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# PRO BONO & HUMAN RIGHTS ALERT

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### The SCA's Nimble balancing of interests

Although it has been carefully crafted, with the clear purpose of protecting and balancing the rights of the parties involved, the application of our eviction legislation is never easy. Recently, the Supreme Court of Appeal (SCA) was faced with such a case in the matter of *Nimble Investments (Pty) Ltd v Johanna Malan and Others*, in which the appellant owned farmland on which the respondents resided for several decades. Due to the widening of the R310, a public road adjacent to the farm's borders, the appellant was forced to forgo a portion of land and accordingly negotiate the relocation of the respondents to a different cottage on the property.

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## The SCA's Nimble balancing of interests

Although it has been carefully crafted, with the clear purpose of protecting and balancing the rights of the parties involved, the application of our eviction legislation is never easy. Recently, the Supreme Court of Appeal (SCA) was faced with such a case in the matter of *Nimble Investments (Pty) Ltd v Johanna Malan and Others*, in which the appellant owned farmland on which the respondents resided for several decades. Due to the widening of the R310, a public road adjacent to the farm's borders, the appellant was forced to forgo a portion of land and accordingly negotiate the relocation of the respondents to a different cottage on the property. However, relations between the owner and occupiers began to sour, culminating in eviction proceedings in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA). In resolving the matter, the court focused its attention on the proper interpretation of section 10(1)(c), read with section 8(1)(e), of ESTA as it carefully considered how to properly give effect to this piece of social legislation.

Perhaps reflecting the complex balance of interests that social legislation like ESTA seeks to manage, the court was split, giving rise to both a majority and a minority judgment. The majority found the first respondent to be a protected occupier under section 8(4) of ESTA and that all other respondents – her children and grandchildren – held title under her. Ultimately for reasons discussed below, it granted an eviction order and set aside the decision of the Land Claims Court (LCC) which was on appeal before it. The minority on the other hand refused to grant an eviction.

The eviction of protected occupiers is governed by, among others, section 10(1)(c), which provides that an order for eviction may be granted if the occupier has committed a fundamental breach of their relationship with the landowner that is not practically possible to remedy. Section 8(1) provides that an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable. A focal point for both the majority and minority rulings was the application of section 8(1)(e) in determining whether the termination of a right of residence is just and equitable. The provision begs the question as to whether the occupier "had or should have" been granted an opportunity to make representations.

Material to the present case was the respondents' conduct during the, initially amicable, relocation. On 28 November 2016, and without the consent of the owner, the respondents stripped their previous dwelling of all materials as they moved to their new designated home on the property, provided by the owner. Pursuant to the respondents' theft of the materials from the original house, their erection of an illegal structure immediately next to the relocation dwelling (using the stolen material), and the housing of new occupants in that dwelling, the owner pursued eviction proceedings under ESTA in the Magistrate's Court. The eviction order was granted in the Magistrate's Court, but was not confirmed by the LCC when the matter came before it on automatic review. Now on appeal, the SCA was tasked with drawing a firm line in the sand.

## The SCA's Nimble balancing of interests...*continued*

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The majority found that a further delay could not be justified, that the matter had dragged on for nearly five years and that the *"intolerable position in which the appellant finds itself, cannot be allowed to continue"*.

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### Judgment

The minority and majority parted ways in their consideration of the wording of section 8(1)(e), and accordingly whether the respondents should have been granted an opportunity to make representations against the termination of the right of residence. The minority found that an opportunity to make representations is to be afforded in every instance, and that a failure to comply with the procedural fairness that is required by section 8(1)(e) would render the purported termination of the right of residence unlawful and invalid. On this basis, the minority refused to grant an order for eviction. The majority, taking a different view, noted that it is a settled principle that when interpreting a statutory provision, the language, context and purpose of the statute must be considered. It found firstly, from the language and syntax of section 8(1)(e) that it is clear that Parliament did not require an occupier to be given an opportunity to make representations in every case, and, secondly, that considering the plain language of the section, the opportunity to make representations applies only in relation to a decision to terminate the right of residence (i.e. not to eviction), and constitutes the procedural fairness requirement of *that* provision.

Once the right of residence has been lawfully, justly and equitably terminated under section 8, section 10(1)(c) authorises the eviction of an occupier on the grounds of a fundamental breach of the relationship between them and the owner or person in charge, and says nothing about representations on the part of the occupier. The majority

reasoned that a construction that an owner is required to grant an occupier an opportunity to make representations once it is found that the occupier has committed a fundamental breach of their relationship which is practically impossible to remedy, is both insensible and intolerable, and would render the provisions of section 10(1)(c) nugatory. The majority found the respondents' conduct on 28 November 2016 to amount to a fundamental breach in the relationship with the appellant that could not be remedied.

Of further importance to the majority was the requirement in section 8(1)(c) that the termination of a right of residence must be informed by 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. In this matter the respondents had historically failed to pay rent and the landowner had over several years paid for the provision of municipal services for the respondents. The majority noted that the appellant remained willing to assist the respondents in finding alternative accommodation, and that the municipality, having confirmed that it had adopted an emergency housing assistance policy, was obliged to provide the respondents with alternative accommodation should they be rendered homeless, not only in terms of ESTA but also in terms of section 26 of the Constitution. Finally, the majority found that a further delay could not be justified, that the matter had dragged on for nearly five years and that the *"intolerable position in which the appellant finds itself, cannot be allowed to continue"*. Drawing on



## The SCA's Nimble balancing of interests...continued

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Our country's history, fraught with countless examples of horrific forced evictions, informed the drafting of eviction legislation like ESTA, which ensures that the rights of occupiers are carefully considered and upheld.

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the 2007 LCC decision in *Labuschagne and Another v Ntshwana*, the majority pointed out that "[ESTA] was not intended to promote the security of opportunistic occupiers at the expense and exploitation of the rights and legitimate interests of the landowners." The majority thus overturned the order of the LCC and granted the eviction.

### Comment

The well-reasoned majority judgment was careful to conduct the delicate balancing act that is demanded by ESTA when considering eviction proceedings, particularly where long-term occupiers are concerned. Our country's history, fraught with countless examples of horrific forced

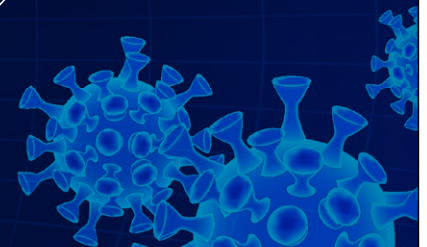
evictions, informed the drafting of eviction legislation like ESTA, which ensures that the rights of occupiers are carefully considered and upheld. But it is not imbalanced legislation; it does not seek to unjustly place the rights of one class of persons above another. Rather, it demands a careful, case-by-case assessment of what is just and equitable, taking into account all relevant factors. In achieving the necessary balance, the majority was careful, in granting an order of eviction, to order that the provision of emergency accommodation be dignified with access to services, ensuring that even after such eviction, the respondents' basic human rights were upheld.

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*Brigitta Mangale and Layen Petersen*

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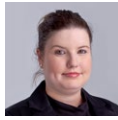
## OUR TEAM

For more information about our Pro Bono & Human Rights practice and services in South Africa and Kenya, please contact:



**Jacquie Cassette**

Practice Head  
Director  
Pro Bono & Human Rights  
T +27 (0)11 562 1036  
E jacquie.cassette@cdhlegal.com



**Tricia Erasmus**

Senior Associate  
Pro Bono & Human Rights  
T +27 (0)11 562 1358  
E tricia.erasmus@cdhlegal.com



**Gift Xaba**

Associate  
Pro Bono & Human Rights  
T +27 (0)11 562 1089  
E gift.xaba@cdhlegal.com



**Clarice Wambua**

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E clarice.wambua@cdhlegal.com



**Brigitta Mangale**

Senior Associate  
Pro Bono & Human Rights  
T +27 (0)21 481 6495  
E brigitta.mangale@cdhlegal.com

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**JOHANNESBURG**

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

**CAPE TOWN**

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

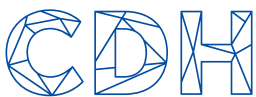
**NAIROBI**

Merchant Square, 3<sup>rd</sup> floor, Block D, Riverside Drive, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.  
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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