IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case number: **LCC 2022/06**

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

(Signed)

18 May 2022 .....

SIGNATURE

In the matter between:

MAREDI, CHARLES ELIAS Applicant

and

ANDERSON, GIDEON PETRUS First Respondent

REGIONAL LAND CLAIMS COMMISSIONER, MPUMALANGA PROVINCE Second Respondent

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JUDGMENT

SPILG J

18 May 2022

INTRODUCTION

1. The applicant, Mr Maredi, brought an urgent *ex parte* application under the provisions of Rule 34 against Mr Anderson, who is the first respondent and owner of the farm on which the applicant and his family live. The orders sought were to;

    a. interdict the first respondent from "*entering the Applicant's homestead at random hours without any consent or invitation*";

    b. restore the *status quo ante* prior to the first respondent purchasing the farm, in respect of the number of livestock kept by the Applicant and which grazed on the farm

    c. permit the Applicant "*to build a durable mud house following the one that was destroyed by winds"*

    pending the contemplated eviction of the Applicant and his family by the first Respondent;

    The terms of the order sought have been repeated since the first respondent has taken issue with the way they are worded and *inter alia* argues that the applicant is confined to seeking final relief at this stage.

2. On considering the *ex parte* application I was of the *prima facie* view that the application as a whole was sufficiently urgent to be dealt with outside the court's ordinary rules and that no prejudice could arise if an interim interdict was granted in respect of the alleged entry onto the applicant's homestead.

    The alleged attempt to interfere with the applicant grazing his livestock on the farm and the failure to permit the rebuilding of the mud house that was allegedly partly destroyed by a storm appeared, at least *prima facie*, to require reasonably prompt resolution. However the other relief sought was framed as mandatory orders, which in the circumstances required the first respondent to be given an opportunity to first be heard.

The interim interdict was granted pending the holding of an urgent pretrial conference to set expedited time frames to deal with the matter. The first respondent was however given leave to anticipate the return date if he so wished.

3. At the pretrial conference of 21 January 2022 directions were issued with regard to the filing of affidavits and agreement was reached on a date for the hearing with the interim order being extended until then.

4. Aside from filing an answering affidavit, the first respondent brought a counter-application to interdict the applicant from grazing his livestock on the farm and to direct that they be removed. The first respondent relies on an entitlement to terminate an agreement concluded in September 2020 that had allowed the applicant a limited right to graze his livestock on a small part of the farm of some 1.5 hectares in extent.

5. There are a number of features to this case which should be mentioned at the outset.

The first is that on the papers before me it is not disputed that prior to about 2009 the farms which are identified as portion 7 and portion 18 Olifantslaagte were beneficially owned, or at least operated by Phillip Meyer. Portion 18 is also known as Wonderhoek.

Accordingly Phillip Meyer would have enjoyed unrestricted access to and use of both portions for farming purposes.

Phillip Meyer was the grandfather of Japie Meyer and Japie's own father (Jakob Meyer) had held portion 7 through the vehicle of a close corporation from which Japie had eventually acquired ownership.

Carel Meyer, who according to the Applicant was Phillip Meyer's other son and Jakob Meyer's sibling, acquired portion 18.

For reasons which are relevant to the way in which this case is to be disposed of, the first respondent does not expressly dispute that Japie's father and Carel Meyer were the sons of Phillip Meyer.[1]

[1] FA para 20 where the applicant unambiguously avers that Phillip Meyer's sons were Jakob and Carel and that Japie Meyer was Jakob's son. There is no express denial of this averment, only a broad rolled up denial to a number of paragraphs contained in the FA- see AA para 22.

6. Secondly portions 7 and 18 share a common boundary with a dam intersecting the boundary line. Historically there never was a boundary fence erected between the two farms. This would have allowed livestock to roam at will between the grazing fields on both sides of the boundary line.

   However, according to Carel Meyer's affidavit the dam did not provide drinkable water for cattle which necessitated the installation of a borehole on portion 7's side of the dam

7. Furthermore, the homestead where the applicant and his family reside, and which presently consists of three brick structures and the mud house, is on portion 7 whereas the applicant is not presently employed by the owner of portion 7- only by the owner of portion 18

8. The final set of features is that on the first respondent's version, which is supported by the previous owner of portion 7 (Mr Japie Meyer) and the present owner of portion 18 (Mr Carel Meyer);

   a. Portion 7 which is some 342.6 hectares in size[2], historically was divided into an arable area and a grazing area. The grazing area comprises approximately 35 hectares and is situated around the dam (which on the portion 7 side is another 30 hectares or so)[3]. The grazing area is also referred to by the first respondent as the pan.

      The applicant's homestead was built close to the dam on the grazing area of portion 7;

   b. The owner of portion 18 had the right to use the grazing area on portion 7 for his livestock. He had enjoyed that right for the past 20 years and claims to have rented the area.

[2] Deeds Office Search (Annexure GA1 of the AA under the heading "*Farm Information*")

[3] The total area of dam and grazing area on portion 7 is 66.4 hectares. The size of the area on which livestock can graze will vary due to the impact of seasonal rains. See para 5.6 of the report of Mr Gerber, an imagery analysis expert. attached to the AA (Record at p 186). If regard is had to the map of portion 7 (annexure GA2 to the answering affidavit) it appears that the applicant's interest lay in utilising the cultivation area which represents the overwhelming bulk of that farm. Carel Meyer continued to rent the remaining area where the dry pan was located and which was the only grazing area on portion. (see AA para 15.4)

In an affidavit deposed to during November 2020 at the request of the first respondent, the owner of portion 18 stated that because the dam did not provide drinkable water for his cattle he had provided for the supply of drinking water at his own cost on the grazing area of portion 7 and that the installation "*therefore … is my property".* [4]

The installation is in fact a hand driven borehole in front of the applicant's homestead.[5]

9. With regard to the Meyers:

a. The applicant refers to the original beneficial owner of both portions 7 and 18 as Phillip Meyer. The first respondent and Japie Meyer identify Phillip Meyer as Jakob Phillipus Meyer or "*Jakob Meyer, senior*". [6]

In a further affidavit Japie Meyer explains that all male members of the Meyer family (presumably the first born male line) were christened Jakob Phillipus[7];

b. The one son of Phillip Meyer is identified by the applicant as Jakob Meyer and his son as Japie (i.e. the owner of portion 7 prior to its acquisition by the first respondent). The first respondent refers to Japie's father as Jakob Phillipus Meyer and to Japie either as Jakob Meyer junior or simply "*Japie*".

c. The person who the applicant identifies as Carel Meyer is also referred to in the first respondent's papers as "*Callie*".[8]

In order to avoid confusion Japie's grandfather will be identified as Phillip and Japie's father will be referred to as Jakob.

[4] Affidavit of Carel Meyer attached to the AA as part of annex GA6 (Record pp 131-2 at paras 8 and 9)
[5] Affidavit of Jappie Meyer (Jakob Phillipus Meyer) also deposed to in November 2020 and attached to the AA as part of annex GA6 (Record pp 134 at para 14)
[6] AA paras 9.3 and 9.4
[7] Annexure GA21 to AA at para 5. Record p 168
[8] Aa para 9.6

THE ISSUES

10. Each party contests that the other is entitled to urgent relief or that a case for final relief has been made out.

11. I am satisfied that the issues raised by the applicant regarding the alleged interference with his and his family's peaceful occupation of the premises, the grazing of their livestock and restoring the habitability of a dwelling have each a sufficient degree of urgency to be dealt with outside the framework of this court's ordinary rules.

12. By way of illustration, the need to effect repairs where there exists a right of occupation and where there is a failure by the landowner to permit the occupier to do so impairs the dwelling's habitability and engages the exercise of a fundamental right. This is *a fortiori* urgent; particularly where the occupier is prepared to bear the cost as here. In his argument *Adv. Lukhele* referred to *Daniels v Scribante and another* 2017 ZACC 13 which is clearly of application. [9]

    Furthermore, the nature of the rights enjoyed by the applicant and the first respondent are central to the issues including the festering issue regarding the extent to which the applicant is entitled to graze his livestock on the farm, if at all; one of the key issues being whether the applicant was limited to graze only three head on an area limited to 1.5 hectares within the grazing area of portion 7.

    Accordingly I am satisfied that the grounds relied on for launching both the application and the counter-application require relatively urgent resolution once adequate time was afforded to file their affidavits.

13. Another preliminary issue raised by the first respondent is that the applicant cannot make out a case in reply. The complaint is that the applicant has introduced evidence in his replying affidavit which should have been contained in the founding papers. Nonetheless the first respondent also wishes to rely on the same evidence to demonstrate that the applicant's version should be rejected out of hand.

14. While courts frown on an applicant attempting to make out a case in reply, where the respondent himself brings a counter-application then even an applicant with a genuine

[9] *Daniels* at paras 33, 34 and 59 to 60

cause may have little choice, when dealing with the contents of a counter-application, but to reinforce with more specifics those allegations contained in the founding affidavit which were supported by only one illustration or which may have been broadly stated.

In this context it is to be borne in mind that ordinarily the way in which a court determines the evidence it will accept, is founded on the *Plascon-Evans* rule which applies equally when considering whether a counter-application which raises its own unique set of facts ought to succeed.

Unless there is a relaxation of the requirement that additional evidence cannot be raised in reply, then in some instances an applicant's fair trial right may be prejudiced if the case made out by the other party and which is the foundation of the counter-application cannot be respondent to. In order to maintain consistency, the facts which need to be dealt with in response to the counter-application may then, even if out of caution, be considered necessary to include in the replying affidavit.

Whether the evidence is then to be considered will not depend on a red lining but will be determined by reference to the facts relied on to support the counter-application, that the party bringing the counter-application remains at liberty to argue, as *Adv. Roberts* does in the present case, that the version now contended for by the other party cannot, on an application of the very same *Plascon-Evans* principles, be accepted.

15. I now proceed to identify the substantive issues which arise in respect of each of the orders sought.

16. The substantive challenge to the first issue is a factual one: The first respondent denies that he entered the applicant's homestead.

As to the second issue; the first respondent relies on both a factual and a legal challenge. He contends that the applicant has no extant legal right to graze his livestock on the land since such right does not arise under ESTA but was purely a personal right available against the first respondent's predecessor in title which did not survive the transfer of the farm into his name.

The first respondent also relies two fall back positions. The one is that the applicant breached the terms of an agreement he concluded with the first respondent. The other

is that if any agreement is in force, then the applicant is restricted both as to the number of livestock he can graze on the land and the area on which they can graze.

I should add that the first respondent also sought to set up an argument based on overgrazing but no factual allegations were set out nor was it a ground relied on in the papers. The court therefore would not entertain the argument. [10]

17. Insofar as building a "*durable mud house following the one that was destroyed by winds*" is concerned, it turns out that the applicant only wishes to rebuild that part of the homestead which was destroyed by the high winds while the first respondent contends that he never had an objection to the applicant doing so.

18. Finally, fundamental to the first respondent's counter-application is the contention that the applicant's right to graze does not derive from the Extension of Security of Tenure Act 62 of 1997 (*ËSTA* ") but is a personal right which can only be derived from the consent of a landowner. For this reason, such personal rights as may have been enjoyed to graze livestock are not available against a successor in title to the farm. *Adv. Roberts* for the first respondent relies on a number of cases in support of this proposition.

19. It will be convenient to set out the respective factual averments presented by the parties in order to identify the nature of the disputed facts and then decide whether the legal point raised by the first respondent in answer to the applicant's case regarding a right to graze livestock, and in support of his own counter-application, is determinative of the case. If it is not determinative, then it will be necessary to consider how the disputes of fact ought to be resolved and the appropriate orders which should be made.

APPLICANT'S AVERMENTS

20. The applicant alleges that his family comprises ten members; four women, two men and four children. Two of the adults are alleged to be blind and therefor disabled.

[10] The court has dealt with the issue of overgrazing in a number of cases. As one would expect carrying capacities vary from area to area based on terrain and soil, access to water as well as climatic and other geographic conditions or features. In the present case while overgrazing was mentioned it was not as a self-standing ground with its own consequences

21. He claims to have eight head of cattle and a number of goats which he alleges the first respondent will not permit him to graze on portion 7 but requires him to confine to the kraal area. He alleges that this has resulted in some livestock dying a slow and painful death.

22. The applicant alleges that his rights of tenure on portion 7 arose when he and his family came onto the farm in 1974. At that time the farm was owned by Phillip Meyer. The applicant would have been 12 years old at the time.

    He also claims that at some stage his family obtained consent to use and stay on the farm; he as a general worker and his wife as a domestic worker.

    As a token of appreciation for the services rendered by him and his family Phillip Meyer constructed a three-bedroom brick house. Because it was too small the applicant's family requested and obtained Phillip Meyer's permission to construct a mud house on the side of the house.

    In addition, Phillip Meyer had allocated a piece of land on the farm "*to our family"* where they could keep and graze their cattle.

23. In his replying affidavit and in answer to the counter-application:

    a. The applicant said that it was not him but his late father in law, Jan Moyeni Shabangu, who worked for Phillip Meyer from 1975. Shabangu had received 38 cows as lobola for his three daughters. The cows remained on portion 7 until they were moved for safety reasons to portion 18 although by this time there were 22 cows as some had died, were slaughtered or stolen.

    b. The applicant alleged that he later started working on the farm for Phillip Meyer and in 1986 paid lobola of 16 cows to Shabangu when he married Shabangu's daughter, Poppie. At the time she was a domestic worker on the farm. In turn they received 16 cows in 1993 as lobola for their daughter. They again received 8 cows as lobola in 1996 when their other daughter married.

c. The applicant produced what he contended was the farm registration for his wife. It reflected that she was registered as a farm worker in 1979. His own payslips from 2001 and a year or two after that were provided.

d. The applicant averred that throughout this period both the applicant family's cattle and those of Phillip Meyer would utilise the same grazing area around the dam.

24. Phillip Meyer died in 2009 and his sons Carel and Jakob each took over a portion of the farm. Jakob Meyer took over portion 7 and his son, Japie, subsequently acquired it in July 2016 [11]. Throughout the period the applicant and his family continued to work and reside on portion 7.

In his further affidavits the applicant claims that he had worked on both farms throughout the period from 1985 until the first respondent acquired portion 7 in September 2020. Although he would receive his monthly wages from Carel Meyer, he would take instructions from Phillip, Carel and Japie for anything they needed to be done on the farms.

He also claims that well after 2001 he received six cows as lobola when another daughter married. This was in 2013

25. When the first respondent took occupation of portion 7 in 2020 the applicant and his family had 12 head of cattle, 5 sheep, 18 goats and more than 20 chicken. in addition there were six dogs. He alleged that the livestock would graze around the dam and that there was no other farming activity in the grazing area. In the replying affidavit he stated that he presently has 11 head of cattle.

26. The applicant claims that in September 2020 the first respondent, his wife, Carel Meyer and himself had a meeting where he "*was made to sign a residency agreement*". It was written in Afrikaans. The applicant claims that he is illiterate, uneducated and did not understand what he was signing. He was told that by signing the agreement he and his family would not `be evicted.

[11] Japie's acquisition of portion 7 in July 2016 appears from para 9.1 of the first respondent's answering affidavit

In his further affidavits the applicant added that he spoke to both the first respondent and Carel Meyer in isiZulu, a language he claimed they were conversant in, and not in Afrikaans.

The applicant also alleged in reply that he was simply asked to sign the agreement so that he and the first respondent as the new owner could live peacefully on the farm. He claims that there was no discussion limiting the livestock to three head of cattle and challenged the reason for Carel Meyer keeping a copy of the agreement – particularly as it had nothing to do with his employment. The applicant persisted that he was illiterate and that he was not given the agreement which might have resulted in his children providing clarity.

27. In October 2020 the first respondent informed the applicant that he was to stop grazing his cattle on the farm. The applicant claims that he reported these events to the second respondent who is the Regional Land Claims Commissioner for Mpumalanga ("*the RLCC*"). A meeting was convened by the RLCC on 3 December 2020 which was attended by its officials, the first respondent and the applicant. The applicant alleges that at the meeting it was concluded that he was entitled, by reason of ss 24(1) and (2) of ESTA to continue keeping livestock on the areas previously designated by the previous owner Japie Meyer.[12]

Section 24 provides:

> *<u>Subsequent owners</u>*
>
> *24. (1) The rights of an occupier shall, subject to the provisions of this Act, be binding on a successor in title of an owner or person in charge of the land concerned.*
>
> *(2) Consent contemplated in this Act given by the owner or person in charge of the land concerned shall be binding on his or her successor in title as if he or she or it had given it.*

[12] FA para 26

It is however evident that the applicant confused the office of the RLCC with that of the eMalahleni Regional office of the Department of Agriculture, Land Reform and Rural Development responsible for Tenure Reform Implementation ("*the Department*").[13]

28. It is apparent from the first respondent's answering affidavit that there was an exchange of correspondence between his attorneys, Moolman & Pienaar Inc ("*the attorneys*") and the Department.

However the founding affidavit picks up first on a letter of 17 December 2020 from the attorneys to Ms Sibuyi of the Department in which it was contended that the applicant had committed a material breach of the terms of any agreement which may be in existence with an owner of portion 7 by not only keeping more than the three head of cattle but also by allowing them to graze outside a 1.5 hectare area around the homestead. In the letter the first respondent stated that it accepted the repudiation and terminated any agreement pertaining to the keeping of livestock. In the letter he also required the applicant to move his cattle to Carel Meyer's farm where it is alleged he was given access to grazing.

The first respondent also made his position clear to the Department regarding any agreement that may have been concluded between the applicant and any prior owner of portion 7; namely that ESTA did not extend any right to graze livestock which was purely a personal right which may have been agreed on with a previous owner and as such could not survive a transfer of ownership in the land. Reference was pertinently made to the Supreme Court of Appeal decision in *Adendorffs Boerdery v Shabalala and another* [2017] ZASCA 37 which the attorneys contended was in point.

The letter was not sent to the applicant but assumed that the Department was representing his interests.

29. When the applicant got wind of the letter he refused to move the livestock on the grounds that the grazing area provided on Carel Meyer's farm was too far away from his homestead and that animal theft was rife.

[13] See the letter from the Deputy Director: Tenure Reform Implementation on the Department's letterhead

30. The applicant then claimed that the RLCC (no doubt meaning the Department) had tendered to purchase the portion of the farm where the homestead was situated to secure the family's security of tenure but that the first respondent had rejected the proposal.

31. Another meeting was held in January 2021 between the first respondent, his wife and lawyers, the farm manager and officials from the Department at which it was confirmed that the agreement signed by the applicant was in Afrikaans and that he had not been given a copy. The applicant alleges that the reason given by the first respondent was that he would make it dirty.

32. The next event mentioned by the applicant was the damage occasioned to the mud house by the strong winds of 3 November 2021 which had torn part of the roof off resulting in rain pouring in and members of the family at risk of falling corrugated iron if they remained inside. The applicant wished to rebuild and approached the Department to engage the first respondent's attorneys.

    On 6 November the Deputy Director within the Department, Mr Nematandani, sent a letter to the first respondent recording the damage to the mud house due to the high winds and enclosed pictures of damage to the roof. The request was for the applicant to be given permission to build "*a more durable house that will withstand heavy winds and rains*" and for the family's safety.

33. In the meanwhile, on 8 November the attorneys sent an email to Sibyui of the Department advising that a notice to terminate the applicant's right of residence in terms of s 8(1) (e) of ESTA would be served soon.

    This letter also contained a complaint that the applicant had laid a false charge with the Human Rights Commission alleging that the first respondent had threaten applicant's wife during a visit to the farm after the attorney, in the company of the first respondent, had noticed the erection of another structure on the farm for which consent had not been sought. It was contended that these untruthful accusations by the applicant together with his previous conduct had "*caused an irretrievable breakdown in the relationship between the parties*". The letter asserted that the first respondent was no longer willing to engage in any other manner with the family. A copy of the notice was attached to the letter. However neither party has placed it before the court.

34. The attorneys followed up the email of 8 November with another on 9 November, also to Sibuyi, which responded to the request of 6 November to allow the applicant to rebuild the mud house. The attorneys pointed out that the applicant was *"permitted*" to reside rent free in a brick house constructed by the owner of the farm although he was employed elsewhere. They sought clarification as to why the damage could not be repaired by simply replacing or repairing the roof, contended that the three-bedroom brick house on its own afforded the family the necessary dignity and added that the applicant was in the process of constructing a new house on the eastern side of his homestead without permission.

35. The applicant admits that on 9 November 2021 he was served with a notice of intention to terminate his family's residency on the farm. As stated earlier, the parties do not appear to have attached this notice to either of their papers.

36. The applicant avers that the rights he and his family enjoy are protected by s 25(6) of the Constitution.

Section 25(6) provides that:

> *a person or community whose tenure 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*.

The applicant also avers that ss 5, 6, 13 and 24 of ESTA protect his and his family's right to reside on the farm, rebuild their mud house and keep livestock which are entitled to graze on the land. The text of s 24 has already been set out, while certain of the other provisions relied on by the applicant will be set out later.

37. The applicant, who is now 60 years old contends that he and his family have resided uninterruptedly on the farm for 47 years and know no other home.

FIRST RESPONDENT'S AVERMENTS

38. The first respondent admits only that the applicant, his wife and three children may lawfully reside on portion 7. This is based on the agreement that was signed in

September 2020 between the applicant and himself. the first respondent also alleges that the applicant was at no stage entitled to keep more than three head of cattle on portion 7.

39. In regard to the applicant and his family's occupation of the homestead the first respondent alleges that:

a. Philip Meyer only purchased portion 7 and erected the homestead occupied by the applicant and his family in 1997. The applicant and his family therefore only came onto portion 7 in 1997 where they were employed as farmworkers. [14]

Significant to the first respondent's case is that the applicant was only an employee and was not then entitled to keep cattle on the farm. [15]

b. Philip Meyer had informed his grandson Japie Meyer that the applicant *"was employed on the farm until 2001 on condition that his right to reside there and within the brick structure erected was linked to his employment on the farm*". [16]

c. In 2001 Japie's father (Jakob Meyer) acquired the farm through a close corporation.

The actual allegation is that by 2001 Phillip Meyer (Jakob's father) held the farm as sole member of Jaap Meyer Boerdery CC and Jakob then became the sole member in 2001 after which Phillip Meyer again "*repurchased*" the farm from his son Jakob in 2004 and owned it until he passed away in 2015. [17]

d. After Phillip Meyer's death the farm was transferred to his wife and then to Japie Meyer in July 2016[18]

From the time when Jakob Meyer first acquired the members interest in the close corporation in 2001 until 2020, the applicant was never employed on portion 7.

[14] AA para 9.3 read with para 22.3
[15] AA para 22.3
[16] AA para 9.4
[17] This is the only way of reconciling the averments in para 9.1 to 9.5 with para 22.4 of the AA
[18] AA para 22.5. There however appears to be some confusion by the Meyers between beneficial ownership and the vehicle used

e. Despite Japie's father acquiring portion 7 through his close corporation in 2001, the first respondent alleges that the applicant then commenced working exclusively for Carel Meyer (Phillip Meyer's son and the brother of Jakob Meyer). This would have still been during the lifetime of Philip Meyer who, it will be recalled, only passed away in 2009.

f. In the meanwhile, Carel Meyer farmed on Portion 18 and according to the first respondent, (supported by the affidavits of both Carel and Japie Meyers:

> *"Mr Carel Meyer, gainfully, employed the applicant since 1 March 2001, despite the fact that he continued to reside on the farm. The applicant has since then not contributed to the maintenance of the infrastructure on the farm and neither has he or any of his family members paid any compensation for his and his family's occupation and use of any part of the farm".*

For reasons which will be provided later, this appears to be a somewhat cynical allegation if regard is had to the manner whereby the Meyer family, starting with Philip Meyer, sought to whittle away the applicant's rights which, at the very least were already entitled to the protection afforded by ESTA when it came into force in November 1997.

g. Since the time when the applicant came to be employed by Carel Meyer in 2001 on portion 18, he together with the other employees of Carel Meyer were only entitled to graze their cattle on a designated grazing camp on Carel Meyer's farm being portion 18 (also known as Wonderhoek). [19]

This is the first time that the first respondent acknowledges that the applicant had livestock of his own. However, the first respondent makes it plain that at all times until 2016 the applicant never grazed his cattle on portion 7- the cattle only grazed on portion 18.

These are very important allegations.

h. In 2016 Jakob Meyer's close corporation sold the farm to Jakob Meyer's son, Japie. However, some 20 years ago (i.e. around 2001) Carel Meyer "leased" the grazing

[19] AA paras 22.9 and 22.10

area on portion 7 and continued to lease it after Japie Meyer acquired the members interest in portion 7.[20]

Also in 2016 the applicant requested Japie Meyer to allow him to graze his cattle on portion 7.

According to Japie Meyer he permitted the applicant to graze not more than three head of cattle within a designated camp of 1.5 hectares in area which surrounded the homestead on portion 7. This left only another 35 hectares of portion 7 available for grazing. It was pointed out that the utilisable area of the farm is small because the bulk of the farm (i.e. portion 7) comprises a dry pan.

For sake of clarity the area surrounding the applicant's homestead on which he was allowed to graze his cattle from 2016 will be referred to as *the designated area* (which at some stage was demarcated with fencing and the first respondent refers to this same area as the "*demarcated area"*) the perimeter of which is drawn in red on annexure "GA2" to the answering affidavit. It falls within the much larger area, referred to as *the grazing area,* of approximately 36 hectares on portion 7 all of which had been "*leased* "by Carel Meyer.

i. The first respondent counters the applicant's reliance on s 24 of ESTA in relation to the keeping of livestock by reference to the Supreme Court of Appeal (*"SCA*") case of *Adendorffs* and a number of Land Claims Court cases which he contends hold that the right to graze does not derive from ESTA but is a purely personal right as between the owner of the land at the time and the occupier which, as with all personal rights (so it is contended), would not have survived the transfer of ownership of portion 7 from Japie Meyer to the first respondent.

j. It was also contended that the order sought by the applicant would give him an unfettered right to graze an unlimited number of livestock over an undefined area of land on portion 7.

40. It is evident from the first respondent's papers that prior to taking transfer of portion 7 he was aware of the applicant's occupancy of the homestead, that Carel Meyer had the

[20] First respondent's answering affidavit para 9.14

rights to the grazing area of portion 7 and that the applicant was grazing more than three head of cattle on the grazing area and not confining them to the designated area of 1.5 hectares surrounding the homestead and from the access road to the homestead. [21]

41. According to the first respondent, he together with Japie Meyer had several discussions with the applicant during the beginning of September 2020 at which:

a. Japie Meyer informed the applicant that he was entitled to reside on the farm with his wife and three children and had consent to keep three head of cattle within the designated area of 1.5 hectares.

b. The first respondent informed the applicant that he was buying the farm in order to extend his other farming operations in the vicinity.

He also told the applicant that Carel Meyer would rent the adjacent grazing area. It is worth repeating that Carel Meyer had the right to rent the entire grazing area of portion 7. [22]

c. The first respondent told the applicant that he could continue residing on portion 7 although he was not employed there but employed on portion 18 by Carel Meyer

d. The first respondent also informed the applicant that he could no longer graze any goats or sheep and must reduce his cattle to three so that there would be no risk of them grazing outside the demarcated area.

It is significant that the first respondent adds:

> "*During the discussion, the Applicant did not inform me that he would not be able to reduce his cattle or graze his cattle elsewhere"*

This is a clear concession that the applicant had more than three head of cattle and that they were grazing beyond the designated area.

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[21] Answering affidavit paras 9.22

[22] The first respondent states that pursuant "*to transfer of the farm, I continued with the lease agreement with Mr Carel Meyer, in respect of the grazing area of the farm, which he had leased from the previous owners for the past 20 years.*" (AA para 9.28)

e. The entire discussion was in Afrikaans and the applicant fully understood *"the contents of our discussion and what the extent of our respective rights would be*".

I will return to the meaning to be ascribed to this statement where the manner in which the first respondent narrates the events suggests that he and Japie Meyer were telling the applicant what everyone's rights were without giving the applicant an opportunity to verbalise the position as he understood it.

This becomes even more apparent in light of the first respondent's statement that the applicant "*was given an opportunity to think about the conditions of his residence including the consent giving him the right to keep only three cattle within the demarcated area"* and that a written agreement would be drawn up in accordance with the discussed terms which the applicant "*would be required to sign".* [23]

The first respondent concludes this section of the narrative by stating that the applicant never indicated a reluctance to sign an agreement on the terms discussed.

42. Subsequently, on 8 September 2020 the first respondent together with Carel Meyer met the applicant on Carel Meyer's farm. At the meeting;

a. The discussions took place in Afrikaans, which the first respondent again asserts the applicant was well able to understand

b. The applicant was given the written agreement which was *"interpreted*" to him in Afrikaans[24]. It is apparent that the first respondent wishes to convey that each page of the agreement which was in Afrikaans was explained to the applicant in plain Afrikaans so that he could clearly understand its terms which he then accepted. [25]

[23] Answering affidavit para 9.23.8
[24] The words "interpreted "and "translated" are both used. See AA para 9.24.4
[25] AA para 9.24.4

43. In terms of the agreement:

    a. The applicant was given the right to reside in the housing situated within the designated area together with only those who were identified in annexure B to the agreement as his "*associates"*. They are his wife, one adult child and two minor sons.

    b. The demarcated area within which the applicant and the family members as identified in the agreement could reside was the 1.5 hectares mentioned earlier and they could not use any other part of the farm or damage any of the fencing. Furthermore, only the specific camp within the demarcated area could be used by them

    c. The applicant could only keep three head of cattle and three dogs within the demarcated area which had been fenced off.

    d. The applicant could not keep more than the three head of cattle nor could he graze in any other area without the express written consent of the applicant

44. The applicant was told by Carel Mayer that he would take the original agreement and keep it safe for the applicant together with the applicant's employment agreement and that he could approach Carel Mayer to uplift the original or make a copy of it at any time. It is said that this was "*not only to ensure that the agreement does not get dirty during the applicant's working hours on the farm and that the agreement is kept safe for the Applicant for when he needs it.*"

    It is alleged that the applicant never asked Carel Meyer for a copy of the agreement and if he had it would have been provided willingly.

45. Some of the features of the agreement are:

    a. It is 18 pages in length and consists of over 80 distinct clauses;

b. one of the clauses provides that the parties agree that the terms of the agreement are fair and reasonable, in all respects and were properly negotiated "*between them and their respective legal representatives"*. [26]

c. there are also references to various sections of ESTA and an acknowledgement that the agreement is entered with full appreciation of the provisions of ESTA and complies with its requirements;

d. Clause 11.1 entitles either party to cancel the agreement if the other fails to comply with any of its terms. There is no requirement of notice, only a reference to the right to cancel being subject to the provisions of ESTA.

   Nonetheless clause 11.4 contradicts this in the case where the applicant contends that the first respondent has failed to comply with a term of the agreement. In such a case, the applicant is required to first give the first respondent 30 days written notice of the alleged breach before being able to pursue any remedy under ESTA.

e. the applicant acknowledges that his family members reside on portion 7 solely by reason of their relationship("*verwantskap*") to the applicant and in the event of his death they will be obliged to leave within the time period stipulated under the law as applicable to them;[27]

f. the area which the applicant is entitled to use is identified by a series of four different GPS co-ordinates and a photograph which was apparently attached to the agreement marked C.

46. I consider that the number of provisions, the nature of the wording used which the applicant could not reasonably be expected to understand (such as GPS co-ordinates, the provisions of ESTA which were being impacted by the agreement as well as the distinction between the requirement of notice where the first respondent is in breach but an agreed right to cancel without notice if the applicant is in breach) and the fact that the applicant was not given a copy to consider beforehand let alone be given a copy until *after* the first respondent had purported to cancel it are factors relevant to a determination

[26] Clause 14.1 of the agreement
[27] Clause 2.2 read with clause 9

of whether the applicant could have been expected to memorise let alone understand the material terms or the rights he was forfeiting.

These would include those rights which his wife may have enjoyed independently of him under either the Labour Tenants Act or ESTA since her father had worked and resided there as did she. That he could not have understand all its terms or appreciated that he was entitled to amend paragraphs that may not apply to him is evident from the inclusion of a clause which suggests that he was legally represented, but for which he could never be expected to have understood the provisions of ESTA or that he was signing away such rights as his wife may have had to continue residing on portion 7 should he predecease her.

The point is;

a. that no good reason exists for not having provided the applicant with a copy so that he could consider the terms of the agreement before it was signed;

b. the first respondent failed to afford the applicant a reasonable opportunity to consider a document of such length and importance, particularly when it was obviously drawn by skilled lawyers representing the interests of the first respondent or other persons in a similar position and which the first respondent would have to be guided in understanding before taking it to the applicant (since the first respondent claims that he explained its terms to the applicant- which would therefore have required an understanding of the rights the applicant did enjoy under ESTA and the legal implications if they were signing away or diminished under the agreement;

c. the first respondent and the Meyers would therefore have been conflicted when explaining the rights which ESTA may have accorded to the applicant and which he might be forfeiting by signing the agreement in its terms

In such circumstances the first respondent runs the risk of not affording the applicant a reasonable opportunity to independently consider with his family, and if possible obtain independent advice (as he subsequently did). The risk is that the evidence may reveal that there in fact was no meeting of the minds on essential terms (i.e. *no consensus ad idem*)

47. The first respondent adds that during the discussions which took place when the agreement was signed on 8 September Carel Meyer informed the applicant that he could keep any of his livestock on Wonderhoek if the grazing area was insufficient for his cattle "*as set forth in the designated area or if he had more than 3 cattle"*

Two points should be noted.

The first is that once again the first respondent concedes that the applicant had more than three head of cattle already grazing outside the demarcated area.

The other is that, despite the agreement purporting to record all the terms of the agreement between those who were privy to the negotiations which had commenced in early September and culminated on 8 September, Carel Meyer is left out of the picture until his appearance on 8 September[28] even though the area which is the subject matter of the applicant's occupation falls four square within that over which Carel Meyer had the right of use for at least the past 20 years.[29]

No written agreement mentions that Carel Meyer also recognised the applicant's right to occupy or that he could graze any livestock on Carel Meyer's Wonderhoek farm (portion 18) should they exceed three head of cattle or should the grazing area in the demarcated area of portion 7 be inadequate. This despite Carel Meyer being present at the meeting of 8 September, despite being a witness to the agreement[30] and despite continuing to enjoy the right to occupy the entire grazing area on portion 7 (within which the designated area fell).

I will return to this.

48. The actual registration of transfer of portion 7 into the first respondent's name occurred in September 2020 although the sale agreement had been signed some two months earlier in July. On his version the first respondent was already aware in July of the applicant and his family's presence and that of their livestock on portion 7. [31]

[28] Compare AA para 9.23 with para 9.24
[29] See also AA para 9.28
[30] See para 11 of the affidavit of Carel Meyer attached to the AA as part of GA6 (record p 132)
[31] See AA paras 9.8 and 9.21

49. In October 2020 officials from the Department tried to approach the first respondent with regard to an alleged violation of the applicant family's rights. It will be recalled form the applicant's The first respondent claims that this upset him because of the interactions that had led to the agreement in September. He eventually agreed to meet with them in December 2020 but provides no acceptable explanation for not doing so sooner.

50. However, prior to meeting with the Department officials, and in November 2020, the first respondent avers that Carel Meyer cancelled the lease to the grazing area of potion 7. This was as a result of Carel Meyer noticing that since the end of October 2020 the applicant was driving his cattle beyond the confines of the designated area[32]. The first respondent also avers that as a result it was no longer sustainable for Carel Meyer's own herd of cattle to utilize the grazing area he had leased. He had stopped paying rental to the first respondent from December 2020. As a result, the first respondent states that he suffered financial loss.

    Moreover, until sometime in 2021 there was no boundary fence between portion 7 and Wonderhoek (portion 18). This confirms that the grazing area had historically been around the dam which traversed both farms and that the right to graze had been tied up with access to the dam despite any historic division of the farms during Phillip Meyer's time.

    In an affidavit deposed to by Carel Meyer on 21 November 2020 he alleged that the water from the pan is not suitable for cattle and he had therefore installed a supply of drinking water at his own cost on portion 7 which he contends is "*therefore … my property".* [33]

51. On 3 December the first respondent met with Sibuyi at the Department's offices in eMalahleni. She referred to the applicant disputing that he could only graze three head of cattle in the demarcated area and that the 1.5 hectares was insufficient for the livestock.

52. The first respondent advised her of the agreement and the historic position as set out above including the availability of alternative grazing on Wonderhoek. He left the meeting

[32] This is confirmed in Carel Meyer's affidavit of 21 November 2020

[33] Affidavit of Carel Meyer attached to the AA as part of annex GA6 (Record pp 131-2 at paras 8 and 9)

on the basis that he would provide the agreement and an affidavit. Of importance is that he never conceded that s 24 of ESTA applied.

The affidavits of Carel Meyer and Japie Meyer were then provided to the Department as was a copy of the agreement.

53. Subsequently a meeting was held on 28 January 2021 at portion 7 between the first respondent, his attorney, Sibuyi and the applicant. It transpired that the applicant's family had recently received livestock as lobola and said that they needed an area to enable them to graze.

The first respondent maintained that the applicant was in breach of the written agreement of September 2020 and the earlier agreement with Japie Meyer when he was given permission to graze only three head of livestock on the designated area. He expressed his dissatisfaction with the fact that the applicant had unauthorisedly brought more cattle onto the farm.

The applicant persisted that he did not understand Afrikaans. This issue was left on the basis that the Department would review the terms and conditions of the written agreement and they would advise if they considered any of the terms to be unacceptable. It was also agreed that on a future date an attempt would be made to formalise a written tenure agreement for the applicant.[34]

54, The meeting of 28 January dealt with a number of disputes, one of which clearly indicated that the applicant had trespassed beyond the grazing area and cut down the first respondent's growing wattle trees without permission in order to erect an additional kraal[35]. The applicant had also sought to lay claim to an abandoned structure which was some distance away from the applicant's homestead and which the first respondent then demolished. Later during the course of the meeting this claim was withdrawn by the applicant.

54. On 4 March 2021 the first respondent's attorney enquired whether the Department was in a position to respond to the issues that were discussed at the 28 January meeting.

[34] AA para 9.47, 9.50 and 9.51
[35] AA para 16.4

On 4 May Sibuyi responded and indicated that a meeting would be held at portion 7 on 4 June. Correspondence was then exchanged, with the first respondent's attorneys requesting that the comments which the Department wished to make regarding the agreement be provided so that they could prepare. It then transpired that the issues would concern the number of persons residing with the applicant and the retention of livestock, with the Department contending that the first respondent could not compel the applicant to sell his livestock and that clause 6 of the agreement was in contravention of s 24 of ESTA.

Clause 6 of the agreement dealt with the number of livestock the applicant was permitted to have and that grazing was confined within the designated area of 1.5 hectares on portion 7.

55. On 7 October 2021 a meeting was held at the Department's offices which was attended by Sibuyi, the first respondent and his attorney. The applicant was not in attendance due to employment commitments. and the meeting did not proceed.

The Department recorded the aforegoing in a letter written on 8 October and also recorded that a certain Mr Mahlangu allegedly representing a political party had purported to represent the applicant and issued "*very alarming and threatening messages"*. The purport of the letter was to indicate that the Department had a statutory mandate to mediate or negotiate on the issues which faced the parties and that those now purporting to represent the applicant lacked knowledge regarding ESTA.

56. About a week later, and after the first respondent had noticed the applicant putting up poles in order to erect a structure outside the designated area, and in an area over which the first respondent wished to extend his arable land, the first respondent received a letter from the Human Rights Commission (*the HRC*"). The letter advised that the applicant had lodged a complaint alleging that the applicant's wife had been threatened by the first respondent after he had noticed the poles being erected. The first respondent denied the allegations in a written reply to the HRC.

It was the culmination of all these events which included the threats received, the false averments and the failure to attend the meeting on 7 October which the first respondent alleges led him to conclude that the applicant demonstrated a disdain for

the former's rights, resulting in an irretrievable breakdown in the relationship between them and rendering any further engagement fruitless.[36]

57. The applicant confirms receiving the email of 6 November 2021 from the Department but contends that it was unclear whether the request was to build a completely new structure or one with the same dimensions as the one which was severely damaged as it was broadly worded- it requested "*permission to build a much durable house that will withstand heavy winds and rains".*

The response from the first respondent's attorney on 9 November reveals the suspicion with which the request was received. The first respondent wished to have first clarified whether the applicant was still seeking to build another structure and to establish whether a new structure was to be erected on the existing foundations or whether an additional structure was to be erected outside the homestead area. The letter however goes further and suggests that the existing homestead is adequate. One should also bear in mind that the agreement refers to no more than five inhabitants whereas the applicant contends that ten were in fact living there.

There was no reply from the Department to these requests.

58. However before responding on 9 November to the Department's email of 6 November, the first respondent's attorney sent an email to the Department on 8 November advising that he will soon serve on the applicant a notice of an intention to terminate the right of residence in terms of s 8(1) (e) of ESTA.;

Although a copy of the s 8(1) (e) notice would have accompanied the email it does not appear to have been included in any of the affidavits.[37]

According to the first respondent, the notice set out the grounds of the intended termination and afforded the applicant 30 days to provide reasons as to why his right of residence should not be terminated. The first respondent contends that this

[36] This would presumably be relied on to demonstrate that a termination of the applicant's right of residence was just and equitable having regard *inter alia* to the considerations set out in s 8(1)(b) of ESTA, namely: "*the conduct of the parties giving rise to the termination"*

[37] The first respondent refers to the s 8(1) (e) notice being annexure FA7 to the FA. It is not. FA7 consists only of the letter to the Department of 7 November but did not include the notice of intention to terminate attachment.

demonstrates his willingness to meaningfully engage with the applicant should he elect to terminate the applicant's right of residence.[38]

59. The first respondent contends that the applicant has failed to demonstrate a clear right since he has not responded to the first respondent's s 8(1) (e) notice. He however then challenges the applicant's entitlement to seek even interim relief pending an application for his eviction. The first respondent puts it as follows;

> *"no eviction application has been instituted and the applicant's rights of residence in terms of ESTA have not been terminated"*.[39]

It is difficult to appreciate how the first respondent can have it both ways. Either he contends that the applicant cannot rely on his residence to afford protection pending the first respondent initiating a process to terminate the residence or he has not yet initiated that process. In the former case relief would have to be pending the final determination of that issue while in the latter case the applicant's rights under ESTA remain intact.

60. The first respondent raised in the answering affidavit a number of additional matters for consideration;

a. Portion 7 was bought for R6 million, and he took out a bond of R4 million which must be serviced in addition to ensuring that portion 7 is a viable economic unit. [40]

b. Aside from suffering a loss of rental because Carel Meyer terminated the lease agreement due to the applicant's livestock grazing outside the designated area, the applicant has not tendered to pay for grazing in the larger area;

c. the applicant had not immunized his livestock as required by the Health Act 7 of 2000 or under the State Veterinarian programs

d. As he understands it, the Department appears to have offered to purchase only the designated portion where the homestead is situated and not the grazing area.

[38] AA para 25.5. This would be a factor a court has regard to under s 8(1) (e) when considering whether the termination of an occupier's right of residence is just and equitable
[39] AA para 25.8
[40] AA paras 30.7 and 31.7

61. Subsequently the first respondent filed a supplementary affidavit in response to the applicant's replying affidavit and contended that the applicant had introduced evidence which should have been set out in the founding affidavit. He objected to what he termed was an attempt to make pout a case in reply.

    Nonetheless the first respondent dealt with these issues which concerned the alleged raids on the homestead and the allegations concerning the residence of the applicant's father in law on the farm.

62. By reason of the view I take of the alleged raids it suffices to note the first respondent set out strong grounds for disputing that he intimidated the applicant and his family when he or a Mr Pretorius, who was engaged to read the GPS co-ordinates of the designated area approached the homestead.

63. Of significance though is the first respondent's denial;

    a. that the applicant's father in law ever resided on portion 7 or grazed livestock on that part of the farm;

    b. that Phillip Meyer owned portion 7 before 1997. It is contended that Ongesiens Boerdery (Pty) Ltd was the owner from 1975 to 1997

64. In his affidavit in support of the counterapplication the first respondent relied on his cancellation by way of notice on 17 December 2020 to the Department of the applicant's limited grazing rights of three head of cattle within the designated area of 1.5 hectares. The grounds relied on were that the applicant had repudiated the terms of the September 2020 agreement concluded between them by failing to decrease the number of cattle he had and by allowing them to graze outside the designated area.

    The first respondent does not rely on the termination of any earlier agreement under which the applicant may have been entitled to graze cattle on portion 7. This appears to be because of;

    a. the principle contention that in terms of *Adendorffs* any agreement between the applicant and the first respondent's predecessor in title regarding livestock were limited personal rights which do not survive transfer of property and that ESTA does not statutorily extend the protection afforded of residence to livestock grazing;

b. clause 14.4 of the September 2020 agreement between the applicant and the first respondent records that it replaces all previous agreements whether written or oral.

65. The first respondent therefore does not rely on any demand calling on the applicant to remedy his breaches, nor on any notice of termination being sent to the applicant, himself, only the one sent to the Department which does not in its terms rely on any earlier demand made to remedy the alleged breaches.

It is however evident that the first respondent relies on clause 11.1 of the September 2020 agreement which allows him to cancel the agreement without notice in the event of a failure by the applicant to comply with any of its terms.

66. The applicant subsequently clarified that he wished to demolish the remains of the mud-house and rebuild it on the very same spot.

DISPUTES OF FACT AND THE ISSUE CONCERNING LIVESTOCK

67. It is evident that there are numerous disputes of fact as to the relationship between the applicant's family and the prior owners of portion 7.

The first respondent contends firstly that the only agreement concluded between the first respondent and the applicant with regard to livestock terminated in December 2021 and that any alleged prior agreement with the previous owners of portion 7 is irrelevant since *Adendorffs* holds that such agreements would only have conferred personal rights which would not have survived the transfer of the land to a new owner.

68. There are also disputes of fact as to whether the first respondent "*raided*" the applicant's homestead. However the issue regarding rebuilding consequent on the damage caused to the mud house by the storm can be readily determined.

69. I will therefore proceed to consider the order which should be made in respect of the mud house damage, then deal with the whether *Adendorffs* and certain other cases are determinative of the question of grazing rights. If they are then it will still be necessary to determine the relief sought in respect of the alleged raids on the homestead and if not, then that issue and how to proceed with the issue regarding the keeping and grazing of the livestock will have to be determined.

RECONSTRUCTION OF THE MUD HOUSE

70. The distrust between the parties is no better illustrated than in the issue of whether the applicant is entitled to repair the damage caused to the mud house as a consequence of the high winds which resulted *inter alia* in parts of the corrugated iron roof being blown away.

71. On the one hand the applicant couched the relief sought in broad terms which suggested that he wished to build a completely new structure and was intent on building new outbuildings whereas the first respondent had adopted a position which suggested that the number of persons entitled to occupy in terms of the September 2020 agreement could more than adequately be housed in the main brick buildings[41]. However in the answering affidavit the first respondent mentioned that the applicant did not inform the court why the portion of the house that was damaged could not be repaired "*or the portion thereof rebuilt on the same location in accordance with human dignity"*[42]*.* He however persisted with the contention that the applicant did not have to rebuild the mud house as the area of accommodation *excluding* the mud-house was more than adequate. [43]

72. The first respondent refers to the Constitutional Court case of *Daniels* which required constructive engagement between the parties before either approached the court[44]. It appears to me that each party displayed an intransigence that could only be resolved by a court. up to here

73. It turns out that the applicant wishes to rebuild the same mud house structure on the existing foundation and that the first respondent has no objection to that. In his replying affidavit the applicant puts it this way: "*All I require is to demolish the current one and rebuild another one on the very same spot".* By "*another one*" is meant "*a durable mud house*"[45]

74. The court will therefor make an appropriate order in that regard.

[41] This is also made clear in the AA at para 15.1
[42] AA para 13
[43] Aside from AA para 15.1 see also para 26.7
[44] *Daniels* at para 64. see also
[45] Applicant's Replying Affidavit para 27

THE RIGHT TO GRAZE LIVESTOCK

75. The order sought by the applicant to enable him to maintain the number of livestock that he had kept immediately prior to the first respondent purchasing the farm involves substantially the same enquiry as the counterapplication brought by the first respondent which requires the applicant (and his family members) to remove all their livestock from the farm within fourteen days and that he shall not be entitled to return the livestock without the express written consent of the first respondent.

    It is evident from the contents of the answering affidavit and affidavit supporting the counter-application that the first respondent will not be disposed to allowing the reintroduction of any of the applicant's livestock on portion 7.

    In this regard it is significant that the purpose of the order is not to temporarily remove the cattle pending the rehabilitation of the grazing land but obtain the court's confirmation that any existing entitlement to graze livestock on the farm has been extinguished.

76. It is best to tackle the issue by reference to *Adv. Roberts'* challenge to the order sought by the applicant regarding the livestock.

    Firstly, it is contended that the applicant seeks a spoliation order without making any of the essential allegations required for such relief. As set out earlier, it is also contended by the first respondent that any right to graze livestock can only be derived from consent given by the owner and, being a personal right, cannot survive a change of ownership in the farm.

77. As to the first point; I do not believe that on a reading of the papers the applicant has sought a spoliation order: Rather he seeks a *mandamus* for the enforcement of a right he contends arose out of the protective provisions of s 24 of ESTA against a subsequent owner.

    Adv. Roberts however counters the applicant's reliance on s 24 by citing a number of cases including Adendorffs. She submits that these cases hold that ESTA only regulates the rights of occupancy to a residence on land and does not extend to livestock which the occupier may have brought onto the land. The submission is that the keeping of

livestock is a separate right from ESTA rights established by consent of the landowner, and being a personal right is therefore not binding on a successive landowner.

78. It is correct that the cases relied on by the first respondent of *Absa Bank v Keet* 2015 (4) SA 474 (SCA) at para 20 and *National Stadium South Africa (Pty) Ltd v FirstRand Bank Ltd* 2001(2) SA 157 (SCA) at para 31 state that personal rights are only enforceable between immediate contracting parties.

There can be no quarrel with that statement provided it is not extended to urban or rural tenements, as those terms came to be understood under our common law[46]. In current parlance they equate to leases of urban property and leases of rural or agricultural land.[47]

While our law relating to the lease of immovable property respects the principle that leases involves only the existence of personal rights between immediate parties, it received the law developed in the States of Holland during the seventeenth century which came to protect a tenant's continued occupation under a lease should there be a change in ownership of the property concerned. This is the well-known doctrine of *"huur gaat voor koop".*[48]

79. Under this doctrine the right of a lawful occupier is protected against successive land owners save in limited situations involving leases of rural land which are not now relevant, such as the non-availability of an entitlement to sub-let.

80. There is academic debate as to whether, in order to qualify as a lease, the consideration can only be by way of the payment of money or of fruits harvested. This is relevant because historically the protection afforded under *huur gaat voor koop* was a development limited to the law relating to the lease of immovable property, not any other form of possession or occupation. In other words, if the occupation of immovable property does not meet the legal requirements for a lawful lease then *huur gaat voor koop* does not apply.[49]

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[46] See for example *Burrows v McEvoy 1924* CPD 229 at 234

[47] See *Spies v Lombard* 1950 (3) SA 469 (A0 at 476H. See *also Business Aviation Corporation (PTY) Ltd and another v Rand Airport Holdings (Pty) Ltd* [2006] ZASCA 68; [2007] 1 All SA 421 at paras 17 and 23

[48] Voet, *Commentary on the Pandects* (Gane translation) XIX, 2, 17(v).
See for instance *Boshoff v Theron* 1940 TPD 299 and *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A). Christie *The Law of Contract (*4th ed) at p 538 describes it as in effect a delegation by operation of law.

[49] See generally Prof Glover *Kerr's Law of Sale and Lease (4th ed)* at 359 to 365 para 16.4.4.

81. In Jordaan *NO v Verwey* 2002 (1) SA 643 (E) at 646H-647B Erasmus J held that the doctrine does not extend beyond relationships that meet that requirements for a valid lease. However Prof Glover in *Kerr's Law of Sale and Lease (4th ed)* suggests that certain obiter passages in *Rubin v Botha* 1911 AD 569 at 574-5 and 579 indicate that the law may already have developed beyond that. [50]

82. In *Zulu v Van Rensburg* 1996 (4) SA 1236 (LCC) one of the issues considered by the court was the nature of a labour tenancy and whether it fell under employment law (*location conductio operis*), the law of lease or was concerned with labour broking. Dodson J said the following at 1260H-1261 B:

> *"There are three approaches which have been identified in determining the nature of a contract which displays characteristics of more than one type of agreement. ….*
>
> *The different approaches are described by Hathorn and Hutchison as follows[51]:*
>
> > *'The agreement may either be relegated to the dominant type of contract (the absorption theory), or the naturalia of each type of contract may be applied to the relevant portion of the agreement insofar as that is possible or practicable (the combination theory), or the agreement may be considered to fall into a new category of its own, rendering the naturalia of the accepted contract types inapplicable (the sui generis theory).'*

83. However in relation to the application of *huur gaat voor koop,* courts have been spared the task of deciding whether the dominant nature of the relationship between an ESTA occupier and the landowner is that of lease, whether the combination theory should apply to the relationship because there are elements in the relationship unique to leases or whether the relationship is *sui generis* thereby inviting the extension of the doctrine, particularly by reference to the remedial provisions of ss 25 (6) and 39(1) and (2) of the Constitution.[52]

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[50] Id.

[51] Hathorn and Hutchison *'Labour Tenants and the Law'* at 199

[52] Sections 25 (6) and (9) of the Constitution seek to redress, through legislation, legally insecure land tenure caused by past racially discriminatory laws or practices.
Sections 39(1) and (2) build on s 25(6) by directing that when interpreting not only legislation but also when developing the common law, a court "*must*" promote the spirit, purport and objects of the Bill of Rights

This is because s 24 of ESTA has statutorily introduced for the protection of an ESTA occupier the doctrine of *huur gaat voor koop* subject of course to the broader framework of the Act which in certain prescribed circumstances permits termination of the right of residence and orders for eviction.

On trite principles of interpretation, this is the only possible explanation for its introduction. These are the principles which have regard to the intention of the legislature by reference to the ordinary meaning to be ascribed to the words used in the context of the Act as a whole, the Act's expressed purpose and objective which in the present context must also have regard to the provisions of s 25(6), s 25(9), s 39(1) and s 39 (2) of the Constitution which were mentioned earlier and which also refer back to the constitutionally protected right to dignity in s 10, as well as the recognised aids to interpretation with particular reference to words used in a statute must be given effect to as surplusage is not intended. These considerations also inform our interpretation of the section's reach.

84. In terms of s 24, which was quoted earlier, such rights as the occupier has shall, subject to the provisions of ESTA, be binding on a successor in title or person in charge of the land, and so too any consent, as contemplated in the Act, given by either of them.

A "*person in charge*" is defined in s 1 to mean someone who had the *"legal authority to give consent to a person on the land in question*".

This definition obviates the need which might otherwise arise to pierce the corporate veil. It goes behind a corporate owner and binds it to the decisions of its sole member, controlling mind or other persons who held legal authority. In the present case irrespective of the corporate vehicle used, it appears that Phillip, Jakob and Japie Meyer had the legal authority to give consent to the manner of occupation by the late father of the applicant's wife as well as to her, the applicant and other member of the family where applicable.

85. The first respondent relies on a number of cases to support the argument that ESTA does not extend to the keeping of livestock irrespective of whether s 24 statutorily

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provisions and must promote the *values that underlie an open and democratic society based on human dignity. equality and freedom" (*emphasis added*)*

introduces the doctrine of *huur gaat voor koop* to occupiers under the Act. The cases are:

Adendorffs Boerdery (Pty) Ltd v Shabalala and others [2017] ZASCA 37 (and where leave to appeal to the Constitutional Court was refused),

Tsotetsi and Others v Raubenheimer N.O and Others [[2021] ZALCC 2; 2021 (5) SA 293 (LCC)

Margre Property Holdings CC v Jewula [2005] All SA 119 (E) at pp 5 and 8

JB Sithebe and others v Normandien Farms (Pty) Ltd and others (LCC38/2018B

DE Kubheka and others v Normandien Farms (Pty) Ltd and others (LCC50/2019)

Adendorffs Boerdery and Margre Property cases

86. *Adendorffs* concerned an order for the removal from a farm of livestock belonging to ESTA occupiers until such time as the land was rehabilitated.

The farm owner contended that it was entitled to such an order since the respondent occupier had breached the grazing agreement between the parties by keeping more livestock than permitted with the result that there was overgrazing contrary to the requirements of legislation dealing with the carrying capacity of land. The trial court found that the grazing area required rehabilitation which necessitated the temporary removal of the occupier's livestock until that was achieved.

On the facts it was found that the respondent no longer lived on the farm nor was he currently employed on the farm. The trial court however made it the responsibility of the landowner to provide alternative grazing during the period when the land was being rehabilitated and that it would have to pay half the costs of providing such grazing. This finding led the landowner to appeal.

87. The trial court had found that the previous owners had given written permission for the respondent to keep cattle on the farm. The agreement entitled the respondent to lease grazing land within a specified demarcated area but limited the number of livestock which

they could have. There was a specific provision that the respondent could not allow the livestock to stray outside the demarcated area.

88. It is apparent that neither the trial court nor the SCA were concerned with the termination of the right to graze. The case concerned only a temporary removal of livestock pending the rehabilitation of the grazing area on the farm and respect for legislation which stipulated the maximum carrying capacity of land. [53]

In reaching its decision the SCA indicated that its decision was informed by the respondent's concession that he did not reside on the property and that his grazing rights had been granted by the appellant's predecessor only- never by the appellant.[54]

Mathopo JA (at the time) then proceeded[55]:

> *It thus follows that his rights of grazing doe not derive from ESTA. He has a personal right to use the land for the purpose of grazing."*

89. In my respectful view *Adendorffs* was specifically concerned with a landowner who wished to rehabilitate the grazing area through the temporarily removal of the respondent's livestock. The latter had accepted, whether correctly or otherwise, that his right to reside on the land had terminated and he did not assert a continued right to reside when relying on, in effect, a limited right to graze that had been granted by a previous owner.

90. The case was therefore not concerned with s 24 because the landowner accepted that the respondent was entitled to return with his livestock once the land was rehabilitated, the only limitation being the legislation which precluded the number of livestock from exceeding the terms of the agreement and the carrying capacity of the land. Nowhere in the judgment is reference made to s 24.

On the contrary the case centred around the carrying capacity of land and the extent to which a land owner may be responsible for assisting in finding and paying for the cost of alternative grazing. This may be tested by asking whether the case would have turned

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[53] Conservation of Agricultural Resources Act 43 of 1983, commonly known as CARA
[54] *Adendorffs* at para 27
[55] Id. at para 28

out differently if the same agreement had in fact been concluded with the present owner. On my understanding of the *ratio* the answer with respect would be no.

Tested another way; the mere fact that the right to graze is a personal right (as is a common law right to occupy under a lease) does not inform the nature and extent of the protection afforded by s 24. Just as under common law, the fact that the rights of a lessee of immovable property are personal rights does not inform the protection afforded against a subsequent owner by reason of the principles of *huur gaat voor koop.*

91. The first respondent's reliance on *Adendorffs* exposes the major flaw in the argument presented; namely that it impermissibly conflates an enquiry into the nature of a right with the enquiry as to who the right is enforceable against where special provisions apply either under the common law or by statute.

While the nature of the right will remain a personal right and never changes to a real right, it does not automatically follow that the enforcement of that bright does not bind a successor in title. There are some cases where either the common law has come to the assistance of one of the parties (such as the doctrine of *huur gaat voor koop)* or as in the present case, the provisions of s 24.

92. In my respectful view the SCA was therefore not called on, nor did it purport, to decide a case which involved an interpretation of;

a. section 3 read with s 24 of ESTA, which recognises that;

i. consent to an occupier may relate to residing on or using land and that such consent to "*reside on <u>or use land</u> shall only be terminated in accordance with the provisions of section 8";*[56]

ii. such consent (i.e. the consent to reside on or use land which is referred to in s 3) "*shall be binding on … (the owner's)… successor in title as if he or she had given it"*; [57]

[56] Section 3(1). See also the wording of s 3(2) which is consistent with s 3(1)
[57] section 24(2)

b. section 6, which accords an occupier the right "*to reside on and use the land on which he or she resided".* It provides that subject to certain provisions;

> *"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".*

It has already been mentioned that a basic aid to interpretation of statutes is that surplusage is not intended. The right accorded is expressly stated not to be limited to only the right to reside but it also includes the right to use the land- subject always to the overriding consideration that in both instances consent which must be given. The right to use as provided for in the various sections of ESTA therefore cannot be ignored, nor can its consequences.

c. the definition of "*evict*", which includes an act "*to deprive a person against his or her will of residence on land or the use of land …* "

d. the definition of "*suitable alternative accommodation*", which refers to the provision of alternative accommodation being not less favourable overall than the occupier's previous situation *'having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to –*

> *(a) the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services"*

The availability of suitable alternative accommodation is a consideration which the court is required to take into account in almost all applications for the eviction of an occupier. It is a requirement a court must take into consideration before it can order an eviction under s 10(2). It is also a consideration which is to be taken into account when the court exercises its discretion to grant or refuse an eviction in the situations contemplated under s10(3) or s 11(2) (as read with s 11(3)).

e. the definition of "*terminate*", which includes the withdrawal of "*consent to a person to occupy or use land"*

f. section 7 (1), which recognises that the occupier may have animals in his or her care on the land. The provision deals with the manner in which a land owner may deal with an occupier's animals which trespass outside any allotted area that the occupier is entitled to use.

g. section 14(3), which deals with the reinstatement of a person who was evicted contrary to the provisions of ESTA. It provides not only for the restoration of residence but also to restoration of "*the use of land*";

The references in the various sections of ESTA to "*the use of land*" have been highlighted to demonstrate not only their consistency but also their import in the general scheme and purport of ESTA.

93. While the court in *Adendorffs* agreed with the remarks made by Pickering J in the case of *Margre Property Holdings CC v Jewula [2005] 2 All SA 119 (E)* at 7 in my respectful view it did so in order to extract the salient feature relevant to the case before it, which was:

> *"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 s 6 (2)".*

In other words, the rights under s6(2) are the statutorily recognised *naturalia* which flow from the right to reside (balanced only by the owner's rights). Unless it is so understood a right only to use land for grazing without a right to reside there (or elsewhere in those circumstances recognised by ESTA) would render all the rights mentioned which flow from occupation superfluous, save possibly for ss (2)(a) and (e). It would be absurd to suggest that absent agreement, a right only to graze would automatically entitle a person to have visitors, receive post, have a family life, bury deceased or find himself or herself in a position resulting in a deprivation of access to educational or health services (all of which are rights accorded under ESTA as a consequence of a right to occupy).

It is in this sense that Pickering J described the right to graze as not one of the naturalia of a right of residence. I believe that this becomes clear from the issue which faced the

learned judge in *Margre Property* and the context in which the statement was made, to which I now turn.

94. In *Margre Property* the above extract to which *Adendorffs* made reference, was said in the context where the consent to reside was not accompanied either at the time or subsequently with a consent to graze livestock. This is evident from the following passages:

> *"In this regard Mr. Kincaid submitted that the use by respondent of the land for grazing his livestock was indeed linked to his right of residence in terms of the Tenure Act inasmuch as such use was necessarily incidental to his right of residence. For this reason, so he submitted, an occupier of a farm, wishing to graze his livestock thereon, was not obliged to obtain the prior consent of the owner of the farm thereto. For the following reasons I do not agree.*

> *"His right, if any, to graze stock on the farm does not derive from that Act {ESTA]. 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 his right of residence. His entitlement to do so is dependent on the prior consent of the owner of the property having been obtained."*

95. In my respectful view it is evident that the learned judge was responding to an argument that the right to reside, which itself is derived through an initial consent of the landowner under either s 3(1) or 3(2), enables the occupier, as a necessary adjunct to obtaining residence, to *mero motu* bring his or her livestock onto the land and to allow them to graze at will. It is in this context that I believe the following passage in the judgment, which was also quoted in *Adendorffs,* is to be understood:

> *"'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 s 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 the 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 his right of residence. His entitlement to do so is dependent on the prior consent of the owner of the property having been obtained."[58]

96. The court in *Margre Property* was therefore not concerned with a case where the owner, or prior owner for that matter, had at some stage consented to the occupier bringing his livestock onto the land for grazing; it being obvious that the nature and extent of the consent and the implied terms which went with it were matters that were either agreed upon or inferred (whether by subsequent conduct or otherwise).

The case also did not deal with whether the consent of an owner bound his successors in title.

It in fact turned on whether a written agreement signed between the landowner and the occupier, that restricted the number of livestock which could graze on the

[58] Pickering J was acutely aware that the court did not have the jurisdiction to interpret the nature and extent of an ESTA right once established (this would be by reason of ss 17 and 20). The decision therefore cannot be understood to have done so.
Indeed the court cited the passages in *Nkosi and another v Bührmann* 2002 (1) SA 372 (SCA) at 388 A and E, which bound it at the time, where Howie JA (at the time) said: "*As far as s 6 (1) is concerned, it confers the rights of residence, 'use' and services, subject to the owner's consent or agreement* …. (and that) … *the land use intended is use in association with the right of residence*". *Nkosi* was concerned with whether ESTA accorded a right to bury independent of a right to reside and with respect is limited to that. In *Daniels* Madlanga J at ftn 56 and 57 recognised that the right sought to be exercised in *Nkosi* was very different from a right in fact conferred *on a proper interpretation of what Parliament itself had said".* In these footnotes the court also indicated that it was unnecessary to consider the correctness of *Nkosi* because the legislature had since expressly extended burial rights to occupiers.

land, was concluded under duress or without informed consent. It was common cause that there had never been proper consent to the livestock being brought onto the land- hence the argument set out earlier that the right to bring livestock onto the land was a necessary incidence of occupancy under ESTA.

The Normandien cases

97. Both *JB Sithebe and others v Normandien Farms (Pty) Ltd and others* (LCC38/2018B and *DE Kubheka and others v Normandien Farms (Pty) Ltd and others* (LCC50/2019) were decided by Ncube AJ (at the time).

98. in both cases it was common cause that the occupiers were given consent to graze a specific number of cattle on certain allocated camps and that they could not, without the consent of the owner, use any other land on the farm for purposes of grazing their cattle.

99. in para 16 of *Sithebe* the court said:

> *There is no credible evidence to show that even with the previous owners the Applicants grazed their cattle in any other land on the farm except the demarcated camp. Even if there was such an agreement, the First Respondent or Mr Hoatson was under no obligation to honour the same. The right to graze cattle on the farm being a personal right is enforceable against specific individuals, those who are party to that specific arrangement. A personal right has a corresponding obligation. A person, who creates a personal right, by consent, in this case has a corresponding obligation to honour that right. Should the Applicants keep the number of their cattle within the carrying capacity of the allocated grazing camp, they will have no problem.*

100. The issue in *Kubheka* was whether the ESTA occupiers were entitled to graze their cattle on any area other than that identified by the landowner. The occupiers claimed that the previous owner had given consent for them to graze over an extended area. There was no evidence presented that the previous owner had in fact given consent. The court then continued at para 12:

> *"Even if there was such consent given to the Applicants to graze cattle on the larger portion of the farm, the question is whether or not the consent given by Mr. Conradie as the previous owner, is binding on the new owner of the farm. In other words, the question is whether consent given by the previous owner is transferable to successors in title."*

Although counsel argued the applicability of s 24 (i.e. an owner is bound by the consent given by a predecessor in title) the court considered it was bound not only by *Adendorffs* case with regard to a right to graze being a personal right but also by *Absa* with regard to personal rights not being transferable. The learned judge said at paras 14 to 16:

> *[14] …. the Supreme Court of Appeal ("SCA") has held that the right of an occupier to keep or graze cattle on another person's farm or land is not a right which derives from ESTA, but a personal right which derives from consent between the occupier and the land owner or person in charge.*[59] *Therefore, the law at present is that consent to graze livestock given by the previous owner or person in charge is not binding on the successor in title and such right is not an ESTA right. This presupposes that each subsequent owner or purchaser of a farm will have to consent to the occupier keeping livestock on the farm despite the fact that there was consent to do so given by the previous owner or person in charge.*
>
> *[15] Therefore, any agreement given by Mr. Conradie to keep livestock is not binding on the First Respondent. The First Respondent has given consent to the occupiers to confine their livestock within the identified camp which is shown as camp "E" on RH2. In other words, the First Respondent did not consent to the occupiers grazing their cattle on any other land which is outside of camp "E". That is the effect of a personal right. A personal right differs from a real right. A real right is enforceable against the whole world. A personal right is enforceable against the individuals who are a party to a certain agreement. A personal right creates a reciprocal obligation to perform in terms of the right given to a certain individual. In ABSA Bank v Keet, Zondi JA explained the difference in the following terms:*

[59] The SCA case referred to is *Adendorffs*

> *'In my view, there is merit in the argument that a vindicatory claim, because it is a claim based on ownership of a thing, cannot be described as a debt as envisaged by the Prescription Act. The high court in Staegemann (para 16) was correct to say that the solution to the problem of the prescription is to be found in the basic distinction in our law between a real right (jus in re) and a personal right (jus in personam). Real rights are primarily concerned with the relationship between a person and a thing, and personal rights are concerned with a relationship between two persons. The person who is entitled to a real right over a thing can, by way of vindicatory action, claim that thing from any individual who interferes with his right. Such a right is the right of ownership. If, however, the right is not an absolute, but a relative right to a thing, so that it can only be enforced against a determined individual or a class of individuals, then it is a personal right.'*
>
> *[16] The authorities make it clear that the Applicants cannot claim any right to graze cattle anywhere on the farm except in the camp allocated to them by the First Respondent. Any consent which might have been given by Mr. Conradie is not binding on the First Respondent. In terms of consent given by the First Respondent, the Applicants' cattle are confined to the allocated camp which is camp "*

101. The finding by the court that the *Adendorffs* decision meant that s 24 (1) only applied to a consent to reside, not a right to graze livestock, was with respect clearly incorrect.

Adendorffs only found that the right of an occupier to keep or graze cattle on another person's land is not a right which derives from ESTA but a personal right which derives from consent, I have already set out the limited scope of *Adendorffs* and the narrow issue which Pickering J had to decide and which inform the passages from his judgment that were also cited in *Adendorffs*. It is also evident from the two judgments that neither case was called on to decide s 24(1) nor did either purport to do so.

102. Secondly the principle confirmed in *Absa,* regarding personal rights only binding immediate parties and not a successor in title does not apply to leases of immovable property by reason of the doctrine of *huur gaat voor koop* and s 24 is clearly the legislature's endeavour to integrate those principles into ESTA legislation so as to avoid

any argument as to whether the absorption theory, the combination theory or the *sui generis* theory should be applied. In the context of the Labour Tenants Act, Dodson J in *Zulu* preferred the combination theory or the *sui generis* theory (but not the absorption theory) when considering whether the nature of a labour tenancy was subject to the *huur gaat voor koop* principle.

It makes perfect sense when considering the remedial nature of both the Labour Tenants Act and ESTA that they would harmonise at least to this extent.

103. Thirdly, the consent referred to in s 24 (2) which binds a successor in title, is the consent contemplated in s 3. That section does not limit consent to a right to reside but includes the right to use. And the term *"use*" includes "*agricultural use*" as demonstrated earlier when considering the wording of s 3, the definition of "*suitable alternative accommodation*" and the provisions of ss 10(2), (3) and 11 (2).

The preamble to ESTA makes plain that it is intended to promote the long term security of tenure for occupiers of land, extend the rights of occupiers while giving due recognition to the rights duties and legitimate interests of owners so as to ensure that occupiers are not further prejudiced because they "*do not have secure tenure of <u>their homes and land which they use</u> and are therefore vulnerable to unfair evictions "* which has led to great hardship, conflict and social instability, all "*in part the result of past racially discriminatory laws and practices".*[60]

(emphasis added)

It will also be recalled that ESTA, together with the Labour Tenants Act, are the statutes which s 25(6) of the Constitution required Parliament to pass in order to entitle persons or communities whose tenure of land is insecure as a result of past racially discriminatory laws or practices, to the extent provided for by an Act of Parliament, "*to tenure which is legally secure or to comparable redress".*

Accordingly, the provisions of s 24(1) and the continual references in ESTA (as demonstrated earlier) to both residence and the use of land within the context of consent reveal that each is subject to initial owner consent, not that the latter is statutorily

[60] At this stage it is unnecessary to go into the extent to which the common law or its development may have been stifled by legislation which distorted the relationships between occupiers and landowners by depriving black people of acquiring any rights in land.

incidental to the former. This lies at the heart of the issue which faced the courts in both *Margre Property* and *Adendorffs.*

104. Even the type of "*use*" to which land may be put is illustrated in ESTA. It expressly mentions "*agricultural use*". The term "*agricultural* "is generic and includes cultivation of the soil, growing crops and raising livestock.

Recognising consent to graze, cultivate or plant is quite understandable. ESTA is concerned with what is generally termed rural as opposed to urban land. ESTA applies only to non-urban land. This is in terms of s 2 which identifies such land as that either "*designated for agricultural purposes"* or land other than that "*in which a township has been established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships"*.

105. The legislature when enacting s 24(2) would have been alive to the fact that consent would relate to consent in respect of rural land which may allow for agricultural use such as the growing of crops or keeping livestock. This is common place and it would be surprising if the legislature would not have been aware of such practices in respect of occupiers on agricultural land or would not have taken this into consideration having regard to the remedial nature and objective of ESTA.

In short it would be surprising if the legislature, despite recognising that residence may also entail consent to use land for agriculture, and providing as it does for the acquisition of land to an occupier in certain cases (see s 4(1)(b)), would render a consent given to an occupier to sustain himself or herself on the land or to hold cattle so tenuous by not binding successive owners of land while binding them only to consent given to reside.

Nowhere does s 24 limit consent, which is expressly mentioned in the section, to only a right to reside. On the contrary "*consent*" is defined in s 1 broadly and it is not confined to residence only, while s3(1) expressly recognises that consent may be given to an occupier not only to reside but also to "*use the land"*. Those words are required to be respected and be given effect to. If consent was to be limited to residence, then one would expect it to have been done in the definition of the term. That is where one would have found it if that had been in the intention.

Apartheid laws and practices ensured that black people did not acquire land or any rights in land. despite what may be termed symbiotic relationships which de facto existed

between land owners and occupiers of land who provided labour at some stage on the land, could live there, graze livestock with permission, have a family life and bury deceased family members on the land.

Section 24 of ESTA has statutorily extended the principle of huur *gaat voor koop,* at least in relation to providing protection against a change in ownership to occupiers of agricultural land, which by its nature may include consent given at some stage by an erstwhile owner to allow an occupier to grow crops or graze livestock.

Under *huur gaat voor koop* the purchaser of immovable property succeeds to *all* the duties and obligations owed by the predecessor in title to the tenant. Where consent had been given also to graze on the land, then the entitlement to do so would impose a duty and obligation on the owner to respect that right and therefore it too would be passed on to the successor in title. This would have been the case with rural tenements and everything in s 24 as well as the object and purpose of ESTA when read as a whole is consistent with that being absorbed into ESTA. **up to here**

106. I therefore reluctantly come to the conclusion that I am unable to agree with the learned judge because it was, with respect, incorrect to apply principles relevant to other areas of law when interpreting the express provisions of s 24 (2), to have applied *Adendorffs* and *Margre Property* when each case dealt with issues unrelated to a case where consent to graze had been given by an owner to a person who was residing on and using an agreed part of the land for agriculture and where both cases were concerned only with the issue of whether the right of an occupier to keep or graze cattle on another person's land was a right which flowed as a necessary incidence or *naturalia* from a right of residence that may have been accorded under ESTA rather than requiring its own consent from an owner. Neither case was concerned with s 24(2).

Tsotetsi

107. The final case relied on by the first respondent is *Tsotetsi and Others v Raubenheimer N.O and Others* [[2021] ZALCC 2; 2021 (5) SA 293 (LCC). It is a full bench decision of this court.

108. In my respectful view Cowan AJ (at the time) recognised the thrust of *Adendorffs* and the import of *Margre Property*. At para 31 the court said the following

> *"In our view, the close nexus between the statutory rights derived from ESTA and the personal rights that flow from an agreement with an ESTA occupier, which in this case regulated grazing, renders an order about the latter to be "in terms of" ESTA for purposes of section 19(1)(b). It has been held that the right of an ESTA occupier to keep cattle is a personal right which is contractual in nature and not a statutory right derived from ESTA. However, where ESTA occupiers have such personal rights, they will at least usually form part of the terms and conditions of their occupation and will be integrally connected to their right to reside on and use the property, being primary rights ESTA confers on an occupier in terms of section 6(1). These personal rights may also entail "services" agreed upon as contemplated by section 6(1) of ESTA.*

109. Cowan AJ expressed in clear terms that the right to use land for an agricultural purpose is dependent on consent and that the cases did not go further than this. Indeed, the court concluded that a Magistrates' Court has jurisdiction to entertain a matter concerning the grazing rights of an occupier precisely because it fell under ESTA when consent had been given. This distinguished the case from Margre *Property* where a High Court did not consider its jurisdiction ousted by ESTA because in that case consent had never been given by any landowner to the occupier to graze his livestock- thereby taking the case outside the purview of ESTA.

110. In summary; care must be taken not to conflate the need for *contractual* consent between parties to allow for the grazing of livestock with the issue of whether, once that consent has been given, ESTA has statutorily bound successive land owners to such terms through s 24, the latter issue having nothing to do with consent being in the nature only of a personal right.

    ESTA is not the source of a right to graze cattle. It only recognises that consent once given by a landowner to an occupier binds him or her. This is the effect of s 3 read with the definition of "*consent*"

    ESTA is however the source of the protection which binds successive land owners to abide by the terms of the consent that had been given; this is through s 24(2)

Finding

111. I accordingly find that any consent that may have been given to reside and graze livestock bound successive owners of portion 7 by reason of s 24(2) and that none of the cases referred to by Adv. Roberts have held differently save for the two *Normandien* cases which were in my respectful view clearly incorrectly decided.

RESOLVING THE DISPUTES OF FACT REGARDING CONSENT TO GRAZE

112. The issues in dispute regarding consent to grazing livestock on portion 7 concern;

    a. whether the agreement of September 2020 with the first respondent binds the applicant

    b. whether the first respondent lawfully terminated that agreement

    c. if there was no binding agreement concluded between the applicant and the first respondent regarding the grazing of livestock, then what were the terms agreed upon between the applicant and the first respondent's predecessors in title regarding the area on which livestock could graze and the number of livestock permitted or number. In this regard the subsidiary issues include;

        a. who were the *beneficial owners of portions 7 and 18 at all relevant times?*

        b. what were the terms of and basis of Carel Meyers right to the grazing area on portion 7 and whether they have terminated?

The purported repudiation and cancelation

113. This court is able to answer the second question on the papers before it.

    If the agreement of September 2020 is binding then on the undisputed facts the first respondent could not rely on the applicant's repudiation of its terms because at the time the first respondent purported to terminate, being on 17 December 2020, the papers, including the annexed correspondence, reveal that the applicant was seeking to negotiate a way forward with the Department acting as facilitator. Such conduct is

inconsistent with a clear and unequivocal intention no longer to be bound by the terms of an agreement.

In this regard it will be recalled that the Department was going to review the terms and conditions of the September 2020 agreement and would advise the parties if they considered any of the terms to be unacceptable. It was also agreed that on a future date an attempt would be made to formalise a written tenure agreement for the applicant. It will also be recalled that a subsequent meeting in January 2021 the applicant had withdrawn certain claims. Moreover, the first respondent does not make out a sufficient case that the applicant had frustrated these negotiations. At best for the first respondent the Department may have been tardy but he also failed to follow up.

It is therefore unnecessary to consider whether in the circumstances demand to remedy a breach had first to be made or whether notice of cancelation to the Department suffices as notice of termination to the applicant under the agreement.

Consent to graze livestock on portion 7

114. It then becomes necessary to decide whether the outstanding disputes of fact can or should be decided on paper

115. The threatened violation of a right to graze or the extent of such right may justify a somewhat different approach to that normally applicable where final interdictory or mandatory relief is sought. In a purely commercial matter brought by way of motion the evidence which a court accepts is determined by an application of the *Plascon-Evans* principles, the import of which appears from the *Rail Commuters* case *infra*[61].

In *Bhe and Others v Khayelitsha Magistrate and Others* [2004] ZACC 17; 2005 (1) SA 580 (CC) at para 13 Langa CJ considered, in the context of a constitutional issue involving status, that reliance on the rule in *Plascon-Evans* would be inappropriate. Later in the same year *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC) held at para 53 that:

> *"In assessing a dispute of fact on motion proceedings, the rules developed by our courts to address such disputes will be applied by this Court in*

[61] *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623 (A) (*Plascon-Evans*) at 634H-635C.

constitutional matters. Ordinarily, the Court will consider those facts alleged by the applicant and admitted by the respondent together with the facts as stated by the respondent to consider whether relief should be granted. Where however a denial by a respondent is not real, genuine or in good faith, the respondent has not sought that the dispute be referred to evidence, and the Court is persuaded of the inherent credibility of the facts asserted by an applicant, the Court may adjudicate the matter on the basis of the facts asserted by the applicant. Given that it is the applicant who institutes proceedings, and who can therefore choose whether to proceed on motion or by way of summons, this rule restated and refined as it was in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd is a fair and equitable one".

Metrorail was concerned with the legal principles governing the state's delictual liability in respect of its constitutional obligations *" and particularly, those relating to the rights to dignity, life and freedom and security of the person*"[62]

116. Harms in *Civil Procedure* suggested that the import of *Bhe* is not that different evidential rules should apply but rather that a court, in matters involving status, should be more amenable to refer the disputed issues to oral evidence or trial.[63]

117. The issues before me involve constitutionally protected rights which were required to be legislated into law; and this was done through ESTA.

118. The version of events provided by each party raises issues which are not satisfactorily dealt with on paper yet both seek final relief.

119. By way of illustration, the applicant speaks broadly of consent being given but does not pin himself down to the number of livestock which it was actually agreed he or his family could actually graze on the land and what area precisely he could utilise for grazing. It is also evident that he glossed over how the initial consent arose and whether it was in his favour or that of his father in law and if so did the ESTA rights devolve on him or his wife (the daughter of his father in law) or both. He is also vague about whether his livestock ever left portion 7 to graze on portion 18 and if so the basis on which his livestock was allowed to return tom portion 7 (if at all).

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[62] *Metrorail* at para 73

[63] In land rights issues, including that of tenure, the dividing line between status, dignity and property may be difficult to discern as each may impact on the other.

120. On the other hand one of the difficulties with the first respondent's case is the failure to expressly deny that Carel and Japie's father were siblings, although they distance themselves from each other as if the right which Carel Meyer had to use the grazing area on portion 7 was a purely arms-length transaction between neighbouring farm owners[64]. The nature of the right Carel Meyer enjoyed to graze on portion 7 and how it came about are relevant to an understanding of the nature and extent of the consent which applicant had[65].

121. This is so because the applicant was entitled, at least at some stage, to graze a number of livestock on a part of portion 7and it is common cause that he has the right to reside on a part of portion 7 which the first respondent describes as the demarcated area, yet those areas fell under the area over which Carel Meyer had grazing rights for the past 20 years.

    The first respondent and the Meyers describe this as a lease. However Carel Meyer also claims that he owns the borehole he erected on portion 7. It is however evident that Carel Meyer enjoyed rights to graze over the entire grazing area on portion 7 while Japie Meyer would confine himself to the arable area of portion 7.

    How these rights are defined in the agreement of sale and whether there can be any prejudice to the first respondent if as a fact he was confined to only the arable part of portion 7 appear likely to affect the outcome of the issues in dispute. At present there appears to be little prejudice to the first respondent if as a fact Carel Meyer enjoyed the entire grazing portion of portion 7 save for damages in respect of loss of rental- but that would also depend on the nature of the right enjoyed by Carel Meyer over that part of portion 7 and the amount of such rental as may have been paid.

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[64] Carel Meyer refers to Japie Meyer only as his "*my next door neighbour*". see para 6 of his affidavit of 21 November 2021 (AA p 131)

[65] Earlier I mentioned the somewhat cynical statement that since March 2001 the applicant continued to reside on portion 7 despite contributing nothing there and instead working on portion 18. It is cynical because on the version provided by the Meyers it is evident that this state of affairs was not of the applicant's making but had everything to do with the way in which Phillip Meyer (who was alive at that time) and then his family members decided to arrange their affairs on both farms.
In short; how the applicant found himself continuing to reside on portion 7 while working on portion 18 were decisions made by Phillip Meyer and his family members (through corporate vehicles on occasion) which directly affected him and had the potential of whittling away such rights as he and his wife may have enjoyed either pre- or post- 1997 (when ESTA came into effect). It should also be born in mind that, on the papers, there was no visible division between the two portions since there was no boundary fence at the time and cattle roamed freely between the grazing areas of both portions

122. It is for these reasons that in the exercise of my judicial discretion, and applying *Bhe* that I will refer the issues in broad terms for the hearing of or oral evidence after conducting a case management meeting.

ENTRY ONTO THE HOMESTEAD

123. Although the order sought in the application was for an interim interdict pending a contemplated eviction by the first respondent the applicant argued for final relief.

124. There is no dispute that the applicant at present lawfully occupies the homestead. Accordingly he has a clear right not to have that right interfered with either by intimidatory conduct or through unlawful trespass which is the nub of the applicant's complaint h he describes as a constant raiding at all hours.

125. It is axiomatic that in the context of this case and the acknowledgment by the first respondent of the applicant's present lawful occupation of the homestead (although termination of that right is threatened) that such acts would constitute an infringement of one of the most important protected rights, being the right to human dignity under s 10 of the Constitution overlaid, as in this case with the right to privacy (under s 14) and the right to freedom and security of person (under s 12).

126. The question then is whether an injury has actually been committed or is reasonably apprehended, and whether the latter consideration requires the application of a purely objective test or whether subjective considerations may intrude in an appropriate case.

127. There is a dispute of fact as to whether the first respondent had "*constantly*" entered the applicant's homestead (the word used was "raided") "*to take pictures or show his companion around- without talking to any members of the family or seeking our consent*" and that he and his family "*live in a state of constant fear*".

128. The first respondent claimed that he had never entered the applicant's premises but only spoke to the applicant and his wife "*at a far distance away from their homestead".*

129. The applicant then produced photographic evidence in his replying affidavit of a person said to be the first respondent's companion on a red motorcycle. The applicant also stated that the photographs evidenced one of many occasions that the first respondent

had visited the homestead at random hours on his motorbike. The applicant continued "*I unfortunately do not have pictures of every raid he made at my homestead but have a video showing his companion driving inside my yard, to which I am happy to share with the court.*"[66]

130. The first respondent took exception to the production of the photographic evidence, contending that this was new matter. However, out of caution the "*companion*" filed a confirmatory affidavit. He is Mr Pretorius who identifies himself as working for MAPCO Farm Surveying and Map Analysis and that he was in the vicinity of the homestead for the purpose of plotting GPS coordinates.

In substantiation he produced a number of photographs of what is in fact a quadbike as well as a map on which he had superimposed the GPS co-ordinates he had taken in the vicinity of the homestead. Accordingly, the first respondent admitted no more than that Pretorius had travelled along an access road leading past the applicant's homestead in order to take GPS co-ordinate readings of the farm boundaries and internal camps.

131. In answer to the claim that the applicant also had a video showing the first respondent or his "*companion*" trespassing, the first respondent denied the averment, enquired about when it was taken and contended that the applicant was obliged to have given him an opportunity to look at it. The video was not tendered during argument. The first respondent also pointed out the inconsistency in the applicant's version where initially it was claimed that only the first respondent had constantly raided the homestead without mentioning another person or providing evidence of anyone other than Pretorius being in the vicinity of the homestead at any material time relevant to the complaint. Adv. Roberts also argued that no mention of the alleged raid in March 2021 was made when the parties had discussions after that date.

132. The applicant's allegation that the first respondent raided his homestead has two attributes. The one is an allegation of intimidation and the other of trespass. Both concern an alleged infringement of constitutionally protected rights.

133. Turning to the facts I am satisfied that the first respondent "*seriously and unambiguously addressed*" the issue[67].

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[66] Replying affidavit para 7; p197 of record

[67] *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 3 SA 371 (SCA) para 13

134. The next enquiry is whether the applicant could have had a reasonable apprehension that the first respondent was set upon invading his right to dignity and privacy, and if so whether he ought now to be satisfied with the explanation given.

The test in this regard is an objective one and a judge is required to decide on the facts presented "*whether there is any basis for the entertainment of a reasonable apprehension by the applicant".* See *NCSPCA v Openshaw* 2008 (5) SA 339 (SCA) at para 21 and the cases cited.

135. On the facts presented on affidavit there is insufficient to demonstrate that the first respondent's conduct personally or through another person created a reasonable apprehension that the first respondent was unlawfully threatening or intimidating him.

136. I am however satisfied that having regard to the overall history of events which includes the first respondent's intention to evict the applicant and the cancellation of any right to graze livestock the applicant had a treasonable apprehension that the first respondent would trespass on the homestead area or the demarcated area as identified in terms of the September 2020 agreement.

137. In the present case it is evident from the first respondent's answer that he disavows any intention of intimidating the applicant or his family. However it is of concern that he does not fully appreciate the limits of his control over that area of the farm inhabited by the applicant or his rights as landowner *vis a vis* an ESTA occupier. For these reasons it appears that interdicting the first respondent from trespassing pending the final determination of the right to graze, and which I have referred to oral evince meets the requirements for an interim interdict and is appropriate in light of the case still pending final determination.

COSTS

138. The main issue and the one in respect of which the major argument was centred concerned whether the applicant enjoyed any grazing rights and if so what had been agreed to. This issue remains to be determined and accordingly the appropriate order is that costs should be in the cause.

ORDER

139. I accordingly order that:

"1. The Department of Agriculture, Land Reform and Rural Development is to be substituted for the Regional Land Claims Commissioner, Mpumalanga Province as the second respondent

2. The applicant is entitled to demolish the present mud house on the homestead situated on portion 7 of the farm Olifantslaagte ("portion 7") and rebuild a durable mud house on the same foundations as the present one.

3. The issues of;

a. whether the applicant is bound by the terms of the written agreement signed by him and the first respondent in September 2020;

and if not so bound:

b. what the terms of the consent given and agreed upon between the applicant and the predecessors in title of portion 7 were in relation to the grazing of livestock, and in particularly where they could graze, in what number and for how long (if applicable)

c. the registered owners and ultimate beneficial owners of portions 7 and 18 since 1975 and the terms and basis of Carel Meyers right to the grazing area on portion 7 and whether they have terminated

are referred to oral evidence, the terms of which are to be determined by the Judge at a case management meeting to be held on 9 June 2022 at 15h30 via MS- Teams

4. *Pending the determination of the issues;*

    a. *the applicant and his family;*

        i. *may not have or graze more livestock than there are at present but such numbers shall not exceed 11 head of cattle, 5 sheep and 18 goats on the area of portion 7 which is identified as the grazing area on annexure GA2 of the Answering affidavit and is the grazing area on portion 7 that Mr Carel Meyer had utilised for his livestock ("the said grazing area")*

        ii. *may not graze such livestock or permit them to roam beyond the said grazing area*

    b. *the first respondent is interdicted from;*

        i. *entering the applicants homestead, being the residential structures occupied by the applicant and his family without the applicant's consent*

        ii. *entering any other area in the demarcated area identified on annexure GA2 of the Answering Affidavit without the applicant's consent*

5. *A legal representative of the applicant and of the first respondent shall as soon as possible, but no later than Tuesday 24 May 2022 attend together on the said grazing area and by agreement provide the court by email with a list of the applicant and his family's livestock which is actually on portion 7*

6. Costs are cost in the cause

(Signed)

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SPILG, J

DATES OF HEARING	21 January. 21 and 28 February 2022,
DATE OF ORDER	16 May 2022
DATE OF JUDGMENT	18 May 2022
FOR APPLICANT	Adv. B Lukhele
	Mohlala Attorneys
FOR FIRST RESPONDENT	Adv. E Roberts
	Moolman & Pienaar Inc