IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 399/06

In the matter between

AGRICO MASJINERIE (EDMS) BPK **APPELLANT**

and

H SWIERS **RESPONDENT**

Coram: **CAMERON, BRAND, HEHER, VAN HEERDEN JJA and THERON AJA**
Heard: **15 MAY 2007**
Delivered: **1 JUNE 2007**

Summary: Land – eviction from – Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 – 'unlawful occupier' – who is – 'other right in law to occupy such land' – does not extend to occupation unlawfully obtained by self-help – discretion of court to order eviction – s 4(7).
Land – eviction from – Extension of Security of Tenure Act 62 of 1997 ('ESTA') – 'occupier' – who is – rights of occupier – waiver of rights – when effective – availability of s 14 rights to occupier who has waived without knowledge of ESTA rights – repossession of land by occupier without consent of owner or order of court – effect on ESTA rights.
Land – ESTA - s 20 - interpretation of and pronouncement upon rights relied on as ESTA rights – jurisdiction of High Court not excluded where party does not claim performance of functions of court under ESTA.

Neutral citation: This judgment may be referred to as *Agrico Masjinerie v Swiers* [2007] SCA 84 (RSA)

JUDGMENT

HEHER JA

HEHER JA:

[1] The appellant is the registered owner of the farm Dassenberg No 15, Malmesbury in the Cape Division which it acquired in 1995 and on which it farms cattle and grows grapes and grain.

[2] In July 2002 the appellant applied to the Cape Town High Court to evict the respondent from the farm. It alleged that she had unlawfully built and occupied a wendy house (with extensions) on the property. The application was opposed. Allie J dismissed it with costs on 7 September 2004. An appeal to the Full Bench was likewise unsuccessful. Hlophe JP and Van Reenen J (with whom N C Erasmus J concurred) delivered separate judgments, both dismissing the appeal. The appellant appealed to this Court with special leave granted.

[3] The appellant proceeded in the court of first instance on motion. Numerous disputes of facts arose from the affidavits. Neither party sought then or subsequently to have the matter referred for the hearing of oral evidence or to trial. The appellant's legal right to the relief claimed thus depended upon the uncontested facts in its founding affidavit and the respondent's version regarding those facts which were the subject of a genuine dispute in her answering papers. (As will be seen she filed two answering affidavits.)

[4] The relationship between the parties has a long history and it will be

necessary to refer to the various averments in that regard in some detail. At the outset however I should point out that the real questions which required to be considered concerned the rights of the respective parties under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE') and the Extension of Security of Tenure Act 62 of 1997 ('ESTA'). The rights which the appellant had to establish on paper were those attaching to an owner of land who invokes PIE against an alleged unlawful occupier as defined in s 1 of that Act[1]; while it had to seek to defeat the conclusion that the respondent had the rights of an 'occupier'[2] as defined in s 1 of ESTA since it was common cause that the respondent had had the consent of the owner to reside on the farm on 4 February 1997 and had both at and after that date in fact resided on it. The two sets of rights are mutually exclusive, as the definition of 'unlawful occupier' in s 1 of PIE 'excludes a person who is an occupier in terms of' ESTA.

[5] The application to court was provoked by the discovery in June 2001 of a partially completed and apparently unoccupied shack on an outlying part of the farm. The appellant demolished the structure and removed the materials. At the end of July 2001 it received a letter from the West Coast Law Clinic ('the Clinic') representing the respondent which alleged that (a) the dwelling had been erected with the knowledge and consent of the appellant's employees; (b) the respondent had been in possession of the structure and the land on which it rested at the time of the demolition; (c) no warning had been given to the respondent; (d) the demolition without a court order had been unlawful by reason of s 26(3) of the

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1' "unlawful occupier" means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996).'

2' "occupier" means a person residing on land which belongs to another person, and who has or [sic] on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding-

(a) . . .

(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and

(c) a person who has an income in excess of the prescribed amount'.

Constitution, 'the common law' and 'subordinate legislation'. The letter called on the appellant to re-erect the dwelling and restore possession to the respondent by 3 August 2001 or face an urgent application to court.

[6] After investigating the allegations the appellant wrote to the Clinic on 8 August 2001 denying that any of its employees had given permission for the erection of the structure. It offered to replace corrugated iron sheets damaged in the course of removal or to discuss compensation for them and concluded:

'We have been approached by the Department for Land Affairs regarding the possibility of selling off some of our land, in order to accommodate the desire for land of the nearby communities and the tenants on our farm. Negotiations are under way.'

[7] After further correspondence had been exchanged the Clinic wrote to the appellant on 5 September 2001 in accordance with instructions from the respondent. The letter dealt with her birth on and occupation of the farm as well as the fact that she had previously, in 1995, erected an informal dwelling on the farm at the same place where the later structure had been erected. The former event took place, so the letter averred, with the consent of a Mr Stofberg, then the applicant's farm manager; subsequently he had mentioned that the owners were offering R25 000 to people who left the farm voluntarily and he encouraged her to accept the offer. According to the letter:

'3. Our client informed Mr. Stofberg that she would accept this offer. He however informed her that she must first move from the farm and then she would receive the money. Our client accordingly, on this basis, moved from the farm in approximately October 1996. She did however continuously, through family members, make enquiries as to when she would receive the R25 000 but to no avail. It does appear to be a reasonable inference therefore that the owners of the farm were not of intention to pay the money to her but only mentioned the same for purpose of coaxing her with false pretences from the farm.

4. Nevertheless during or about April 2001 our client, whilst visiting relatives on the farm, approached Mr. Paul Andrag, a Director of Agrico, and broached the subject of the money still owing to her with him. Mr. Andrag appeared to be non-committal to this

request and just answered “ja”. Our client then requested permission from Mr. Andrag to re-erect her informal dwelling on the farm again as she did not at that time have her own accommodation due to the incident described in paragraph 3 and due thereto that the farm was her place of residence for most of her life. Mr. Andrag did not reply no at any time and merely shrugged his shoulders at this request. Our client interpreted his demeanor as affirmative to her request and therefore commenced during or about April 2001 erecting her dwelling on the same place where it was for some time before.

. . .

Our client informs that she would be willing to settle this matter should Agrico be willing to reimburse her for her loss in the sum of R4909,25 and allow her to erect her dwelling at the premises of her brother Nicolas Swiers, who is also resident on the farm. This will be an interim measure pending successful negotiation with the Department of Land Affairs.

You will note from the claim documentation that you surely have received from the Department of Land Affairs that our client is also one of the claimants claiming tenure rights to a portion of the farm Dassenberg.

Should you therefore agree to settle this matter on the above terms our client will be amenable to relocate to the land that the Department of Land Affairs intends purchasing from you, to accommodate her and other tenants and claimants, as soon as the agreement is concluded.’

[8] The parties tried to settle the dispute but without bridging the gap between them. The appellant ascertained that the respondent had entered into a written lease agreement with it on 14 October 1995 which permitted her to occupy only the portion on which her informal dwelling stood at that date subject to a right in the appellant to terminate the agreement on six months’ notice.

[9] On 20 October 2001 the appellant’s director, Mr A O Andrag, his farm manager, Mr Loubser, and Mr Gaerdes of the Clinic met on the farm in an effort to reach agreement. In para 22 of the founding affidavit Andrag describes what happened:

‘By sodanige ontmoeting is daar tussen Applikant en Respondent ooreengekom dat Respondent nie weer die plaas sou beset nie. Applikant sou Respondent voorsien van materiaal om ‘n wendyhuis op te rig, naamlik ses sypanele en sinkplate. Respondent sou die nodige reëlings tref

vir die oprig van die wendyhuis en was van voorneme om dit by haar suster in Pella te gaan oprig. Respondent sou Applikant in kennis stel waar sodanige material afgelewer moet word.'

Andrag confirmed the substance of the arrangement in a letter to the Clinic on 25 October 2001. His affidavit continues:

'24. Ek het verdermeer op 23 Oktober 2001 ontmoet met eerwaarde Wynand by die Pella sendingstasie om die nodige toestemming te verkry dat Respondent haar wendyhuis op haar suster se plot in Pella kon oprig. Ek [het] ook gereël dat respondent se naam op die waglys geplaas word vir die toekenning van 'n erf te Pella. 'n Afskrif van my bevestigende skrywe in die verband word hierby aangeheg gemerk "AOA13".

25. Gedurende November 2001 het Mnr Gaerdes my telefonies gekontak en laat weet dat die Pella gemeenskap glo nie vir Respondent wou toelaat om by haar suster 'n wendyhuis op te rig nie. Ek het aan Mnr Gaerdes bevestig dat die ooreenkoms met betrekking tot die voorsiening van material bly staan het en dat Applikant dit aan Respondent sou beskikbaar stel ongeag die ligging waar sy dit sou oprig. Dit is egter pertinent gestel dat Respondent geensins geregtig was om dit op die plaas op te rig nie.

26. Op 6 Desember 2001 het ek, mnr Gaerdes en me. Linsey Lotter (Blouberg Munisipaliteit: Pella Projekbestuurder) in Pella ontmoet om die aansoek van Respondent en andere vir erwe in Pella te bespreek. Tydens hierdie geleentheid het Mnr Gaerdes aan my genoem dat Respondent die wendyhuis moontlik by haar suster in Atlantis sou opsit.

27. Op 11 Desember 2001 het Mnr Gaerdes my gebel en bevestig dat Respondent die huis by haar suster op Atlantis sou oprig. Hy het namens Respondent versoek dat die materiaal by Respondent se suster, Diana Collins, op Pella afgelewer word.

28. Op 17 Desember 2001 het ek Mnr Gaerdes geskakel en bevestig dat aflewering van die materiaal deur die loop van daardie week sou geskied.

29. Op 20 Desember 2001 is 'n volledige hout wendyhuis afgelewer by Respondent se suster, Mev D Collins, te Pella, soos ooreengekom.'

[10] The matter seemed to have been resolved. However, after Christmas 2001 the respondent moved back to the farm and re-erected the wendy house. When the appellant became aware of this it sent further letters to the Clinic without receiving a satisfactory reply. On 21 February 2002 it put the respondent on terms to remove the structure by 1 March. When Andrag spoke to the respondent she told him that

she was aware of the demand. She said Gaerdes was no longer prepared to act for her because of her breach of the agreement, she was not willing to leave the farm and the applicant would have to resort to law.

[11] The appellant launched the application in July 2002. It attached to its founding affidavit a photograph of a wooden structure which, so it alleged, the respondent was occupying with a child. It averred that there were no facilities at all, whether for supply of water, sanitation, cooking or garbage disposal and stated that the situation was dangerous, unhygienic and an encouragement to other unlawful occupiers.

[12] The appellant alleged that the respondent was able to reside with a sister at Pella or Atlantis, that application had been made to place her name on the waiting list for housing at Pella and that subsidised RDP housing was available at Riverlands some three kilometers from the appellant's farm.

[13] With *in forma pauperis* legal assistance the respondent opposed the application. According to the answering affidavit to which she deposed on 28 August 2002:

13.1 She was a 38 year old, unemployed mother of six children, the youngest an epileptic and physically disabled. She occupied the structure together with all the children. They survived on the occasional income of the eldest son (who was 21), the charity of the Pella community and that of her family members who lived on the appellant's farm.

13.2 She was born on the farm on 17 December 1963. Her parents rented a home there and she lived in that house until 1995. Then she and her children moved to a part of the farm which was closer to medical facilities for the youngest child. There she erected a wendy house.

13.3 She concluded a rental agreement with the appellant and occupied the farm

until 1998 under that arrangement. In particular, she stated that on 4 February 1997 she was living lawfully on the farm with the express or tacit consent of the owner.

13.4 During 1997 when the manager, Mr Stofberg, was collecting her rent, he informed her that the owners were offering R25 000 to those persons who voluntarily left the farm. She understood this information as an offer to her. In the belief that the money would enable her to provide better accommodation for her children, so she deposed, she left the farm. She had not been aware of her statutory rights and was not made aware of them by Stofberg. She stated that she did not abandon her right to live on the farm.

13.5 After leaving the farm she regularly made enquiries about receiving the promised money but never received a satisfactory answer. Eventually she decided to return home. In April 2001, a Mr Paul Andrag had given her permission to erect her informal dwelling on the farm.

13.6 On the basis of the facts set out in her affidavit the respondent stated that she relied on the protection afforded to her by ESTA.

13.7 The respondent admitted that the appellant had undertaken to provide her with materials for a wendy house which could be erected at Pella but denied that she had agreed not to re-occupy the farm. On the contrary, she said that she had expressly told a certain Alfred Andrag that if she could not obtain permission to erect the house at Pella she could erect it on the farm. Permission had been refused her at Pella. She moved to Atlantis on a temporary basis on the understanding that Mr Gaerdes was to launch a statutory claim on behalf of all the residents of the farm under the terms of the legislation on land reform and restitution.

13.8 Although she was occupying the structure together with her six children, ‘aangesien ek nou ‘n geruime tyd op die plaas woon het ek sekere sanitêre geriewe opgerig wat voldoende is vir my okkupasie’.

13.9 She rejected the possibilities of alternative accommodation identified by the appellant. She could not stay with or near her sister at Pella because she was not of

the Moravian persuasion, nor with her sister at Atlantis because there was insufficient space to accommodate her and the children. Riverlands was not an option because she was unemployed and it is too far from the medical facilities required by her epileptic son.

[14] In support of the appellant's replying affidavit (dated only on 22 December 2003) Stofberg denied making any offer of compensation to the respondent as a *quid pro quo* for vacating the property. He stated that he was the appellant's farm manager until August 1997 when he left the appellant's employment. He also denied receiving any enquiries from the respondent concerning payment of compensation. Paul Andrag denied giving the permission attributed to him. (The respondent did not rely upon such permission as a factor in her favour in the appeal to this Court.)

14.1 The appellant admitted that the respondent had been resident on the farm at 4 February 1997 but averred that she had thereafter left voluntarily and had no right to return without the appellant's permission.

14.2 The appellant denied that ESTA was applicable to the circumstances of the respondent. It also denied that any claim for restitution of land had been lodged in respect of the farm.

[15] On 13 January 2004 the appellant applied for an order authorising it to serve notices in terms of s 4(2) and 4(5) of PIE, informing the respondent of its intention to apply on 13 April 2004 for relief in substantially the same terms as that contained in its notice of motion of July 2002. The service of this notice produced a further lengthy 'answering affidavit' (the respondent now being represented by new attorneys). In it the respondent again rested her defence on ESTA, alleging that one of her direct maternal ancestors had been born on 'the Dassenberg Farm' as long ago as 9 May 1831. She also made the following statements (which are both more detailed and, perhaps, not entirely consistent with corresponding

averments in her earlier affidavit):

‘15. Soos voormeld, is ek op 17 Desember 1963 op die Dassenberg Plaas gebore. Ek het op Dassenberg Plaas gewoon tot ongeveer November 1998 in ‘n ander struktuur, letterlik ‘n sinkhok. Dit was op presies dieselfde plek op die plaas waar ek tans woon. Die rede waarom ek die maand onthou, was dat dit kort voor die Desember skoolvakansie was.

16. Ene Kobus Stofberg, een van die vorige werknemers (ek dink hy was die plaasbestuurder op daardie stadium) van Applikant het van tyd tot tyd huurgelde opgeëis van my en van die ander families, maar omdat ek geen geld het nie, en werkloos is, het ek nog nooit huurgelde betaal nie. Ek weet nie wat is die omstandighede van die ander families ten opsigte van die betaal van huurgelde nie, maar ek is bewus daarvan dat daar ‘n hele aantal ander families is wat nie huurgelde betaal nie. Soos gestel dink ek sommige families betaal wel vir die huur van grond, ten opsigte van huise wat hulle self opgerig het.

17. Vir die afgelope sestien (16) jaar woon ek alleen met my ses (6) kinders op die plaas en ek het soos gestel nog nooit huurgelde betaal nie. Ek ontken ook dat daar enige huurooreenkoms bestaan tussen my en Applikant of enige ander persoon. Voor hierdie periode het ek saam met my voormalige eggenoot van wie ek geskei is op die plaas gewoon.

18. By een van die geleenthede waartydens Kobus Stofberg my woning aangedoen het, het ek hom om hulp gevra vir ‘n seil om oor my sinkhok se dak te trek omdat die dak baie gelek het. Een van my kinders, Christopher Moerat, tans nege (9) jaar oud, het op daardie stadium aan epilepsie gely en ons geneesheer het aan my bevestig dat weens die damp omstandighede waarin ons gewoon het, het die epilepsie vererger.

19. Kobus Stofberg het aan my voorgestel dat indien ek van die plaas af trek, ek van ‘n geleentheid van die plaaseienaars sou kon gebruik maak ingevolge waarvan hulle aan my R25 000 sou betaal om die plaas te verlaat. Hierdie gelde sou egter eers betaal word nadat ek die plaas verlaat het, aangesien hulle bang was dat ek die geld sou neem en dan sou weier om te trek.

20. Weens die siekte van my kind en die aanbod wat aan my gemaak is, het ek besluit om dit te aanvaar en die plaas te verlaat. Gevolglik het ek die plaas verlaat in November 1998 en na die Strand verhuis, waar ek agter in die erf van een van my susters, Marlene Ross, gaan woon het. Hier het ek gewoon tot ongeveer Januarie 2001 toe ek na Dassenberg Plaas terugverhuis het. In die funderende eedsverklaring vermeld Andrag dat ek die plaas in 1996 verlaat het, welke datum hy blyk te kry uit ander korrespondensie, maar hierdie

datum is verkeerd. Ek het definitief eers die plaas verlaat in November 1998 en nie voor daardie datum nie.

21. Ek het teruggekeer plaas toe aangesien ek nie my geld ontvang het nie en die plaaseienaars duidelik nie van plan was om hul deel van die ooreenkoms na te kom nie. Aangesien meer as twee jaar verloop het vandat ek die plaas verlaat het, was die houding van die plaaseienaars vir my duidelik.

22. Ek kon nie langer by my suster aanbly nie weens die plaaslike regering se verordeninge oor die aard van die boustruktuur waarin ek gewoon het. Die struktuur moes afgebreek word en ek het nie geld gehad om ‘n struktuur van klip en sement te bou nie. Ek het in ‘n sinkstruktuur gewoon. Gevolglik is ek gedwing om na die plaas terug te keer, juis weens hierdie verbreking van die ooreenkoms deur die plaaseienaars.

. . .

27. Op of ongeveer 20 Desember 2001 het die plaaseienaars vir my ‘n aantal boustruktuurplanke laat aflewer as vergoeding vir die Wendy-huis wat hulle omgestoot het met die padskraper. My prokureur op daardie stadium het die plaaseienaars oortuig om eerder die skade wat ek aangedoen is goed te maak. Ek doen aan die hand dat dit afgelei kan word uit die onderhandelinge tussen my prokureurs en Applikant, waarna Andrag verwys in sy funderende eedsverklaring.

28. Met hierdie material het ek ‘n nuwe woonstruktuur opgerig op die Dassenberg Plaas en ek woon sedertdien in daardie selfde struktuur wat dien as my woonhuis, op presies dieselfe plek waar ek gewoon het voor 1998.

29. Ek erken dat daar verskeie onderhandelinge plaasgevind het tussen die plaaseienaars en my prokureur van rekord op daardie stadium, maar ek dra nie werklik detailkennis van daardie onderhandelinge nie.

30. Die werklike kruks van die saak is egter daarin geleë dat dit die wens van die plaaseienaars was dat ek my Wendy-huis te Pella moes oprig welke oprigting met die toestemming van die beheerliggaam van die wooneenhede daar moes geskied het. Soos gestel, woon my een suster daar. Die skrywe aan die predikant daar, is die skrywe om toestemming wat deur Applikant gerig is op 24 Oktober 2001 en wat as aanhangsel “AOA.13” tot die funderende eedsverklaring van Andrag dien.

31. Omdat die nodige toestemming nie gegee is nie, kon hierdie oprigting nie plaasvind nie en is ek verplig om my huidige woonhuis op te rig waar dit steeds staan op Dassenberg Plaas, vanwaar dit verwyder is voordat ek die plaas onder valse voorwendsels verlaat het in 1998.

32. Ek ontken ook dat daar ooit enige ooreenkoms was dat ek enige woonhuis te Atlantis sou oprig. Ek het nooit so ‘n ooreenkoms aangegaan nie en dra geen kennis daarvan nie. Andrag het wel aan my die voorstel gemaak dat ek na Atlantis verhuis, maar ek het nooit die voorstel goedgekeur of daarmee saamgestem nie. Die enigste ooreenkoms tussen ons was die ooreenkoms wat voorsiening gemaak het vir ‘n tydelike struktuur te Pella, maar wat skipbreuk gely het weens die toestemming wat nooit in hierdie verband verleen is nie.’

[16] The application was heard by Allie J. She concluded that the respondent was an occupier (as defined in s 1 of ESTA) until her departure in November 1998 and that she thereafter retained the protection afforded to an occupier by that Act. The learned judge dismissed the application with costs.

[17] The appellant appealed to the Full Bench. Two judgments were delivered. Hlophe JP found that the respondent had never abandoned her intention of residing on the farm and therefore remained an ESTA occupier throughout her absence and thereafter. He too held that she had not lost the protection of ESTA. His judgment, like that of Allie J, did not recognize that an occupier in terms of ESTA is one who physically resides on the land, which the respondent did not do after November 1998. Hlophe JP drew inferences and engaged in trenchant condemnation of the motives and conduct of the appellant. That was unjustified. The learned judge appears to have lost sight of the fact that he was dealing with allegations on paper untested by cross-examination.

[18] Van Reenen J (with whom N C Erasmus J concurred) held that after her departure from the farm the respondent did not qualify as an occupier for the purposes of ESTA as she neither resided on the farm nor possessed an intention to do so; nor did she have the express or tacit consent of the owner then or subsequently to reside on any part of it. He held, however, that the respondent retained rights conferred on her by ESTA despite no longer qualifying as an

occupier. Those rights included the right to reside on and use the land (s 6(1)). Accepting the respondent's version for the purpose of the application proceedings, he found that the respondent had vacated the property in 1998 without knowledge of her rights under ESTA in exchange for the offer of R25 000, so that any alleged waiver of her rights to occupy the land was of no force and effect because of the terms of s 25 of ESTA.[3] She therefore retained her right to reside on and use the land despite her physical absence. Such right, the learned judge held, fell within the scope of 'any other right in law to occupy such land' as that phrase is used in the definition of 'unlawful occupier' in s 1 of PIE. The respondent

3For the text of the relevant part of s 25, see *fn* 6 below.

was for that reason not such an occupier and the application for her eviction under PIE had to fail.

[19] In the appeal before us the respondent's counsel submitted that the High Court possessed no jurisdiction to determine the application in the first instance because any decision involved a determination of the respondent's ESTA rights. He referred to s 20[4] of that Act which confers exclusive jurisdiction on the Land Claims Court (and, to the extent provided in s 19, on a magistrate's court). For the reasons which follow I do not agree with this submission.

[20] The application was launched on the premise that the respondent was an 'unlawful occupier' as defined in PIE. When the respondent relied in her first answering affidavit upon rights arising from ESTA the appellant's attitude was that her reliance was ill-founded. It seems to me that the proper approach to the 'exclusive jurisdiction' for which s 20(2) provides is defined by the terms of s 20(1), ie if a party whether as applicant or respondent claims performance of any of the functions of a court in terms of ESTA, only the Land Claims Court has the power, including the exercise of the powers specified in subparas (a) to (d) of s 20(1), to order or implement such performance. This power of the Land Claims Court is subject to s 17(2), which provides that proceedings under ESTA may be instituted in the relevant division of the High Court if all the parties consent to this, and to s 19(1), which gives the magistrates' courts jurisdiction in respect of

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4'(1) The Land Claims Court shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power-

(a) to decide any constitutional matter in relation to this Act;

(b) to grant interlocutory orders, declaratory orders and interdicts;

(c) to review an act, omission or decision of any functionary acting or purporting to act in terms of this Act; and

(d) to review an arbitration award in terms of the Arbitration Act, 1965 (Act 42 of 1965), in so far as it deals with any matter that may be heard by a court in terms of this Act.

(2) Subject to sections 17 (2) and 19 (1), the Land Claims Court shall have the powers set out in subsection (1) to the exclusion of any court contemplated in section 166 *(c), (d)* or *(e)* of the Constitution.

(3) If in any proceedings in a High Court at the date of the commencement of this Act that Court is required to interpret this Act, that Court shall stop the proceedings if no oral evidence has been led and refer the matter to the Land Claims Court.'

The High Court is a court contemplated in s 166(c) of the Constitution.

certain proceedings under ESTA.

[21] In the present case the appellant did not claim any such performance. Nor did the respondent attempt to do so, eg by making a counter-application for restoration of
occupation pursuant to s 14 of ESTA. She was content merely to adopt the stance that she possessed the rights of an occupier under ESTA and to put the applicant to the task of disproving her contention. It follows that s 20 was not engaged by either party.

[22] Section 20(3) is so phrased to strike only at proceedings pending in a High Court at the date of commencement of ESTA before any evidence had been led in such proceedings. There is no warrant for further restricting the ordinary power of a High Court to interpret the provisions of ESTA if such an exercise is relevant to the determination of a dispute before it. In so far as Gildenhuys J held otherwise in *Skhosana v Roos*,[5] I respectfully disagree. The preliminary submission on behalf of the respondent must therefore be dismissed.

[23] Despite the obvious unsatisfactory and contradictory features of the respondent's version, the appellant's counsel accepted that a genuine dispute of fact arose from her averments about the making of the offer by Stofberg and her acceptance or reliance on that offer and the communication, in so far as needs be, of such acceptance or reliance to the appellant. The case must therefore be approached on the basis that in November 1998 her vacation of the property took place after acceptance of the offer and in anticipation of payment of R25 000; thereafter the appellant breached the agreement, which breach ultimately caused the respondent to decide to return to the farm.

5[1999] 2 All SA 652 (LCC) at para 14.

[24] The second issue argued before us involved the compromise agreement in terms

of which the appellant delivered a wendy house to the site of the respondent's sister in Pella in December 2001. The appellant's case was that it was a term of that agreement that the respondent undertook that she would not return to the farm without its consent. Its counsel submitted that the respondent had not raised a *bona fide* dispute of fact in her answering affidavits in relation to that averment: at best for her she had claimed to have no knowledge of it but she had failed to meet the specific allegations. In the circumstances her return to the farm in January 2002 without the owner's consent was a breach of the agreement and rendered her an 'unlawful occupier' in terms of the definition of such in PIE.

[25] This contention cannot prevail. There is an inherent improbability in the acceptance by the respondent of such a restriction on her future conduct at the time of the agreement. It is not in dispute that she understood that Mr Gaerdes was in the course of bringing a land restitution claim on behalf of the residents of the farm. An undertaking not to return or an abandonment of her occupational rights would have been inconsistent with the potential benefits which the success of such a claim might in due course confer on her. Moreover careful analysis of the affidavits does not bear out the submission of appellant's counsel.

[26] The respondent consistently denies that she agreed not to return to the farm. She points out that the agreement was concluded by her attorney and pleads ignorance of the detail. She says that her acceptance of the wendy house was premised on the availability and suitability of accommodation at Pella. The appellant did not produce an affidavit from Mr Gaerdes (her attorney) in rebuttal. Whether the respondent's version depends only on an unexpressed mental reservation or whether the agreement was as unequivocal as the appellant will have it cannot be determined without the aid of oral evidence. The respondent's

version was not without inherent probability as I have earlier suggested. It cannot be robustly dismissed as not raising a genuine dispute of fact. But the appellant did not seek a reference to oral evidence in the court *a quo* and its counsel disavowed such recourse when asked by this Court during the appeal. For these reasons it is bound to live with the respondent's denial that she undertook not to return to the property after December 2001. The appellant, which has the onus of establishing the terms of the agreement on which it relies, has not succeeded in showing otherwise.

[27] Failing our outright rejection of the respondent's denial, appellant's counsel relied on an alternative submission that was first raised with clarity in the course of argument before us and which he developed on the following lines:

27.1 When the respondent left the farm in 1998 she did so of her own volition, whether in response to the appellant's offer to pay R25 000 to each resident who departed voluntarily or for other reasons of her own.

27.2 The respondent decided to return after she was satisfied that the appellant had no intention of keeping its side of the contractual bargain or simply because it suited her to do so. In either event she did not rely on any delictual wrongdoing by the appellant.

27.3 In leaving the farm, the respondent ceased to occupy the premises as contemplated in ESTA. By the time that she changed her mind she knew that she had no consent from the owner to again take up residence on the farm.

27.4 If the respondent's initial departure from the farm arose simply from a decision by her to change her place of residence, no question of waiver of her rights under ESTA arose. Such a move was simply a termination of her occupation of her own accord and brought her ESTA rights to an end. If her acceptance of the offer amounted to a waiver then such a waiver was by reason of the terms of

s 25(1)[6] of ESTA void unless permitted by the Act.

27.5 The conditions for a permitted waiver are to be found in s 25(3), ie a free and willing vacation of the land by an occupier who is aware of his or her rights in terms of ESTA at the time that he or she leaves.

27.6 A former occupier who claims not to have vacated the land freely, willingly and

with knowledge of his or her rights (and, therefore, to have preserved such rights) is entitled to institute proceedings for restoration under s 14. [7] Although the express terms of that section only apply to cases of eviction, ie deprivation against the will of the evictee, in order to make sense of s 25(3), s 14 has to be given an extended application which recognizes that the remedy of restoration is also open to the occupier who vacates voluntarily while unaware of his or her rights.

27.7 The respondent was not shown to have been aware of her rights when she left the property. ESTA therefore conferred upon her a right to claim restoration in terms of s 14.

6S 25 provides (in so far as relevant):
'(1) The waiver by an occupier of his or her rights in terms of this Act shall be void, unless it is permitted by this Act or incorporated in an order of a court.
(2) A court shall have regard to, but not be bound by, any agreement in so far as that agreement seeks to limit any of the rights of an occupier in terms of this Act.
(3) Notwithstanding the provisions of subsections (1) and (2), if an occupier vacates the land concerned freely and willingly, while being aware of his or her rights in terms of this Act, he or she shall not be entitled to institute proceedings for restoration in terms of section 14.'

7Section 14 provides (to the extent relevant):
'(1) A person who has been evicted contrary to the provisions of this Act may institute proceedings in a court for an order in terms of subsection(3).
(2) A person who-
(a) would have had a right to reside on land in terms of section 6 if the provisions of this Act had been in force on 4 February 1997; and
(b) was evicted for any reason or by any process between 4 February 1997 and the commencement of this Act, may institute proceedings in a court for an order in terms of subsection (3).
(3) In proceedings in terms of subsection (1) or (2) the court may, subject to the conditions that it may impose, make an order-
(a) for the restoration of residence on and use of land by the person concerned, on such terms as it deems just;
(b) for the repair, reconstruction or replacement of any building, structure, installation or thing that was peacefully occupied or used by the person immediately prior to his or her eviction, in so far as it was damaged, demolished or destroyed during or after such eviction;
(c) for the restoration of any services to which the person had a right in terms of section 6;
(d) for the payment of compensation contemplated in section 13;
(e) for the payment of damages, including but not limited to damages for suffering or inconvenience caused by the eviction; and
(f) for costs.'

27.8 Until that right has been adjudicated upon as provided for in ESTA and an order made for restoration, any occupation of the property by her without the consent of the owner would be a resort to self-help and hence unlawful. That, submitted counsel, was the legal consequence of an acceptance of the facts set up by the respondent. On any other interpretation, an ESTA occupier who voluntarily leaves would have more than the s 14 right of restoration that an occupier who is unlawfully evicted has. In the result the respondent ceased being an ESTA occupier and was indeed an unlawful occupier as defined in PIE.

[28] Counsel for the respondent did not contest the propriety of the interpretation placed on s 25(3). He sought to counter the argument by submitting that when the respondent returned to the farm she was merely exercising an extant right to occupy the land which she had never lost. (In essence this was the route preferred by the majority in the Full Bench.) That right, he said, was another ‘right in law to occupy the land’ in terms of the definition of ‘unlawful occupier’ in s 1 of PIE which served to exclude her from that category. The appellant was accordingly unable to bring its case within the terms of that Act and the appeal should fail.

[29] I think that the logic of the reasoning of counsel for the appellant is, save for one reservation the correctness of which it is unnecessary to decide, inescapable. The legislature, in enacting ESTA, recognized the existence of a large population bound by history and circumstance to the land on which they live. It intended to provide ample protection to such occupiers who would in all probability be disadvantaged by lack of means and inadequacy of education and thus constitute an easy prey to a landowner seeking to take advantage of them. In these circumstances, and having regard to the

broad content of the rights of such occupiers arising from ss 25(1)[8], 25(6)[9] and 26[10] of

the Constitution, it may well be that 'waiver' should be given a broad interpretation

which includes unilateral abandonment even though the intention of the ESTA occupier is to take up permanent occupation elsewhere, provided that the occupier is aware of his or her rights under ESTA at the time of his or her departure from the land. However, even allowing the respondent the benefit of that interpretation she faces the problem that the legislature so constructed ESTA as to institutionalise and canalize all disputes between owners and occupiers (or former occupiers) and thereby to limit the scope for conflict between them. This it sought to achieve through inter alia the restoration proceedings provided for in s 14. In particular s 14(3) affords a wide discretion to a court to make orders which are equitable and appropriate in the particular circumstances of the proceedings before it. That discretion is not one which considers only the interest of the claimant. It recognises that restoration may be impracticable or unfair to the owner. As counsel for the applicant submitted, the assertion by an evictee of an apparently unassailable right to occupy does not mean that restoration of occupation will automatically follow. That determination lies solely in the discretion of the competent court after a consideration of all the relevant circumstances.

[30] But I think appellant's counsel was also correct in submitting that it is not only evictees whom the legislature intended to bring within the remedies of s 14. The only way to give meaningful content to s 25(3) is to place the occupier who

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8 (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

9 (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.'

10(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

vacates property, otherwise than freely and willingly and with awareness of his or her rights, on a par with an evictee. It would seem that the legislature intended that such a person should be regarded as one who was deprived 'against his or her will of residence or use of land or access to water which is linked to a right of residence in terms of' ESTA.[11] That equation is by no means unduly strained and it is consistent with the overall purpose of the legislation to which I have earlier referred because it has the effect of bringing the parties together in a controlled judicial environment in order to resolve the dispute. It also follows that resort to self-help is at odds with the means provided. The argument for the respondent is flawed in so far as it equates her claim to a right to occupy with actual occupation. The reality is that, instead of resorting to her remedies under the statute, the respondent simply moved on to the property without the owner's consent or the authority of an order granted in terms of s 14. In doing so she was not an ESTA occupier and did not become one, but rather occupied the land without any right in law to do so. She was, therefore, an 'unlawful occupier' within the terms of PIE when the application was launched.

[31] It follows that the applicant has established what it set out to prove. That however does not mean that eviction is the appropriate relief. The respondent's present occupation, although unlawful, is not a crime. While it is no doubt an inconvenience to the appellant, there is no evidence of greater immediate prejudice to it. The respondent is a single mother of minor children, one of whom has special needs. She appears to be indigent. The availability of suitable alternative accommodation is at least doubtful. Her continuous residence on the property extends, save for one absence of nearly two years, for about thirty-five years. Under s 4 of PIE an application for her eviction would be subject to the exercise of an equitable discretion because she had unlawfully occupied the land for a period of more than six months by the time proceedings were initiated in the

11 This is the definition of 'evict' and 'eviction' in ESTA.

court *a quo*. On the facts which the application procedure requires us to accept she has a claim to restoration of occupation under ESTA which may result in her once again obtaining legal residence and use of a portion of the farm. The equities of the situation thus justify a flexible approach which will offer her the opportunity of regularising her occupation. The order I propose recognizes that the continuance of the uncertainty is undesirable for both parties and should be brought to an end as soon as possible.

[32] The appellant has throughout the protracted proceedings adopted an approach which does not seek to penalise the respondent by an adverse costs order. Neither party has achieved outright or final success in the proceedings. It is in all the circumstances fair that each party should bear its or her own costs in all the courts.

[33] The following order is made:

1. The appeal succeeds. Each party is to pay its or her own costs.

2. The order of the court *a quo* is set aside and replaced with the following order:

> ‘1. The appeal succeeds. Each party is to pay its or her own costs of appeal. The order of Allie J is set aside. The following order is made in substitution of that order:
>
> “(a) The respondent is placed on terms to institute proceedings in terms
>
> of section 14(1) of the Extension of Security of Tenure Act 62 of 1997 for restoration of her residence and use of land on the farm Dassenberg No 15, Malmesbury within 4 months from the date of this order. The appellant may, if so advised, bring counter-proceedings in terms of sections 9, 10 and 12 of that Act.

(b) Should the respondent fail to institute such proceedings timeously or fail to prosecute such proceedings to their conclusion with due expedition, the appellant is given leave to apply on the same papers duly supplemented for an order of eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

(c) Each party is to pay its or her own costs."'

J A HEHER
JUDGE OF APPEAL

CAMERON JA **)Concur**
BRAND JA **)**
VAN HEERDEN JA **)**
THERON AJA **)**