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MINING & MINERALS ALERT

IN THIS ISSUE

Evicted me, evicted me not: Mining companies be mindful of ESTA and its eviction provisions

Mining companies have the responsibility to improve the standard of housing and living conditions of mine employees, as stipulated in the housing and living conditions standard for the mining and mineral industry, developed in terms of section 100 of the Mineral and Petroleum Resources Development Act 28 of 2002.

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In instances where employees are residing in hostels situated at the mine on land subject to ESTA, the termination of their employment contracts does not automatically raise a right of eviction.

Mining companies have the responsibility to improve the standard of housing and living conditions of mine employees, as stipulated in the housing and living conditions standard for the mining and mineral industry, developed in terms of section 100 of the Mineral and Petroleum Resources Development Act 28 of 2002.

Whilst mining companies are to provide employees with decent and affordable housing as mandated by section 26 of the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 (Mining Charter, 2018), companies must be alive to the provisions of the Extension of Security of Tenure Act, 62 of 1997 (ESTA) when it comes to evictions.

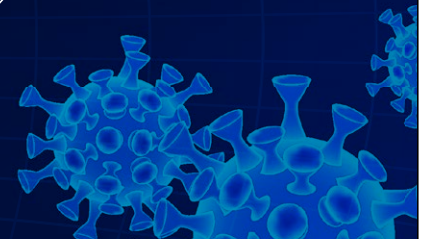
In instances where employees are residing in hostels situated at the mine on land subject to ESTA, the termination of their employment contracts does not automatically raise a right of eviction.

In the recent case of *Aquarius Platinum (SA) (Pty) v Bonene & Others* (1177/2018) [2019] ZASCA (16 March 2020), the Supreme Court of Appeal (SCA) had to determine whether the termination of employment automatically leads to the termination of the occupier's right of residence. In determining this, the court revisited sections 8 and 9 of ESTA. The SCA found, after considering both sections 8 and 9 of ESTA, that termination of employment does not necessarily and automatically lead to the termination of the occupier's right of residence.

The SCA, relying on its previous judgments and those of the Constitutional Court, held that ESTA envisages two stages before an eviction order can be granted. The first is that there has to be a proper termination of the right of residence under section 8 of ESTA. Thereafter, the giving of two months' notice of the intended eviction application to the occupier, the local municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform, prescribed by section 9(2) of ESTA may follow.

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Evicted me, evicted me not: Mining companies be mindful of ESTA and its eviction provisions...*continued*

Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under ESTA, despite the termination of employment.

The SCA agreed with the determination by the Land Claims Court, which was the court of first instance, that an owner (which includes, in relation to the proposed termination of a right of residence by a holder of mineral rights, such holder in so far as such holder is by law entitled to grant or terminate a right of residence or any associated rights in respect of such land, or to evict a person occupying such land) has a discretion in terms of section 8(2) of ESTA. Thus there may be instances where, despite the fact that employment has been terminated, the owner still permits the former employee to continue to reside on the premises, therefore termination of employment does not automatically lead to termination of the occupier's right of residence. A separate and specific notice of termination of right of residence is required.

In reaching this decision, the SCA relied on *Mkangeli and Others v Joubert and Others* 2002 (4) SA 36 (SCA) where the court stated that once an occupier's right to reside has been duly terminated his refusal to vacate the property is unlawful. Nevertheless, it does not mean that the remedy of eviction will necessarily be available. On the other hand, ESTA places no limitation on the other remedies attracted by unlawful occupation. It can therefore be accepted, that the other remedies such as the owner's delictual claim for patrimonial loss caused by the unlawful occupation of his land are still available to him.

As to the remedy of eviction, section 9(2) of ESTA provides that a court may only issue an eviction order if certain conditions are met, such as the giving of the two months' notice of the intended eviction to

the occupier, the local municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform. The termination of the right of residence, it was held, is required to be just and equitable, both at a substantive and procedural level. For the termination to be fair at a substantive level it must be just and equitable in the circumstances. Procedural fairness is captured in the need to provide an opportunity for the occupier to make representations before the decision is made to terminate the right of residence. Mining companies must further take note of the fact that a court may only grant an eviction order if it is of the opinion that it is just and equitable to do so. In deciding whether it is just and equitable to grant an eviction order the court must have regard to the considerations listed in section 11(3) of ESTA, which includes the consideration of "whether suitable alternative accommodation is available to the occupier".

Notwithstanding the provisions of any other law, an occupier as defined in ESTA may be evicted only in terms of an order of court issued under ESTA, despite the termination of employment. A person who has been evicted contrary to the provisions of ESTA may institute proceedings in a court for an order, inter alia, for restoration of residence and use of land and payment of damages. Therefore, in devising a Housing and Living Plan contemplated in the Mining Charter, 2018, mining companies must be mindful of the two-stage procedure for eviction prescribed by ESTA and the consequences of turning a blind eye to these steps.

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