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

Case No: LCC70/2022

REPORTABLE: **YES**

OF INTEREST TO OTHER JUDGES: **YES**

REVISED.

In the matter between:

MOLADORA TRUST

APPLICANT

And

MAGALONE MEREKI

FIRST RESPONDENT

TOPIES MEREKI

SECOND RESPONDENT

DIKHOTSO MEREKI

THIRD RESPONDENT

MAGALONE MEREKI

FOURTH RESPONDENT

**THE DEPARTMENT OF RURAL
DEVELOPMENT AND LAND REFORM**

FIFTH RESPONDENT

JUDGMENT

COWEN J:

Introduction and factual background

1. This case concerns the connection between occupation of land in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA) and cattle grazing. More specifically, it concerns the nature of rights held by ESTA occupiers when grazing cattle on the land they occupy and what protections apply when these rights are terminated.

2. The applicant, the Moladora Trust (the Trust), has approached this Court for an order directing the first to third respondents to remove all of their grazing animals under their control from one of the Trust's farms. If they fail to do so within 30 (thirty) days, the Trust seeks an order directing the sheriff, with the assistance of the South African Police Services, to remove the cattle to the pound master for the district where the farm is situated. The farm is known as the Remainder Wildebeeslaagte No [...] situated in the Dr Kenneth Kaunda district, North West Province (the farm). The first to third respondents are Magalone Mereki, Topies Mereki and Dikhotso Mereki and I refer to them, for convenience, as the respondents.¹

3. According to the applicants, the respondents are the children of a former employee of the Trust, the late Mrs Meriam Mereki. Mrs Mereki passed away on an unspecified date, but 'before 2017'. Her children continued to reside on the farm after their mother's death. The Trust accepts that the respondents are ESTA occupiers. The Trust, however, contends that the respondents' rights of occupation are only for residential or housing purposes and it says that the occupiers have never sought or obtained any consent to graze livestock on the farm. Before instituting proceedings, there was a known dispute about the respondents' entitlement to graze cattle and, apparently, the number of cattle that, at least, Mrs Mereki was entitled to graze: the Trust says only Mrs Mereki had a right to graze cattle and only 5 (five). There are at present 9 (nine) head of cattle. Mr Marius Nel, who is a trustee of the Trust and who deposes to the founding affidavit on its behalf, says that after Mrs Mereki passed away, he made 'some efforts to engage' about the absence of consent to keep any

¹ I do so in circumstances where the fourth respondent is a mistaken citation, being a repeat of the name of the first respondent and the Department of Agriculture, Land Affairs and Rural Development (the Department) is cited as the fifth respondent but no relief is sought against it and it is not participating in the proceedings.

livestock on the farm. He says that during these 'incidents' he was 'verbally abused' and informed that the livestock will not be removed. He then says that in circumstances where 'he' had bought the farm from a previous owner and to afford a reasonable opportunity to make alternative arrangements for their livestock, he served formal notices in January 2018, calling on the first to third respondents to remove their livestock within 30 (thirty) days (the 2018 notices). The Trust has supplied the 2018 notices to the Court with proof of service.

4. The 2018 notices record, in relevant part, that:

4.1. the Trust acquired ownership of the farm on 5 November 2003 and that according to the trustees' knowledge, the respondents occupy the farm 'solely and by virtue of the employment of [their] parents on the farm.'

4.2. Any agreement regarding grazing of livestock was a personal agreement entered into between the owner and the persons employed on the farm allowing the keeping of 5 (five) cattle, which rights were not transferrable to the respondents through succession.

4.3. The respondents' keeping of cattle on the farm was said to be unlawful and the Trust demanded that the respondents remove all of the cattle within 30 days.

5. Mr Nel explains that there was no response to the January 2018 notices and the respondents did not remove the cattle. It appears that nothing then happened for some 19 (nineteen) months when, in August 2020, the Trust was confronted by officials of the Department with claims, allegedly false, that the Trust had arbitrarily reduced and deliberately burnt the respondents' grazing and the Department threatened legal proceedings. On 21 August 2020, the Trust sent a letter to the Department advising that the allegations were denied and that it would oppose legal proceedings. The Trust further responded by advising the Department, amongst other things, that the Trust would now take steps against the occupiers, who, they said, did not have consent to keep livestock. The Trust referred to the authority of the

Supreme Court of Appeal (SCA) in *Adendorffs Boerderye*,² which holds that the right of ESTA occupiers to graze cattle is a personal right derived from consent.

6. The Trust then sent further notices to the respondents, served by the sheriff on 5 October 2020 (the October 2020 notices). These notices refer to the January 2018 notices and the occupiers' failure to remove their livestock in response. The notices also refer to a recent fire which reduced available grazing on the farm and the allegedly false allegations lodged with the Department pertaining to the Trust's conduct. The notices continue as follows:³

'4. Despite the fact that there may be a dispute about whether you had permission to keep your livestock on the farm or not, it is our instructions to hereby give you 1 months' *notice to in terms of the common law of the determination of the right to keep livestock on our client's farm.*

5. You are therefore requested to make arrangements to have your livestock removed from the farm before the expiry of the notice period, failing which we will bring an application to have your livestock removed from the farm.

6. We trust that our client will be able to rely on your co-operation, but nonetheless and if our client is compelled to pursue litigation herein our client will be citing the Department of Rural Development and yourself as respondents and will also be seeking an appropriate cost order.'

7. The sheriff's returns of service reveal that it was not possible for the sheriff to effect personal service:

'With our arrival the people were aggressive and extremely violent. The interpreter tried to translate the meaning of the letter and explain the contents thereof but they said they do not know who the Court is and refused to take the document. We tried to get hold of the recipient of the letter but as the people got more violent we served the letter on A Shuping.'

² *Adendorffs Boerderye v Shabalala and others* [2017] ZASCA 37 (*Adendorffs Boerderye*).

³ The errors in the italicised parts of para 4 appear in the original text.

8. There was no response. However, a further 19 (nineteen) months then passed before the Trust took any action by instituting these proceedings on 11 May 2022. The application was served on a tenant residing at the respondents' residence, a Kediemetse Lephadi. The respondents did not deliver any notice to participate or answering affidavit. The Trust then set the application down on the unopposed roll for 25 July 2022. The sheriff served the notice of set down on the respondents by affixing on the main gate. The returns record:⁴

'The respondents were very aggressive towards us, refused to communicate by taking this Notice he called the police for us, and they did arrive at given address. After the Police arrived did explain to them where we from and we need to serve this Notice on the Respondents, but still they refused to take this Notice, that's why it is served by affixing at the main gate.'

9. On 25 July 2022, Ms Oschman appeared for the applicant. There was no appearance for the respondent. Ms Oschman sought an opportunity to correct certain difficulties the Court raised with the application and I stood the matter down until Wednesday 27 July 2022 to afford the Trust an opportunity to do so. On 26 July 2022, before the matter was recalled, I issued directions requesting the Trust to make submissions on whether there are sufficient allegations in the founding affidavit to ground relief in circumstances where (1) the SCA has accepted that in some circumstances, the removal of cattle may amount to an eviction⁵ and (2) there was no engagement with the respondents prior to the purported termination of any right to keep cattle during 2020. After argument on 27 July 2022, I afforded the Trust an opportunity to prepare written heads of argument, filed on 3 August 2022.

10. The following two issues require determination in this case:

10.1. Whether the respondents enjoyed any right to graze cattle on the farm?

⁴ Minor typographical errors corrected.

⁵ On this issue the applicant's attention was drawn to the following decisions: *The Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and others, Mathibane and others v Normandien Farms (Pty) Ltd and others* [2017] ZASCA 163; [2018] 1 All SA 390 (SCA); 2019 (1) SA 154 (SCA) (*Normandien*) at paras 59 and 60; *Loskop Landgoed Boerdery (Pty) Ltd and others v Petrus Moeleso and others* [2022] ZASCA 53 (*Loskop Landgoed Boerdery*) at paras 14 to 17; *Tsotetsi and others v Raubenheimer NO and others* [2021] ZALCC 2; 2021 (5) SA 293 (LCC) (*Tsotetsi*) para 50 and *Green NO and others v Khumalo and others* [2022] ZALCC 26 (*Green NO*).

10.2. If so, whether the protections of ESTA apply when an owner or person in charge seeks to terminate the right or whether the applicants may terminate the right on reasonable notice?

The Constitution, ESTA, security of tenure and livestock

11. The Constitutional Court has described ESTA as ‘remedial legislation umbilically linked to the Constitution’ which seeks to protect people whose tenure of land is insecure.⁶ When interpreting ESTA, that constitutional purpose must be advanced,⁷ a ‘blinkered peering’ at the language must be avoided and an approach must be adopted that promotes the spirit, purport and objects of the bill of rights. Moreover, the Court must prefer a generous construction over a merely textual or legalistic one in order to afford occupiers the fullest protection of their constitutional guarantees.⁸ Also relevant for present purposes is the Constitutional Court’s injunction in *Goedgelegen* that, when interpreting legislation, courts:

‘must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.’⁹

12. ESTA expressly protects various constitutional rights of occupiers and owners or persons in charge¹⁰ of land to which it applies, which is largely rural areas including many places where cattle are grazed.¹¹ However, ESTA is, centrally, legislation that seeks to give effect to section 25(6) of the Constitution which

⁶ *Klaase and another v Van der Merwe NO and others* [2016] ZACC 17; 2016(6) SA 131 (CC); (2016 (9) BCLR 1187; [2016] ZACC 17) (*Klaase*) with reference to *Department of Land Affairs and others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007(6) SA 199 (CC); 2007(10) BCLR 1027 (CC) (*Goedgelegen*).

⁷ *Daniels v Scribante and another* [2017] ZACC 13; 2017(4) SA 341 (CC); 2017 (8) BCLR 949 (CC) (*Daniels*) para 24.

⁸ *Klaase* supra n 6 para 51. *Daniels*, supra n 7 paras 24 and 25 with reference to *Goedgelegen* supra n 6 para 53. *Mphatsoi v Van Staden* [2020] ZALCC 33; 2021(5) SA 267 (LCC) para 20. See too *Sibanyoni v Holtzhausen and others* [2019] ZALCC 1 (*Sibanyoni*).

⁹ Supra n 6 para 53.

¹⁰ See section 5 of ESTA.

¹¹ Its geographical scope of application is set out in section 2 of ESTA which is entitled ‘Application and implementation of Act’. I do not repeat it here.

provides that '[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.'

13. In *Daniels* the Constitutional Court provided a historical perspective that both identifies the mischief that section 25(6) seeks to remedy and in turn assists to understand ESTA's context. The history considered in *Daniels*¹² refers to the dispossession of land through colonial and apartheid rule, from the early days of white settlement, through the enactment of laws such as the Native Land Act 27 of 1913 and the Native Development and Trust Land Act 18 of 1936, the Group Areas Act 41 of 1950 and the laws and practices that divested Africans of South African citizenship to become citizens of so-called homelands. These processes stripped Africans of their dignity, resulted in a loss of wealth and livelihoods, and rendered Africans 'strangers in their own country' often with precarious tenure as labour tenants or occupiers on farms providing labour. I do not repeat the history recounted in full, but I refer to it because it is necessary to keep it front of mind when interpreting and applying ESTA. It is also important to remain mindful of the Constitutional Court's conclusion in *Daniels* that, painfully, the resultant tenuous tenure for rural people remains an ongoing reality for many ESTA occupiers:

"To this day, some of the poorest in our society continue to keep homes under the protection of ESTA. Needless to say, occupiers under ESTA are a vulnerable group susceptible to untold mistreatment. This is especially so in the case of women."¹³

14. Human dignity is a founding value of the Constitution and a protected right that acknowledges the intrinsic worth of human beings, and their entitlement to be treated as worthy of respect and concern.¹⁴ A further material feature of *Daniels*¹⁵ is the Constitutional Court's holding, in respect of the right to security of tenure that:

¹² Supra n 7 paras 14 to 23.

¹³ Supra n 7 para 22.

¹⁴ *Daniels* supra n 7 para 2 with reference to O'Regan J's judgment in *S v Makwanyane* [1995] ZACC 3; 1995(3) SA 391 (CC); 1995(6) BCLR 665 (CC) paras 327 to 328.

¹⁵ Which, concerned whether the right to security of tenure protected in ESTA entails a right to make improvements to occupied property: the Constitutional Court held that it does.

'[a]n indispensable pivot to that right is the right to human dignity. There can be no true security of tenure under conditions devoid of human dignity.'¹⁶

15. In *Sibanyoni*, this Court considered the historical connection between land dispossession, cattle dispossession and impoundment.¹⁷ This Court held that 'cattle are part and parcel of the story of dispossession, the mischief which is intended to be redressed by section 25 of the Constitution'. It held further that ESTA must be interpreted and applied to redress that history, not to further entrench it and continued: 'That is not to suggest that land owners have no rights. The point is that transformative constitutionalism requires an appropriate balance to be struck with the interests of land occupiers.'¹⁸

16. In arriving at these findings, this Court was guided by the Constitutional Court's decision in *Zondi*,¹⁹ in which the Constitutional Court declared unconstitutional an old pound law that continued to apply in KwaZulu Natal. In *Zondi* the Constitutional Court considered the interconnectedness between the long history of land dispossession and impoundment laws:²⁰

'The impoundment of livestock occurs in a complex setting of historical deprivation of land to black South African people, the struggle for land and the need to protect farms against trespassing livestock. This setting is a consequence of our history ... characterised by the denial of the franchise and land rights to African people and racial segregation was its cornerstone.'

17. In this case, this Court is required to consider whether the security of tenure protected by section 25(6) of the Constitution and ESTA includes rights of ESTA occupiers to graze cattle. The Constitutional Court is yet to pronounce on these

¹⁶ *Daniels* supra n 7 para 2.

¹⁷ *Sibanyoni* supra n 8 paras 43 to 50 which detail the impact of the Glen Grey Act, the Native Land Act and the implementation of 'betterment' schemes in the former homelands; and para 53 on the draconian history of impoundment, with reference to *Zondi v MEC for Traditional & Local Government Affairs* 2005(3) SA 589 (CC) (*Zondi*). See too *Ramahloki and others v Raiden (Pty) Ltd and others* [2020] ZALCC 31 (*Ramahloki*) at para 25. *Green No* supra n 5 para 17 and *Tsotetsi* supra n 5 para 50.

¹⁸ *Sibanyoni* supra n 8 at paras 43, 50 and 51 followed and applied in *Ramahloki* supra n 17 para 25 and following.

¹⁹ *Zondi* supra n 17.

²⁰ At para 38.

issues. However, in recent decisions that bind this Court, the SCA has made pronouncements in connection with the nature of the right to graze cattle under ESTA. In both *Adendorffs Boerdery*²¹ and *Loskop Landgoed Boerdery*,²² the SCA held that an ESTA occupier's 'rights of grazing [do] not derive from ESTA', but are personal in nature and derive from consent. Both of these decisions (which bind this Court) endorse a holding of Judge Pickering in *Margre Property Holdings CC*²³ in the following terms:

'The right of an occupier of a farm to use the land by grazing livestock thereon is a right of a very different nature to those rights specified in section 6(2) [in ESTA]. In my view such use was clearly not the kind of use contemplated by the Legislature when granting to occupiers the right to use the land on which they reside. Such a right would obviously intrude upon the common law rights of the farm owner and would, in my view, thereby amount to an arbitrary deprivation of the owner's property. There is no clear indication in the Tenure Act such an intrusion was intended. It is relevant in this regard that respondent is neither an employee nor a labour tenant as defined by section 1 of the Land Reform (Labour Tenants) Act 3 of 1996. His right, if any, to graze stock on the farm does not derive from that Act. In my view, the use of land for purposes of grazing stock is pre-eminently a use which would be impossible to regulate in the absence of agreement between the parties. I am satisfied in all the circumstances that an occupier is not entitled as of right to keep livestock on the farm occupied by him as an adjunct of this right of residence. His entitlement to do so is dependent on the prior consent of the owner of the property having been obtained.'

18. It must be noted that in *Margre Property Holdings CC* there was an agreement in place that the owner sought to enforce in that case, and the above findings endorsed by the SCA must be understood in that context.²⁴ That stated, I must accept that an ESTA occupier derives any right to graze cattle on the land he or she occupies by consent and not as an adjunct to any occupation rights

²¹ Supra n 2 para 28.

²² Supra n 4 para 14.

²³ *Margre Property Holdings CC v Jewula* [2005] 2 All SA 119 (E) (*Margre Property Holdings CC*) para 7.

²⁴ The same must be said of *Tsotetsi* and *Green NO* supra n 5.

conferred by section 6(2) of ESTA. ²⁵ However, in my view, once consent to graze cattle is obtained, that right forms part of an ESTA occupier's right of tenure protected by ESTA, albeit derived from consent and personal in nature. Furthermore, where an ESTA occupier has consent, the right to graze cattle becomes subject to various ESTA protections.²⁶ I do not consider the full ambit of protection but it will include the protections of section 6(1), 6(2)(a), 8 and 9 of ESTA.

19. Importantly, section 3(1) of ESTA provides:

'Consent to an occupier to reside on or use land shall only be terminated in accordance with the provisions of section 8.'

20. In turn section 8, entitled 'Termination of right of residence' 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 –

²⁵ Section 6(1) and (2) of ESTA, entitled 'Rights and duties of occupier' read:

- (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;
 - (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.
- (3) An occupier may not –
 - (a) ...
 - (b) Intentionally and unlawfully cause material damage to the property of the owner or person in charge;
 - (c) ...
 - (d) ...'

²⁶ *Sibanyoni* supra n 8 para 56.

- (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.'

21. Accordingly, although section 8 refers only to termination of a consent to reside, section 3(1) makes it clear that it also applies to the termination of any consent to use land. This must include for purposes of grazing cattle.

22. Similarly, ESTA defines the term 'evict' in section 1 to mean 'to deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of this Act, and 'eviction' has a corresponding meaning.' Again, the definition clearly indicates that the ambit is not restricted to deprivation of residence on land, but includes the use of land or access to water which is linked to a right of residence in terms of ESTA.²⁷ It will frequently be the case, at least in cattle grazing country and as in this case, that the use of land for grazing will be linked to a right of residence in terms of ESTA. If an occupier is deprived, against his or her will, of the right to use grazing linked to such right of residence, it will amount to an eviction. In turn it will be subject to the protections of section 9 of ESTA. [I am mindful that the provisions of section will apply differently in cases where a person is not simultaneously losing the right of residence.]

²⁷ Cf *Motswagae and Others v Rustenburg Local Municipality and Another* [2013] ZACC 1; 2013 (3) BCLR 271 (CC); 2013 (2) SA 613 (CC): 'The underlying point is that an eviction does not have to consist solely in the expulsion of someone from their home. It can also consist in the attenuation or obliteration of the incidents of occupation.'

23. The interpretation I set out above better serves the remedial purposes of ESTA, including its protection of security of tenure and of the right to dignity than an interpretation that seeks wholly to disaggregate rights to graze cattle from ESTA occupation rights.²⁸ It also serves to balance rights of an owner or person in charge with an occupier: ESTA protections are designed to ensure balance between the rights of occupiers and the rights of owners or persons in charge. The generous interpretation gives fuller protection to other rights such as the right to participate in the cultural life of one's choice,²⁹ and to enjoy one's culture and maintain cultural associations with other members of a cultural community³⁰ and the right of access to sufficient food.³¹ As compelled by *Daniels*, it recognises the dignity of ESTA occupiers, whose lives and livelihoods will at times be bound up with their cattle holdings. Moreover, it gives due cognisance to the injunction that statutes not be interpreted in a manner that permits rights to intrude on common law rights of another, unless the intrusion is intended.³²

24. In arriving at this conclusion I have considered the implications of the SCA's decisions in *Normandien* and *Loskop Landgoed Boerdery*. In my view, these decisions support my conclusion.³³ In *Normandien*, the SCA considered whether the removal of cattle of a labour tenant from a farm for purposes of ensuring compliance with the Conservation of Agricultural Resources Act 42 of 1983 (CARA) constituted an eviction as contemplated by the Land Reform (Labour Tenants) 3 of 1996 (LTA) and on the facts concluded that it did not. However, the SCA held as follows:

[59] In my view *Normandien* was not seeking to 'evict' the occupants within the meaning of the LTA. The term 'eviction' in the LTA connotes a

²⁸ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC).

²⁹ Section 30 of the Constitution entitled 'Language and Culture': Every-one has the right to use the language and to particulate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

³⁰ Section 31 of the Constitution entitled 'Cultural, religious and linguistic communities': (1) (a) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community – (a) to enjoy their culture, practise their religion and use their language, and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society; (2) The rights in subsection (1) may not be exercised in a manner inconsistent with an provision of the Bill of Rights.

³¹ Section 27(1) of the Constitution entitled 'Health care, food, water and social security': (1)(a) Everyone has the right to have access to – (a)... (b) sufficient food and water; and ...'

³² See eg *Loskop Landgoed Boerdery* supra n 5 para 16.

³³ Supra n 5.

deprivation of the right of occupation or use of land as a result of the purported termination or repudiation of that right by the person in control of the land, whether the owner or lessee. ...

[60] In the present case Normandien did not purport to terminate or repudiate the relationship between itself and the occupants as labour tenants. Normandien did not contend that the occupants no longer had the right to reside on the farm. Normandien did not contend that the occupants' right, as between themselves and Normandien, to graze their livestock on the farm as an incident of their occupation was at an end. Normandien asserted that the continued presence of the livestock on the farm contravened CARA [the Conservation of Agricultural Resources Act] and this was damaging Normandien's land and causing Normandien to be in violation of its obligations under CARA. If the Agriculture Minister had brought proceedings to enforce CARA through the removal of the livestock, it could hardly have been contended that he was applying for the occupants' 'eviction' for purposes of the LTA. ...'

25. In *Loskop Landgoed Boerdery*, the SCA considered whether conduct whereby ESTA occupiers had been deprived of a grazing camp and their cattle moved to a camp on another part of the farm was an eviction. The SCA restored the camp to the occupiers but held that the conduct was a spoliation not an eviction. In doing so it endorsed the above *dictum* in *Normandien*.³⁴

26. Thus, as the SCA itself emphasised, although there was no eviction on the facts before it in either case, these were pertinently not cases in which the applicant contended that an occupier's right to graze their livestock (as an incident of their occupation under the LTA or ESTA) was at an end. That is what is in issue in this case.

Did the respondents have a right to keep cattle on the farm

³⁴ Supra n 5 para 17.

27. Ms Oschman submitted that the respondents do not and did not have any right to keep cattle on the farm, and for this reason alone, the application should succeed. She submitted that the respondents acquired the status of ESTA occupiers after their mother passed away and by operation of section 3(4) of ESTA which provides:

'For purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved.'

28. This consent, Ms Oschman submitted, is limited to consent to reside and does not include the right to graze cattle. To support the argument, Ms Oschman relied both on the language of section 3(4) – *openly resided* – and the decisions of *Adendorff* and *Loskop Landgoed Boerderye* which, as mentioned above, hold that the right to graze cattle is personal in nature and derives from consent. This being so, the argument proceeded, when Mrs Mereki passed away, any right to graze cattle terminated with her. As no consent was thereafter given to graze the cattle, the cattle must be removed.

29. In dealing with the argument, and as a matter of caution, I make two assumptions in favour of the Trust, but without deciding the issues. I do so because the application is unopposed, the dispute between the parties is unlikely to end with this decision and because I have not had the benefit of full argument on important issues. First, I assume without deciding that at the time that Mrs Mereki passed away, the respondents were not ESTA occupiers in their own right but derived their right of residence from their parents' status as employees.³⁵ Second, I assume, also without deciding, that the consent to graze cattle was given only to Mrs Mereki and entailed a consent specific to her.³⁶ It is on these premises, that Ms Oschman

³⁵ *Hattingh and others v Juta* [2013] ZACC 5; 2013(3) SA 275 (CC); 2013(5) BCLR 509 (CC). In making this assumption, it should be noted, however, that the Trust – which has owned the farm since 2003 – has been less than forthcoming with the circumstances surrounding the respondents' occupation such as when they arrived on the farm, their ages and what happened when they became adults, and it may well be that the respondents became ESTA occupiers in their own right well before their mother passed away. See section 3(4) and 3(5) of ESTA and see *Klaase* supra n 6 and the decision of Carelse J in *First Reality (Krugersdorp) (Pty) Ltd v G Michell and others* [2021] ZALCC 6 esp paras 42 and 43.

³⁶ This assumption is not without controversy given that there is very little information before the Court about the circumstances of the Mereki family's occupation and the consent that gave rise to it and because property rights held under customary law operate in a family and communal setting and are not individualised as under common

submitted that the respondents' rights under ESTA were limited to the right to reside on the farm and did not extend to any use of land for purposes of grazing cattle.

30. In *Klaase*, the Constitutional Court held that the definition of 'consent' in ESTA is broad and includes both express and tacit consent, and that the word 'tacit' means 'understood or implied without being stated.'³⁷ The Constitutional Court endorsed the following observations of the SCA in *Sterklewies*:³⁸

'The Act does not describe an occupier as a person occupying land in terms of an agreement or contract, but a person occupying with the consent of the owner. One can readily imagine circumstances in which the rural areas of South Africa people may come to reside on the land of another and the owner, for one or other reason, takes no steps to prevent them from doing so, or to evict them. That situation will ordinarily mean that they are occupying with the tacit consent of the owner and will be occupiers for the purpose of [ESTA].'

31. In my view, these remarks must apply to consent to graze cattle, albeit that the consent in question would, in accordance with *Adendorffs Boerdery* give rise to a personal right and, depending on the facts, a tacit agreement. On the facts before me, being the applicant's own version, there can be no real doubt that at least after a period, the respondents had tacit consent to keep and graze cattle and that a tacit agreement arose. The Trust does not quibble with the respondents' ownership of the cattle, which presumably one or more of the respondents acquired through succession if they did not already hold rights to the cattle. There is no cognisable evidence to suggest that the Trust took issue with the right to keep and graze cattle until the Trust sent the 2018 notices. It is not stated precisely when Mrs Mereki passed away, only that it was 'before 2017'. At best for the Trust, it sent the 2018 notices over a year after she passed away. The high water mark of the evidence during this period is wholly unsubstantiated claims that there were 'some efforts to

law. Moreover, in some cultures, cattle can be integral to cultural practices and family life in accordance with culture.

³⁷ Supra n 6 para 53.

³⁸ Para 56. See *Sterklewies (Pty) Ltd v Msimanga & others* [2012] ZASCA 77; 2012(5) SA 392 (SCA); [2012] 3 All SA 655 (SCA) para 3.

engage' about the absence of consent. Moreover, when the 2018 notices were sent, they centrally refer to a legal contention that the rights to keep and graze cattle are not transferrable. Furthermore, nothing was done for a further 19 (nineteen) months thereafter and it was only then, in other words, after at least 31 (thirty-one) months after Mrs Mereki passed away, that the Trust acted by sending the 2020 notices. This was after the Department approached it with allegedly false allegations regarding their own conduct. Thereafter the Trust waited another 19 (nineteen) months before instituting these proceedings. In the result, over 4 (four) years and 2 two months passed before the Trust instituted these proceedings.

32. The conclusion that there was tacit consent is, in my view, also reached by applying section 3(4) of ESTA which creates a presumption that a person continuously and openly resided on land for a year has consent to do. Although section 3(4) uses the language of *openly residing*, it cannot be interpreted narrowly to apply only to a consent to being housed, but must include a consent also to use the land connected to that residence, in this case the grazing of cattle. This generous interpretation pays due regard to the interpretive injunctions articulated in *Klaase*, *Goedgelegen*, *Daniels* and *Sibanyoni*, gives effect to ESTA's remedial purposes and acknowledges that, at least in cattle grazing areas, there will often be a connection between land and cattle dispossession. On the other hand, a narrow interpretation would reflect the 'blinkered peering' that the Constitutional Court tells us to avoid and would ignore the grid of related provisions in ESTA.

33. On the facts, the respondents had not only openly resided on the farm but had used the land for purposes of grazing their cattle. Applying section 3(4), it is then presumed that they had consent to do so. That presumption is not rebutted on the evidence before me.

34. I conclude that the respondents had consent to graze cattle on the farm and there was a tacit agreement with the Trust to that effect. This state of affairs had probably arisen by February 2018, but at least before the October 2020 notices were sent or the proceedings instituted.

Whether the protections of ESTA apply when an owner or person in charge seeks to terminate those or whether the applicants may terminate the right on reasonable notice?

35. Ms Oschman submitted that, if the Court concludes that the respondents had a right to graze the cattle, the Trust then terminated the rights on reasonable notice when it sent the respondents the October 2020 notices. The Trust was entitled to do so, she submitted, just as a lessor is entitled to terminate a common law contract of lease. I cannot agree in view of my conclusions, explained above, that the protections of sections 6(1), 6(2)(a), 8 and 9 of ESTA apply to the termination of the right to graze cattle derived from consent.

Conclusion and order

36. Ms Oschman submitted that if the Court reached this conclusion it should make no order and grant the Trust leave to supplement its papers. In my view, this is not a case where such relief is warranted as there has been no attempt to comply with sections 8 or 9 at this stage. I make the following order:

36.1. The application is dismissed.

36.2. There is no order for costs.

SJ COWEN
Judge of the Land Claims Court

Date of hearing and written submissions: 25 July 2022 and 2 August 2022

Date of judgment: 11 November 2022

Appearances:

I Oschman instructed by Moolman & Pienaar Inc