with its obligations.

Land Claims Court

[19] In terms of section 19(3) of ESTA, an eviction order granted by a Magistrate's Court is subject to automatic review by the Land Claims Court before it can operate. Under that provision the Land Claims Court may confirm such an order in whole or in part, can set it aside in whole or in part, can substitute such an order in whole or in part, or remit the case to the Magistrate's Court with directions to deal with any matter in the manner as the Land Claims Court may think fit.

[20] On automatic review, the eviction order came before Matojane J. He confirmed the correctness of the eviction order as a whole. The applicants asked for reasons. These were provided. The applicants later applied to the Land Claims Court for leave to appeal to the Supreme Court of Appeal against the decision of the Land Claims Court. That Court granted leave.

Supreme Court of Appeal

[21] Ms de Jager adopted the attitude that, where a Magistrate's Court has granted an eviction order under ESTA which is subsequently confirmed by the Land Claims Court under section 19(3) of ESTA, an appeal lies to the Land Claims Court and not to the Supreme Court of Appeal. Her counsel contended that in effect and in substance an appeal in this situation is an appeal against the decision of the Magistrate's Court and not against a decision of the Land Claims Court and that, therefore, the Supreme Court of Appeal may not entertain an appeal against a decision of a Magistrate's Court.

[22] The applicants argued that the decision made by Matojane J confirming the eviction order of the Magistrate's Court was the decision against which they were appealing and it was a decision of the Land Claims Court. For that and other reasons,

the applicants argued that an appeal against a decision of the Land Claims Court lay to the Supreme Court of Appeal. In a judgment by Van der Merwe AJA,⁶ the Supreme Court of Appeal upheld Ms de Jager's contention that an appeal in this kind of matter lay to the Land Claims Court and not to the Supreme Court of Appeal. Consequently, the Supreme Court of Appeal struck the matter off the roll with costs. The judgment of the Supreme Court of Appeal was handed down on 30 September 2015.

After the Supreme Court of Appeal judgment

[23] On 1 October 2015 Ms de Jager caused the Sheriff to evict Mr Snyders and his family from the house they occupied on the Stassen Farm on the basis of the eviction order of the Magistrate's Court without any prior warning whatsoever either to Mr Snyders or his attorneys. Mr Snyders' attorneys communicated with Ms de Jager's attorneys to try and prevent his eviction but the eviction was carried out.

In this Court

[24] Mr Snyders and his family lodged an application in which they sought leave to appeal to this Court against the decision of the Supreme Court of Appeal and an urgent interim order restoring peaceful possession of the dwelling to them pending the decision of this Court on the application for leave to appeal. Ms de Jager opposed both applications. To this end she filed answering affidavits in support of her opposition of the applications.

[25] On 16 October 2015 this Court, by majority, granted an interim order in terms of which Ms de Jager was ordered to take all necessary steps to restore to Mr Snyders and his family peaceful possession of the dwelling they occupied immediately before

⁶ *Snyders v de Jager* [2015] ZASCA 137; (2016) 5 SA 218 (SCA) (Ponnan, Salduker, Dambuza and Mathopo JJA concurring).

their eviction on 1 October 2015. The interim order was to operate pending the determination of the applicants' application for leave to appeal.

[26] In her answering affidavit filed in opposition to the urgent application for interim relief, Ms de Jager disclosed that she had in the meantime given the house or dwelling to a Mr Willem Breda and his family. She pointed out that Mr Breda was employed on the farm and needed accommodation. Mr Breda's occupation of the house was in terms of an agreement between him and Ms de Jager.

[27] At the time that a decision was made on the Snyders' application for interim relief, this Court indicated that it would give its reasons when it hands down its judgment on the application for leave to appeal. Those reasons appear in a separate judgment that is being handed down at the same time as this judgment.

Jurisdiction

[28] The matter raises the interpretation of section 19(3) of ESTA. ESTA is legislation that was enacted to give effect to the Constitution. The interpretation or application of the legislation is a constitutional issue. That means that this Court has jurisdiction. This Court also has jurisdiction by virtue of the fact that the section 19(3) issue we are called upon to decide constitutes an arguable point of law of general public importance that deserves to be considered by this Court.

Leave to appeal

[29] The section 19(3) issue is a very important issue. The issue affects not only the parties before us in this matter but will affect many people against whom Magistrates' Courts may grant eviction orders under ESTA that are confirmed by the Land Claims Court under section 19(3). On the merits of the appeal, Mr Snyders and his family also have reasonable prospects of success. It is, therefore, in the interests of justice that leave to appeal be granted.

The appeal

[30] The first question is whether, in a case where a Magistrate’s Court has granted an eviction order under ESTA and that order is subsequently confirmed by the Land Claims Court, an appeal lies to the Supreme Court of Appeal or the Land Claims Court.

[31] Section 19(3) reads:

“Any order for eviction by a magistrate’s court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in the Gazette, shall be subject to automatic review by the Land Claims Court, which may—

- (a) confirm such order in whole or in part;
- (b) set aside such order in whole or in part;
- (c) substitute such order in whole or in part; or
- (d) remit the case to the magistrate’s court with directions to deal with any matter in such manner as the Land Claims Court may think fit.”

Subsection (3) must be read together with subsections (2), (4) and (5). Subsection (2) reads:

“Civil appeals from magistrate’s courts in terms of this Act lie to the Land Claims Court.”

Subsections (4) and (5) read as follows, respectively:

- “(4) The provisions of subsection (3) shall not apply to a case in which an appeal has been noted by an occupier.
- (5) Any order for eviction contemplated in subsection (3) shall be suspended pending the review thereof by the Land Claims Court.”

[32] Furthermore, section 37(2) of the Restitution of Land Rights Act⁷ and section 16(1)(c) of the Superior Courts Act⁸ are also relevant. Section 37(2) of the Restitution of Land Rights Act reads:

“(2) An appeal from a judgment or order of the [Land Claims] Court shall be heard by the Supreme Court of Appeal.”

The Restitution of Land Rights Act is the legislation that established the Land Claims Court. Section 16(1)(c) of the Superior Courts Act reads:

“(1) Subject to section 15(1), the Constitution and any other law—
 . . .
 (c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with the changes required by the context.”

Section 15(1) is not relevant to the present matter.

[33] The basis of the Supreme Court of Appeal’s conclusion was in effect that a party against whom a Magistrate’s Court has granted an eviction order needs to appeal to the Land Claims Court if he remains aggrieved, even after the Land Claims Court has confirmed the Magistrate’s Court’s eviction order in automatic review proceedings, and not against the Land Claims Court’s order.

[34] The Supreme Court of Appeal said that an order of the Land Claims Court in automatic review proceedings under section 19(3) confirming an eviction order of a Magistrate’s Court does not deal with the merits of the eviction order. The Supreme Court of Appeal said that, if, in automatic review proceedings under section 19(3), the

⁷ 22 of 1994.

⁸ 10 of 2013.

Land Claims Court set aside the eviction order of the Magistrate's Court, that decision is a decision of the Land Claims Court and an appeal lies to the Supreme Court of Appeal. However, it said that, if the decision of the Land Claims Court in the same proceedings was to confirm the decision of the Magistrate's Court, there is only one decision and that is the decision of the Magistrate's Court and an appeal lies to the Land Claims Court.

[35] It is important to point out that in the present case the decision against which the applicants sought leave to appeal to the Supreme Court of Appeal and in respect of which the Land Claims Court granted them leave to appeal is the Land Claims Court's decision confirming the Magistrate's Court's decision and not the Magistrate's Court's eviction order.

[36] I am of the view that the power given to the Land Claims Court in section 19(3)(a) to "confirm such order in whole or in part" is a power to confirm that the order or judgment of the Magistrate's Court is correct and free from irregularities that would render the decision susceptible to being set aside. The power to "set aside such an order in whole or in part" in section 19(3)(b) is the Land Claims Court's power to set aside an eviction order of a Magistrate's Court where the Land Claims Court thinks that such an order should not have been made and was wrong. The powers that ESTA gives to the Land Claims Court under section 19(3)(a) to (d) are as wide as any powers that a court usually has in deciding a matter on appeal. They do not appear to me to be limited to powers that a court has in review proceedings.

[37] One of the meanings of an "appeal" is a review.⁹ In ESTA there is reference to an appeal and a reference to automatic reviews. Furthermore, section 19(4) says that the automatic review provisions do not apply to a case in which an appeal has been noted by an occupier. Normally, the launching of a review application does not suspend the operation of an order that is the subject of the review but section 19(5)

⁹ See *Tikly v Johannes NO* 1963(2) SA 588 (T) at 590E–591A.

provides that an eviction order contemplated in section 19(3) is suspended pending the review thereof by the Land Claims Court.

[38] On the Supreme Court of Appeal's reasoning, a litigant who seeks to appeal that order of the Land Claims Court has no right to appeal that order but must appeal the order of the Magistrate's Court. That proposition is wrong.

[39] There is no justification in ESTA for an approach that deprives a litigant aggrieved by a decision of a court the right to appeal that decision. In my view, a litigant who is aggrieved by a decision of the Land Claims Court under section 19(3) confirming an eviction order of a Magistrate's Court is entitled, subject to leave being granted, to appeal to the Supreme Court of Appeal against that decision. The order against which he would be seeking to appeal is an order of the Land Claims Court and not of the Magistrate's Court. Whether the decision of the Land Claims Court in automatic review proceedings under section 19(3) is one confirming or setting aside the decision of the Magistrate's Court, the decision sought to be appealed against is that of the Land Claims Court and not that of the Magistrate's Court.

[40] This approach is consistent with, and, supported by, section 37(2) of the Restitution of Land Rights Act and section 16(1)(c) of the Superior Courts Act.¹⁰ The Supreme Court of Appeal did not consider section 37(2) of the Restitution of Land Rights Act. The Supreme Court of Appeal did refer to section 16(1)(c) of the Superior Courts Act but, by implication, held it not to be applicable to this case because, in its view, "the Land Claims Court did not determine the merits of the eviction order of the Magistrate".

[41] This was not an answer to section 16(1)(c) because that section refers to a "judgment or order" of a court of a status similar to that of the High Court without any qualification whether that order must be one determining the merits of a matter or not. The Land Claims Court is a court of a status similar to the status of the High Court. In

¹⁰ See [32] above.

any event, a reading of the Land Claims Court judgment in the automatic review proceedings reveals clearly that the Land Claims Court determined the merits of the matter as well.

[42] In seeking to understand the nature of an automatic review under section 19(3) and the extent of the powers that the Land Claims Court has under that provision it is useful to consider the nature of automatic reviews in criminal matters. Certain decisions by Magistrate's Courts are subject to automatic review by Judges of the High Court having jurisdiction over that Magistrate's Court. Under the Criminal Procedure Act,¹¹ if a Magistrate with a certain level of experience has passed a certain sentence, the clerk of the Court must send the record of the proceedings in that matter to the High Court where that record will be assigned to a Judge.¹² The Judge will read the judgment of the Magistrate's Court and the record to establish whether the proceedings were in accordance with justice.¹³

[43] If he concludes that they were, he or she certifies the proceedings accordingly.¹⁴ If he or she concludes that the proceedings were not in accordance with justice, he or she writes a judgment which is required to be concurred in by another Judge and makes such order as he or she considers will accord with justice. The Judge's conclusion that the proceedings were not in accordance with justice may be reached on the basis of either ground that may be taken into account in an appeal or grounds that may be taken into account on review.¹⁵ In other words, the High Court effectively uses both its appellate and its review powers in determining whether the proceedings in a Magistrate's Court were in accordance with justice.¹⁶

¹¹ 51 of 1977.

¹² Section 302 of the Criminal Procedure Act. See also Swanepoel "Review" in Joubert et al *Criminal Procedure Handbook* 11 ed (Juta & Co Ltd, Claremont 1994) at 377.

¹³ *S v Cedars* 2010 (1) SCRA 75 (GNP) at 77A-C citing *R v Harmer* 1906 TS 50 (*Harmer*) at 52.

¹⁴ *S v Addabba; Ngeme; Van Wyk* 1992 (2) SACR 325(T) at 331 A-C citing *Harmer* Id at 52.

¹⁵ *R v Madlélana* 1936 E.D.L 140; *S v Makebe* 1967 (1) SA 464 (N); and *S v Katu* 2001 (1) SACR 528 (E).

¹⁶ See Swanepoel above n 12 at 379.

[44] Under section 19(3) ESTA does not provide that the Land Claims Court must certify whether the eviction proceedings in the Magistrate's Court were in accordance with justice. Nor does it give the Land Claims Court any specific standard by which it should "review" the Magistrate's Court proceedings. What section 19(3) simply does is to give the Land Claims Court wide powers to confirm, set aside, substitute or remit a decision of the Magistrate's Court. The omission in section 19(3) to specify the standard by which the Land Claims Court must assess the appropriateness or otherwise of the eviction proceedings in the Magistrate's Court must have been deliberate so as to confer upon the Land Claims Court as wide powers as possible to make that assessment. In my view, as is the case with the High Court in respect of automatic reviews under the Criminal Procedure Act, in automatic review proceedings under section 19(3) the Land Claims Court may confirm, set aside, substitute or remit a Magistrate's Court's eviction order on the basis of either review grounds or appeal grounds. It is not limited to review grounds or irregularities. It, therefore, has both review and appellate powers.

[45] In reaching its conclusion, the Supreme Court of Appeal followed a line of decisions of the Land Claims Court which are to the same effect. They started with *Magodi*¹⁷ which was followed by other cases including *Klaase*,¹⁸ *Goosen*¹⁹ and ended with *Brummer*²⁰ to which the Supreme Court of Appeal referred in its judgment in the present case.

[46] All these cases appear to be based on the proposition that, when a Judge of the Land Claims Court confirms a decision of a Magistrate's Court under section 19(3), the decision of that Judge is not a decision of the Land Claims Court that has a legal status and legal effect. As a result, in those judgments the various Judges of the

¹⁷ *Magodi v Van Rensburg* [2001] ZALCC 30.

¹⁸ *Van Der Merwe v Klaase; In re: Klaase v Van Der Merwe* [2014] ZALCC 15 (*Klaase*).

¹⁹ *The Mont Chevaux Trust (IT 2012/28) v Goosen*, unreported judgment of the Land Claims Court, Case No L16/2014 (3 November 2014) (*Goosen*).

²⁰ *Brummer v Joostenberg*, unreported judgment of the Land Claims Court, Case No LCC 16R/2014 (20 February 2015).

Land Claims Court took the view that in those cases it is the decision of the Magistrate's Court that may be appealed against and that the appeal would lie to the Land Claims Court.

[47] I can see no basis in law for this approach. The reality is that there is a decision of the Land Claims Court. In my view, once a Judge of the Land Claims Court has confirmed a decision of the Magistrate's Court under section 19(3), the situation cannot be dealt with as if there is no decision of a higher court than the Magistrate's Court. As I say elsewhere in this judgment, when a Judge of the Land Claims Court confirms a decision of a Magistrate's Court under section 19(3), the Land Claims Court confirms that the decision of the Magistrate's Court is correct and is free from irregularities that could render it susceptible to being set aside on review. In the light of this I can see no reason why a litigant would want to appeal the Magistrate's Court's decision instead of the Land Claims Court's decision. Once an eviction order of a Magistrate's Court has been confirmed by the Land Claims Court under section 19(3), an appeal lies to the Supreme Court of Appeal.

[48] On the basis of section 37(2) of the Restitution of Land Rights Act, one only needs to ask the question: is a decision made under section 19(3) confirming an eviction order of a Magistrate's Court a "judgment or order" of the Land Claims Court? If the answer is that it is, then in terms of that provision, an appeal lies to the Supreme Court of Appeal. If the answer is that such a decision is not a decision of the Land Claims Court, then an appeal does not lie to the Supreme Court of Appeal. The answer is clearly that such a decision is a judgment or order of the Land Claims Court. That means that an appeal against it lies to the Supreme Court of Appeal.

[49] With regard to section 16(1)(c) of the Superior Courts Act, the only question that would need to be asked would be: is a decision under section 19(3) confirming an eviction order made by a Magistrate's Court a decision of a court of a status similar to

that of the High Court? If the answer is yes, then an appeal lies to the Supreme Court of Appeal. If the answer is no, then section 16(1)(c) would not be relevant. In my view, the answer is yes. Therefore, this means that an appeal against that decision lies to the Supreme Court of Appeal. Section 16(1)(c) begins with the words “subject to section 15(1), the Constitution and any other law”. There is, in my view, nothing in section 15(1), the Constitution and any other law which militates against approaching the issue this way.

[50] The Supreme Court of Appeal was, therefore, wrong in its conclusion and in striking the matter off the roll. It should have held that the appeal lay to it. It also ought to have considered and determined the appeal on the merits. Accordingly, we should set aside the decision of the Supreme Court of Appeal. Once we have done that, the next question is whether we should remit the matter to the Supreme Court of Appeal to deal with the merits of the appeal or whether we should determine the merits ourselves. If we decide the merits ourselves, we would be dealing with the correctness or otherwise of the decision of the Land Claims Court confirming the Magistrate’s Court’s order. In my view, that would in effect take us to the question whether the Land Claims Court was correct in confirming the Magistrate’s Court’s order as correct.

[51] I am of the view that we should determine the merits ourselves. The eviction application was launched in the Magistrate’s Court in March 2009. The Magistrate’s Court’s order was granted in November 2012. That means that the dispute between the parties has been going on for almost eight years. If we remit the merits to the Supreme Court of Appeal, it might take another year for the merits to be adjudicated and the matter may later come back to us any way. That will be costly for the parties and will unduly delay finality in this matter.

Was Ms de Jager entitled to the eviction of Mr Snyders and his family?

[52] The starting point is to establish whether Mr Snyders was an occupier under ESTA. The word “occupier” in ESTA is defined as meaning “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” certain categories of persons to which Mr Snyders does not belong. This means that a person who resided on land belonging to another and “who has or on 4 February 1997 or thereafter had consent or another right in law to do so” is an occupier if he or she does not fall within the exceptions provided for in paragraphs (b) and (c) of the definition.

[53] Ms de Jager appears to have accepted that on the Stassen Farm Mr Snyders was an occupier as defined in ESTA. She said nothing that suggests that Mrs Snyders is herself not an occupier as defined in ESTA. In the absence of an explanation from Ms de Jager or the Stassen’s to the effect that the consent for Mrs Snyders to reside on the farm was one that was dependent upon Mr Snyders continued right of residence on the farm, we have to assume that the consent she had to reside on the farm was also the one contemplated in the definition of “occupier”. That would make her an occupier as well. Accordingly, for purposes of this case we have to determine the matter on the basis that she, too, was an occupier as defined.

[54] Section 6(1) and (2)(a) to (f) of ESTA reads:

- “(1) Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly.
- (2) Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right—
 - (a) to security of tenure;
 - (b) to receive *bona fide* visitors at reasonable times and for reasonable periods:
 - Provided that—
 - (i) the owner or person in charge may impose reasonable conditions that are normally applicable to visitors entering

- such land in order to safeguard life or property or to prevent the undue disruption of work on the land; and
- (ii) the occupier shall be liable for any act, omission or conduct of any of his or her visitors causing damage to others while such a visitor is on the land if the occupier, by taking reasonable steps, could have prevented such damage;
 - (c) to receive postal or other communication;
 - (d) to family life in accordance with the culture of that family: Provided that this right shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997;
 - (dA) to bury a deceased member of his or her family who, at the time of that person's death, was residing on the land on which the occupier is residing, in accordance with their religion or cultural belief, if an established practice in respect of the land exists;
 - (e) not to be denied or deprived of access to water; and
 - (f) not to be denied or deprived of access to educational or health services."

[55] Section 6(3) reads as follows:

- “(3) An occupier may not—
- (a) intentionally and unlawfully harm any other person occupying the land;
 - (b) intentionally and unlawfully cause material damage to the property of the owner or person in charge;
 - (c) engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or
 - (d) enable or assist unauthorised persons to establish new dwellings on the land in question.”

[56] Section 8 of ESTA makes provision for the termination of the right of residence and eviction. Its heading reads: “TERMINATION OF RIGHT OF RESIDENCE AND EVICTION.” Section 8(1) reads:

- “(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.”*

Section 8(1) makes it clear that the termination of a right of residence must be just and equitable both at a substantive level as well as at a procedural level. The requirement for the substantive fairness of the termination is captured by the introductory part that requires the termination of a right of residence to be just and equitable. The requirement for procedural fairness is captured in section 8(1)(e).

[57] Section 8(2) reads:

“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 the employment or is dismissed in accordance with the provisions of the Labour Relations Act.”

If the owner of land or a farm manager relies on this provision to justify the termination of an occupier’s right of residence, the onus would be on the owner or manager to prove that the termination of the occupier’s employment had a fair reason related to the occupier’s conduct as an employee or his or her capacity or based on the

employer's operational requirements as required by section 188(1)(a) of the Labour Relations Act²¹ and that it was effected in accordance with a fair procedure as required by section 188(1)(b) of the LRA.²²

[58] Section 9 of ESTA deals with the limitations on the right of the owner of land or person in charge to evict an occupier. Section 9(1), (2) and (3) reads:

- “(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, for information purpose, 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*

²¹ 66 of 1995.

²² Section 188(1) reads:

- “(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove—
- (a) that the reason for dismissal is a fair reason—
 - (i) related to the employee's conduct or capacity; or
 - (ii) based on the employer's operational requirements; and
 - (b) that the dismissal was effected in accordance with a fair procedure.”

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.

- (3) For the purposes of subsection (2)(c), the Court must request a probation officer contemplated in section 1 of the Probation Service Act, 1991 (Act No. 116 of 1991), or an officer of the department or any other officer in the employment of the State, as may be determined by the Minister, to submit a report within a reasonable period—
- (a) on the availability of suitable alternative accommodation to the occupier;
 - (b) indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education;
 - (c) pointing out any undue hardships which an eviction would cause the occupier; and
 - (d) on any other matter as may be prescribed.”

[59] Section 10 governs the eviction of a person who was an occupier on the land as at 4 February 1997. Mr Snyders falls into this category of occupiers. As he started residing on the Stassen Farm in 1992 and resided there beyond 4 February 1997. Section 10(1), (2) and (3) reads:

- “(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if—
- (a) the occupier has breached section 6(3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;
 - (b) the owner or person in charge has complied with the terms of any agreement pertaining to the occupier’s right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the

breach despite being given one calendar month's notice in writing to do so;

- (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; or
- (d) the occupier—
 - (i) is or was an employee whose right of residence arises solely from that employment; and
 - (ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act.

(2) Subject to the provisions of subsection (3), if none of the circumstances referred to in subsection (1) applies, a court may grant an order for eviction if it is satisfied that suitable alternative accommodation is available to the occupier concerned.

- (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—

- (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.”

[60] Section 12 deals with aspects of eviction. It reads:

- “12. Further provisions regarding eviction.
- (1) A court that orders the eviction of an occupier shall—
 - (a) determine a just and equitable date on which the occupier shall vacate the land; and
 - (b) determine the date on which an eviction order may be carried out if the occupier has not vacated the land on the date contemplated in paragraph (a).
 - (2) In determining a just and equitable date the court shall have regard to all relevant factors, including—
 - (a) the fairness of the terms of any agreement between the parties;
 - (b) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land; and
 - (c) the period that the occupier has resided on the land in question.
 - (3) A court may, at the request of the sheriff in question, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal, subject to the conditions determined by the court as to the execution thereof: Provided that the sheriff shall at all times be present during such eviction, demolition or removal.
 - (4) Any order for the eviction of an occupier in terms of section 10 or 11 *shall be subject to reasonable terms and conditions for further residence which may be determined by the court, having regard to the income of all of the occupiers in the household.*
 - (5) A court may, on good cause shown, *vary any term or condition of an order for eviction made by it.*
 - (6) Notwithstanding the provisions of sections 10 and 11, the court shall not order the eviction of an occupier if it is of the opinion that one of the purposes of such intended eviction is to prevent the occupier from acquiring rights in terms of section 8(4).” (Emphasis added.)

[61] Ms de Jager's application in the Magistrate's Court was directed at Mr Snyders on the basis that, if Ms de Jager was entitled to an eviction order against him, then she was equally entitled to an eviction order against Mrs Snyders and their children. She did not put up any specific case against Mrs Snyders and the children. In the view I take of this matter, I propose to deal with whether Ms de Jager was entitled to an eviction order against Mr Snyders. I do so because, even on Ms de Jager's own approach, if she was not entitled to an eviction order against Mr Snyders, she could not be entitled to an eviction order against Mrs Snyders and the children.

[62] In her founding affidavit in the Magistrate's Court, Ms de Jager relied upon an averment that Mr Snyders started residing on the Stassen Farm after 17 February 1997. In his answering affidavit Mr Snyders disputed this and pointed out that he and his wife had been residing on the farm continuously from 1992. The significance of this is that, on Mr Snyders' version, his eviction would be governed by section 10 but, on Ms de Jager's version, Mr Snyders' eviction would be governed by section 11. The Magistrate's Court decided the matter on the basis that Mr Snyders had started residing on the farm in 1992 and that, therefore, his eviction was governed by section 10.

[63] In instituting the eviction proceedings, Ms de Jager chose to do so by way of motion proceedings. From the time the application was lodged to the time that it was heard a period of more than three years had lapsed. As already indicated, on the day of the hearing the attorney for Ms de Jager applied from the Bar for leave to lead oral evidence so as to update the Court on Ms de Jager's need for the house occupied by the Snyders family as well as on the availability of alternative accommodation. The Court granted leave for this.

[64] The evidence-in-chief that Ms de Jager gave fell within the scope of the permission granted by the Court. During the cross-examination this did not change. However, in re-examination Ms de Jager's attorney led her on new evidence that did

not arise from the cross-examination. Indeed, she led her on evidence falling outside of the scope of the leave granted by the Court. Evidence was led that sought to make a new case against Mr Snyders and his family that had not been made out in Ms de Jager's founding affidavit or in Ms de Jager's evidence-in-chief. Mr Snyders' attorney subsequently criticised this conduct on the part of Ms de Jager's attorney and said that Ms de Jager and her attorney were not entitled to lead evidence falling outside the scope of the leave granted by the Court.

[65] Ms de Jager's attorney sought to justify their conduct on the basis that Mr Snyders' attorney had cross-examined Ms de Jager on Mr Snyders' conduct on the Stassen Farm. He contended that this had opened the door for them to lead the additional evidence they led in re-examination relating to Mr Snyders' alleged conduct on the farm. A reading of the transcript of the proceedings relating to the oral evidence led reveals that Mr Snyders' attorney did not cross-examine Ms de Jager on Mr Snyders' conduct on the farm. In fact, the Magistrate should have stopped them from going outside the scope of the leave he had granted.

[66] Counsel for the Snyders family criticised the Magistrate's Court for relying on Ms de Jager's evidence that was irregularly led and fell outside the scope of the permission the Court had granted. Ms de Jager's evidence falling outside that permitted by the Magistrate's Court should not have been allowed and should also not have been relied upon by the Magistrate's Court to justify its conclusion and order. It is true that the Snyders family was given an opportunity to lead evidence but declined it. However, this does not change anything. If it was irregular for the Magistrate's Court to allow that evidence to be led, Counsel for the Snyders family was entitled to refuse to be party to the perpetuation of that irregularity and argue later that the Court was wrong to have allowed it and should, therefore, not take it into account.

[67] If a person has a right of residence on someone else's land under ESTA, that person may not be evicted from that land before that right has been terminated. In other words, the owner of land must terminate the person's right of residence first

before he or she can seek an order to evict the person. However, it must be borne in mind that the termination of a right of residence is required to be just and equitable in terms of section 8(1) of ESTA. Section 8(2) deals with the right of residence of an occupier who is an employee of the owner of the land or of the person in charge and whose right of residence arises solely from an employment agreement. It provides that such a right of residence may be terminated “if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act”.

[68] It may well be that Mr Snyders’ right of residence had arisen solely from an employment agreement. We do not know that. In her founding affidavit in the Magistrate’s Court Ms de Jager did not aver that Mr Snyders’ right of residence arose solely from a contract of employment. Nor did she give oral evidence to that effect when she testified in Court. When Mr Snyders started working on the farm, the farm was owned by a Mr de Klerk. Mr Snyders said that his contract of employment was transferred as it was from Mr de Klerk to Mr Stassen Snr. Ms de Jager did not dispute this. Nor could she, seeing that she was not working on the Stassen Farm in 1992. Therefore, this matter cannot be dealt with on the basis that Mr Snyders’ right of residence arose solely from his employment.

[69] In any event Ms de Jager did not terminate Mr Snyders’ right of residence. She assumed that, once she had terminated his contract of employment, that automatically terminated his right of residence as well. She said that the part of the letter of dismissal that told Mr Snyders that he was to vacate the house in a month’s time was the part that informed Mr Snyders of the termination of his right of residence. A copy of that letter was attached to Ms de Jager’s founding affidavit in the Magistrate’s Court.

[70] There are two difficulties with Ms de Jager’s reliance upon the contents of that letter. The first is that Mr Snyders is illiterate and would not have been able to read the letter. In this regard Mr Snyders said that, when Ms de Jager gave him that letter,

she told him that he was being dismissed but never told him that his right of residence was also being terminated. Ms de Jager has not said anything different on this aspect. Since Mr Snyders was a respondent in those motion court proceedings, his version is the one that prevails.²³ There was an obligation on Ms de Jager to have either read the letter to Mr Snyders or to have told him specifically that she was terminating his right of residence if that is what she sought to do. Whether or not it would have been proper or just and equitable for Ms de Jager to terminate Mr Snyders' right of residence at that time and in that manner is another question. However, Ms de Jager would have been obliged to comply with the requirements of ESTA before she could terminate Mr Snyders' right of residence.

[71] The second difficulty is that no part of the letter said that Mr Snyders' right of residence was being terminated. The part on which Ms de Jager relies simply said that Mr Snyders was required to vacate the house. The basis for the requirement that Mr Snyders should vacate the house must have been that his right of residence had automatically terminated when his contract of employment was terminated. That was not necessarily the position. The right of residence needed to be terminated on its own in addition to the termination of the contract of employment. Until Mr Snyders' right of residence had been terminated, he could not be required to vacate the house. In this case Ms de Jager has failed to show that Mr Snyders' right of residence had been terminated. Therefore, Ms de Jager had no right to require Mr Snyders to vacate the house or to seek an eviction order against Mr Snyders. The Magistrate's Court was wrong to find differently. The Land Claims Court was equally wrong to confirm the Magistrate's Court eviction order.

[72] In any event, even if it were to be accepted that Ms de Jager terminated Mr Snyders' right of residence, she has failed to show, as is required by section 8(1) of ESTA, that there was a lawful ground for that termination and that, in addition, the

²³ See *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 [1984].

termination was just and equitable. At best for Ms de Jager, she purported to show no more than that there was a lawful ground for the termination of the right of residence. She did not go beyond that and place before the Magistrate's Court evidence that showed that the termination of Mr Snyders' right of residence was just and equitable.

[73] In its judgment the Magistrate's Court said that Mr Snyders had acted in breach of section 6(3) of ESTA. It said this in the context of the requirement in section 10(1)(a) that an order for the eviction of a person who was an occupier as at 4 February 1997 may only be granted if the occupier has breached section 6(3) and the court is satisfied that ". . . the breach is material and that the occupier has not remedied such breach". The Court erred in concluding that Mr Snyders had breached section 6(3). To breach section 6(3) Mr Snyders must have:

- (a) "intentionally and unlawfully harm[ed] any other person occupying the land"; or
- (b) "intentionally and unlawfully" cause[d] material damage to the property of the owner or person in charge; or
- (c) "engaged in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity"; or
- (d) "enable[d] or assist[ed] unauthorised persons to establish new dwellings on the land in question".

[74] The Magistrate's Court's finding that Mr Snyders had breached section 6(3) was not supported by any evidence. Indeed, Mr Snyders had not been called upon to answer any such case in Ms de Jager's founding affidavit. In any event, even if the Magistrate's Court was right to find that Mr Snyders had breached section 6(3), that did not entitle the Court to conclude that the requirement of section 10(1) had been complied with. This is so because section 10(1) does not only require that an occupier must have breached section 6(3) but it also requires that the breach must have been material and the occupier must have been given an opportunity to remedy the breach but failed to do so. In this case, the Magistrate's Court did not inquire into the

question whether Ms de Jager had given Mr Snyders an opportunity to remedy the breach and Mr Snyders had failed to remedy it.

[75] Counsel for the Snyders family also contended that the Magistrate's Court should not have issued an eviction order because the Snyders family had not been afforded any procedural fairness by way of an opportunity to be heard before they were required to vacate the property. It is common cause that the Snyders family were never invited to make representations to Ms de Jager on why they should not be required to vacate the house before they were actually required to vacate it. In my view, the submission by counsel for the Snyders family has merit. ESTA requires the termination of the right of residence to also comply with the requirement of procedural fairness to enable this person to make representations why his or her right of residence should not be terminated. This is reflected in section 8(1)(e) of ESTA. A failure to afford a person that right will mean that there was no compliance with this requirement of ESTA. This would render the purported termination of the right of residence unlawful and invalid. It would also mean that there is no compliance with the requirement of ESTA that the eviction must be just and equitable.

[76] I, therefore, conclude that the Magistrate's Court erred in finding that Mr Snyders' eviction would be just and equitable. From this it would have followed that the eviction of the Snyders family would also have been unjust and inequitable. The result is that the Magistrate's Court ought to have dismissed Ms de Jager's application with costs. It also follows that the Land Claims Court erred in confirming the eviction order. The Land Claims Court should have set aside the eviction order granted by the Magistrate's Court and replaced it with an order dismissing Ms de Jager's application with costs.

Should we order Mr Breda's eviction?

[77] The next question that arises now is whether we should grant an eviction order against Mr Breda and his family. The eviction that I am talking about in regard to Mr Breda and his family is not his eviction from the Stassen Farm. It is his eviction

from the house which Mr Snyders and his family used to occupy before their eviction on 1 October 2015. It is also the eviction of his partner or “common law wife”, as he referred to her in his affidavit, their children and anyone else who may be living in that house through Mr Breda. This eviction does not require that the right of residence on the farm as Mr Breda and his family members may have should be terminated because, if he or they had that right, they had it long before they moved into the house that Mr Snyders used to occupy with his family. They occupied the “*saaltjie*”²⁴ for about a year before they moved into the house that Mr Snyders and his family used to occupy. In other words, the right of residence that Mr Breda and his family may be enjoying is not necessarily tied to the specific house they presently occupy.

[78] As I have indicated, after this Court had granted the interim order on 16 October 2015 and, according to Ms de Jager, Mr Breda had refused to vacate the house previously occupied by Mr Snyders and his family, Ms de Jager offered Mr Snyders and his family the wendy house. She said that the wendy house would provide proper accommodation to Mr Snyders and his family. Mr Snyders and his family did not accept that offer. I am sure that the reason why they did not accept that offer is that they saw no valid reason why Ms de Jager did not move Mr Breda and his family into the wendy house so that they could move into the house they had previously occupied.

[79] At the time that the wendy house was vacant and Ms de Jager offered it to Mr Snyders and his family, Ms de Jager knew that Mr Snyders and his family were going on with the litigation to get back into the house they previously occupied. She would have known that there was a possibility that the outcome of the litigation could be that Mr Snyders and his family have to move back into the house they previously occupied and that Mr Breda and his family may have to vacate that house. It would have been prudent of her to keep the wendy house available so that she could move Mr Breda and his family into that house should Mr Snyders and his family have to move back into the house they previously occupied.

²⁴ Literally, translated “small hall”.

[80] If Ms de Jager decided to allow someone else to occupy the wendy house, she would have told that person that in case Mr Snyders moved back into the house he previously occupied, that person may have to move out of the wendy house which she would make available to Mr Breda and his family. If she imprudently did not make such an arrangement, she will have to see how she accommodates Mr Breda and his family if we make an order that they be evicted from the house that Mr Snyders used to occupy. She cannot be allowed to keep on taking steps that are aimed at nothing else but to frustrate Mr Snyders' rights and court processes.

[81] Mr Breda's right of residence and those of his family members, if they have any, are not dependent upon them occupying the house previously occupied by Mr Snyders. In my view, whatever right Mr Breda and his family may have had to occupy the house will come to an end when this judgment is handed down and Mr Snyders and his family become entitled to move back into the house and occupy it again. In order to ensure that Mr Breda and Ms de Jager do not frustrate Mr Snyders' right to re-occupy the house, it is necessary that an eviction order be granted against Mr Breda and his family. To do so is just and equitable. Otherwise, an order of court will be frustrated and rendered ineffective and Mr Snyders' rights will be rendered hollow.

[82] I have read the separate judgment by my Colleague Froneman J²⁵ in which he expresses the view that it is not necessary to make an eviction order against Mr Breda and his family. He concludes that it will suffice if we were to make an order that Ms de Jager take the necessary steps to give peaceful possession of the house to Mr Snyders and his family. My difficulty with that approach is that it may render our order ineffective and may make it necessary, if Mr Breda refuses to vacate the house, to start other proceedings afresh. Those would have to be eviction proceedings that Ms de Jager would have to institute against Mr Breda. She would probably institute them in the Magistrate's Court. This case took almost eight years to reach us. If new

²⁵ *Snyders and Others v de Jager* [2016] ZACC 54.

eviction proceedings were to be instituted by Ms de Jager, they might take another almost eight years before the dispute is finally brought to an end. This would mean that in total the dispute would have taken almost 16 years to be resolved by the courts.

[83] An approach to the matter that could lead to such a delay in the finalisation of litigation should be avoided if there is a way to avoid it. We have heard Mr Breda and there is, my view, no reason why we should not avoid that by granting an eviction order against Mr Breda and his family if it is just and equitable to do so. In my view it is just and equitable that we grant such an eviction order.

[84] It follows from all the above that the appeal must be upheld and that the orders made by the Land Claims Court and the Magistrate's Court should be set aside. The order of the Magistrate's Court must be replaced with an order dismissing Ms de Jager's application with costs. In addition this Court must make an order for the eviction of Mr Breda and his family from the house which Mr Snyders and his family occupied before 1 October 2015.

[85] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Land Claims Court, the Supreme Court of Appeal and the Magistrate's Court for the district of Ladismith are set aside and that of the Magistrate's Court is replaced with the following:
 - “(a) The application is dismissed with costs.”
4. Mr Willem Breda, his partner or common law wife and children are ordered to vacate the dwelling or house which was occupied by Mr Karel Snyders and his family before 1 October 2015 within 14 calendar days from the date of this judgment.
5. Should Mr Willem Breda and his family still be in occupation of the house or dwelling referred to in 4 above after the expiry of the period,

the Sheriff is authorised and ordered to immediately evict him and his family or anyone occupying the house through him from the dwelling or house previously occupied by Mr Karel Snyders and his family on the farm owned by Mr F L Stassen.

6. The orders in 4 and 5 do not authorise or order the eviction of Mr Willem Breda and his family from the farm owned by Mr F L Stassen and managed by Ms Louisa de Jager.
7. Ms Louisa de Jager must pay the costs of the application for leave to appeal and the appeal in this Court, the Supreme Court of Appeal as well as the costs of the proceedings in the Land Claims Court.

For Applicants:

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For Respondent:

J J Botha, instructed by Blyth & Coetzee.