

SOUTH AFRICA / JUDGMENT

Tsotetsi and Others v Raubenheimer N.O and Others (LCC140/2020) [2021] ZALCC 2; 2021 (5) SA 293 (LCC) (18 January 2021)

[2021] ZALCC 2

COURT
Land Claims Court

BEFORE
Cowen, Meer

CASE / FILE NUMBER
LCC140/2020

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IN
THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD
AT RANDBURG
CASE
NUMBER: LCC140/2020
In

the matter between:	TSEDISO
	PHILLIP TSOTETSI
	First
	Appellant
	ANDRIES
	TSOTETSI
	Second
	Appellant
	NTHABISENG
	TSOTETSI
	Third
	Appellant
	and
	WILLEM
	JONATHAN RAUBENHEIMER N.O.
	First
	Respondent
	HELGRAD
	PETRUS RAUBENHEIMER N.O.
	Second
	Respondent

FRANCOIS
COOPER N.O.
Third
Respondent

JUDGMENT

COWEN AJ

Introduction

[1] On 13 August 2020, Magistrate Van der Westhuizen of the Vrede Magistrates Court in the Free State granted

orders

requiring the removal of the Appellants' cattle from a property owned by the Mooihoek Boerdery Trust (the Trust) that has been overgrazed. The Magistrate granted the orders in an application the Trustees of the Trust instituted to remove the cattle to allow the affected area of the property to be rehabilitated. The Appellants now appeal to this Court against the Magistrate's orders in terms of section 19(2) of the Extension of Security of Tenure Act 62 of 1997 (ESTA).

[2] The property in question is the Remainder of the Farm Fairdale 1048, District Vrede, Free State Province (the property). The appellants are Tsediso Phillip Tsotetsi, Andries Tsotetsi and Nthabiseng Tsotetsi. The Appellants collectively keep and graze approximately 16 head of cattle there.[1] The Respondents in the appeal are the three Trustees of the Trust cited in their fiduciary capacity.

[3] The Trustees instituted the application on 25 July 2019 seeking the removal of all of the Appellants' cattle, if need be by the Sheriff, with the assistance of the South African Police Services (SAPS). The First Respondent, Mr Raubenheimer, deposed to the Trustees' founding affidavit in his capacity as the general manager of the property. In short, the Trustees alleged that they were entitled to an order removing the cattle in circumstances where the Appellants had allowed them to severely overgraze the specific area allocated to the Appellants for their cattle, being some 17.4 hectares in extent (the allocated area). This, they say, has resulted in environmental degradation in breach of applicable environmental laws, including the Conservation of Agricultural Resources Act 43 of 1983 (CARA), and the allocated area is required to be rested to allow it to rehabilitate. In support of their case, they rely on a report

commissioned in December 2018 from an ecological specialist, Mr Rikus Lamprecht of Focus Consulting (Pty) Ltd, who had prepared a Grazing Management Plan for the Trust in respect of the property (the Grazing Report). In the Grazing Report, Mr Lamprecht makes a series of recommendations, a key one being that the livestock be removed from the allocated area so that it can be rehabilitated over an estimated period of two growing seasons. Before instituting the

proceedings and on 10 June 2019, the Trust's attorneys had sent the Grazing Plan to the Appellants, asserting (inter alia) that the Trust had duties in terms of CARA to ensure that no overgrazing takes place and calling on the Appellants to remove all

their cattle from the property within thirty days, failing which they would approach a court for relief. There was no response.

- [4] The application was set down for 12 September 2019 and was heard on that day in the absence of the Appellants, who did not attend. The Magistrate requested a clarificatory affidavit from the Trustees on various matters including whether the Appellants were working on the property and whether they had been dismissed; whether there was any service agreement between the Trustees and any of the Appellants, and if so, whether it included any stipulation regarding the permitted number of cattle in the allocated area; and whether each of the Appellants were permitted to keep a specific number of cattle or whether the permitted number of cattle applied to all of the appellants collectively. On 14 October 2019, the Trustees filed a supplementary affidavit in response to the Magistrate's queries in which it is alleged that the Appellants are not employees and that they arrived on the property in 2007. It is alleged further that in December 2012, the Trustees and the Appellants concluded an agreement in terms of which only seven cattle would be kept on the property and a rental of R350 per month would be payable for grazing land. On 16 September 2019, the appellants filed a notice of opposition. On 23 October 2019, the Magistrate granted an order, amongst other things, authorizing the removal of the cattle. That order was thereafter rescinded in unopposed proceedings, and the Appellants were granted leave to defend the application.
- [5] On 20 January 2020, the Appellants delivered an answering affidavit deposed to by Mr Tsedisio Tsotetsi in which he responded to both the founding affidavit and the clarificatory affidavit the Magistrate had requested. He raised a preliminary point that the Magistrate has no jurisdiction under ESTA to grant the orders sought. Mr Tsotetsi says that the Appellants have been residing on the property since 1987, not 2007. He does not dispute that there is an area allocated for grazing which is overgrazed and that it requires rehabilitation. However, he contends that the Trustees have provided alternate camps for the Appellants' cattle to allow them to rotate grazing. He also says that the Trustees have reduced the size of the area and took cattle of a Mr Moteka from another farm and put them in the allocated area which contributed to it becoming overgrazed. The alleged agreement referred to in the supplementary affidavit is disputed and it is averred, rather that the proposal was that Mr Tsotetsi remove horses but that the cattle be reduced to 17. He says that there was no agreement regarding rental.
- [6] In May 2020, Mr Raubenheimer deposed to a replying affidavit in which, amongst other things, he disputes any historical practice of providing alternative grazing sites. He also refers to agreements concluded with the Appellants' late father regarding his grazing rights and the terms thereof.

- [7] The Magistrate delivered his judgment on 13 August 2020 and provided reasons on 1 September 2020. The Appellants delivered a notice of appeal on 11 September 2020.
- [8] The appeal came before this Court on 20 November 2020. Mr Phalatsi appeared for the Appellants and Mr Stone appeared for the Trustees. The appeal was argued via Zoom video conferencing in view of the ongoing COVID-19 pandemic.

The Magistrate's decision

- [9] The Magistrate granted the following orders, each of which is the subject of this appeal:[2]
- (1) The Appellants were ordered to move all livestock presently in their possession or under their control from the property on or before 14 September 2020 (the first order).
 - (2) In the event that the Appellants failed or refused to do so, the sheriff of Vrede with the assistance of SAPS was directed to remove them and to take them to such other place indicated or made available by the Respondents or in the absence thereof to impound them at the Harrismith pound for the pound master to deal with in terms of the Pound Ordinance 18 of 1952 (the second order).
 - (3) The allocated area be completely rested for a minimum period of two growing seasons until September 2022 after which a maximum of five head of the Appellants' cattle (in line with the requirements of CARA) be returned to graze in the allocated area (the third order).
 - (4) The Appellants were ordered to pay the Trustees' costs (the costs order).
- [10] In his judgment, the Magistrate dealt upfront with the objection to his jurisdiction. He concluded that the Appellants were occupiers in terms of ESTA and that he has jurisdiction in terms of section 19(1)(b)(i) and (ii) of ESTA, which confer on a Magistrates Court the competence to grant interdicts in terms of ESTA and to issue declaratory orders as to the rights of a party in terms of ESTA.
- [11] On the merits of the case, the Magistrate found that as ESTA occupiers, the Appellants were land users as defined in section 1 of CARA.[3] As such, he held, they are jointly responsible with land owners in terms of Regulation 9(1)(a) to (e) of the Regulations made under CARA[4] to take as many of the measures prescribed as are necessary in the situation to protect the veld on the farm unit effectively against deterioration and destruction.[5] The Magistrate regarded the case as falling within the ratio of the decision of the Supreme Court of Appeal in *Adendorffs Boederye*. [6]
- [12] On the evidence, and relying on the Grazing Report, the Magistrate concluded that the allocated area had been severely overgrazed and required to be rehabilitated. The Appellants, he found, did not put up any evidence to dispute the content of the Grazing Report.

- [13] The Magistrate concluded further that the Appellants are not and have at no stage been the Trustees' employees. Rather, he found that they had arrived with their parents on the property in 1987 and remained on the property after their late father, William Tsotsetsi, passed away. Their late father had worked on the farm and kept cattle there. However, he had only been allowed to keep seven head of cattle and had to pay rental for grazing land. The Court accepted further that the Department of Rural Development and Land Reform at a stage had unsuccessfully sought to resolve the dispute between the Trustees and the Appellants.
- [14] Finally, the Magistrate refused to accept a submission on behalf of the Appellants to the effect that the Trustees must make alternative land available for grazing on the basis that this would not be fair. Moreover, as regards a submission from the Appellants that the Trustees had, as alleged, impermissibly reduced the size of the allocated area, the Magistrate concluded that the Appellants ought to have instituted a counter-claim in that regard.

Grounds of appeal

- [15] The grounds of appeal raised in the notice of appeal, while framed in general terms, are narrow. Importantly, there is no dispute that the Appellants are ESTA occupiers or that it is competent for a landowner to secure an interdict against an ESTA occupier to compel compliance with the duties of land users in terms of CARA, as was permitted in *Adendorffs Boerderye*.^[7] That the responsibility to manage the land in accordance with CARA is that of both the land user and the landowner is also not questioned. There is, moreover, no issue whether the area is overgrazed and requires rehabilitation as recommended in the Grazing Report to ensure compliance with CARA and its Regulations. Rather, in the notice of appeal, the Appellants raise six (partly overlapping) issues, which may be summarized as follows:

- (1) The Magistrate lacked jurisdiction as the order granted does not amount to an interdict or a declaratory order as contemplated by section 19(1)(b)(i) and (ii) of ESTA;
- (2) The Magistrate erred in his reliance on the *Adendorffs Boerderye* case in that in that case the evidence showed that there was no alternative camp on the property for the cattle to be moved to,

whereas in this case, the Appellants aver that the practice was to alternate grazing camps and there are other camps available on the farm to which the Appellants' cattle can be taken.

- (3) The Magistrate erred in making an order reducing the number of cattle that can be returned following rehabilitation as no such order was sought in the notice of motion.
- (4) The Magistrate erred in finding that the Appellants should have instituted a counter-claim in respect of the reduced area as the

allegation was made to show the Respondents' joint responsibility for the overgrazing.

- (5) The Magistrate erred in finding that averments made in the replying affidavit were common cause as they were raised for the first time in reply.
- (6) The Magistrate erred and misdirected himself in making a costs order against the Appellants without justification.
- [16] Mr Phalatsi raised various arguments in his written submissions and oral argument, to which Mr Stone objected, seeking to hold the Appellants strictly to the grounds pleaded in the notice of appeal.[8] However, some objections are to submissions which, in substance, do fall within a pleaded ground of appeal and the difficulty rather is that the relevant ground is pleaded in general terms. It is not suggested that the notice of appeal is a nullity and Mr Stone has ably responded in his detailed and helpful written submissions to each of the arguments raised, and we have accordingly considered the Appellants submissions in the appeal as fully as is fairly permitted having regard to the issues foreshadowed in the notice of appeal. Certain submissions raised are however not foreshadowed by the notice of appeal at all and we are of the view that they cannot fairly be entertained. This includes an objection that the Magistrate lacked jurisdiction in view of the monetary limits on the jurisdiction of the Magistrates Court. This issue was not raised in the answering affidavit and is not sufficiently canvassed factually. It also includes a submission regarding compliance with the general requirements for the grant of an interdict. Both of these submissions were made at a late stage. While we do not entertain the latter submission, we are of the view that the evidence clearly establishes that the allocated area is seriously overgrazed, and that, in order to ensure compliance with Regulation 9 of CARA, an interdict should be granted to ensure that the Appellants' cattle are removed from the area for a period to allow it to be rehabilitated.

Issue concerning jurisdiction raised by the Court mero motu

- [17] During the course of argument, the Court mero motu raised a concern regarding the Magistrates Courts' jurisdiction in terms of section 19(1) of ESTA and in turn, this Court's appellate jurisdiction. While related to the jurisdictional issue raised in the notice of appeal, the concern raised is of wider import. The boundaries of different courts' jurisdiction when dealing with disputes relating to land are not always clear and the interests of justice requires that such clarity be enhanced. Both Mr Phalatsi and Mr Stone accepted that the Court could do so and did not object thereto. Section 19(1) of ESTA provides as follows:

"19. Magistrates' courts.—

- (1) A magistrate's court—
- (a) shall have jurisdiction in respect of—
- (i) proceedings for eviction or re-instatement; and
- ii) criminal proceedings in terms of this Act; and

- (b) shall be competent—
- (i) to grant interdicts in terms of this Act; and
- (ii) to issue declaratory orders as to the rights of a party in terms of this Act.”

[18] The issue raised was whether the Magistrates Court’s jurisdiction in terms of ESTA, and in turn this Court’s

appellate jurisdiction, is limited to the subject matter referred to in section 19(1)(a) of ESTA (proceedings for eviction or reinstatement and criminal proceedings in terms of ESTA). We refer to this interpretation of section 19(1) as ‘the restrictive interpretation of section 19(1)’. We queried whether a more generous interpretation can be adopted which would entail that the Magistrates Court, by virtue of section 19(1)(b), also enjoys jurisdiction to grant interdicts and

declaratory orders as to the rights of parties in terms of ESTA whether or not that relief relates to the subject matter referred to in section 19(1)(a) but provided the relief is ‘in terms of ESTA’. We refer to this interpretation as ‘the generous interpretation of section 19(1)’.

[19] Both parties accepted that the subject matter of these proceedings does not fall within the subject matter of section 19(1)(a). Put differently, the relief granted does not amount to an eviction or reinstatement order (nor, of course, does it entail criminal proceedings in terms of ESTA). In our view, this acceptance is consistent with the Adendorffs Boederye decision in which the Supreme Court of Appeal held that grazing rights are personal rights that flow from an agreement and not from statutory rights to reside on and use property that derive from section 6 of ESTA.[9] Accordingly, the Magistrates Court could only have jurisdiction in this case if the generous interpretation of section 19(1) is the correct one. As we explain below, we have concluded that it is. In doing so, we have been ably assisted by counsel who, on 4 December 2020, delivered supplementary heads of argument after the hearing in response to the Court’s concern.

The

issues

[20] The issues that require determination in this appeal are the following:

- (a) Whether the Magistrates Court had jurisdiction to hear the application?
- (b) Whether the Trustees were entitled to an order requiring the removal of the Appellants’ cattle to allow the allocated area to be rehabilitated?
- (c) If so, whether the Trustees were entitled to an order authorizing the return of only 5 cattle after the rehabilitation period?
- (d) Costs.

- [21] The issues must, of course, be determined in light of the pleaded grounds of appeal. As these are motion proceedings, the facts are to be found in the affidavits and must be determined based on the principles in *Plascon-Evans*[10] and *Wightman*[11]. The core material facts are either common cause or can be determined in light of these principles.

Jurisdiction

- [22] We deal first with the concern about jurisdiction that the Court raised *mero motu*. The issue is whether the restrictive or the generous interpretation of section 19(1) is correct and as indicated above, we have concluded that the generous interpretation is correct.
- [23] Mr Phalatsi submitted that the restrictive interpretation of section 19(1) is the correct interpretation. He submitted that, properly interpreted, section 19(1)(a) delineates the Magistrates Courts' subject matter jurisdiction. On this interpretation, the purpose of section 19(1)(b) is merely to confer on Magistrates Courts the competence, or power, to grant interdicts and declaratory relief in respect thereof given that Magistrates Courts do not ordinarily have the competence to grant declaratory relief. Although Magistrates Courts have the power to grant interdicts in terms of section 30 of the Magistrates Courts Act 32 of 1944,[12] the power to do so is subject to the jurisdictional limits of that Act, which may provide a reason why the legislature regarded it as necessary to empower Magistrates to grant interdicts when exercising its jurisdiction in terms of ESTA. These submissions are not without force and have some attraction in view of the legislature's use of the word "jurisdiction" when introducing section 19(1)(a) and its use of the different word "competence" when introducing section 19(1)(b). The use of the word "competence" thus may suggest that section 19(1)(b) does not confer subject matter jurisdiction as the generous interpretation presupposes.
- [24] However, we have concluded that the generous of interpretation of section 19(1) should be adopted for three reasons.
- [25] Firstly, section 19(1)(b) is reasonably capable of the more generous interpretation and this interpretation is not in any way strained. Although the legislature used different words to introduce section 19(1)(a) and (b), respectively, "jurisdiction" and "competence", these words are not incompatible and the concept of subject matter jurisdiction is readily embraced in the concept of judicial "competence". In this regard Mr Stone referred the Court to the decision of Watermeyer CJ in *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board*[13] in which he described "jurisdiction" as "the power or competence of a court to hear and determine any issue between parties, and limitations may be put upon such power in

relation to territory, subject matter, amount in dispute, parties, etc." Mr Stone also referred the Court to the definition of "competent" in the South African Concise Oxford Dictionary, which is "[h]aving the necessary ability or knowledge to do something successfully (of a person). Efficient and capable (of a court or other body) having legal authority to deal with a particular matter." And Garner's Dictionary of Modern Legal Usage[14] says that "competence", when used of

adjudicative or rule-making bodies is “frequently used for qualification or capacity of an official body to do something.”

[26] Secondly, there are various textual indications that the legislature intended the generous interpretation to be adopted. Section 20(1) of ESTA, which deals with the Land Claims Court’s jurisdiction, refers to this Court having the “powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power” (in subsection (b)) “to grant interlocutory orders, declaratory orders and interdicts.” The legislature’s use of the different term “competence” in section 19(1)(b) and “power” in section 20(1)(b) when referring to interdicts and declaratory relief in the Magistrates Court and in this Court respectively,

suggests that section 19(1)(b) is intended to confer on Magistrates Courts more than the mere ability to make orders of that nature.

The different use of language suggests rather that the emphasis in section 19(1)(b), is on the Magistrates Courts’ ability to do so “in terms of this Act”. A further textual indication that the legislature intended the generous interpretation is the legislature’s insertion of the word “and” between section 19(1)(a) and (b) which suggests that section 19(1)(b) adds to the subject matter jurisdiction of what is contemplated by section 19(1)(a). The legislature’s addition of the words “in terms of this Act” to both 19(1)(b)(i) and (ii) fortify this conclusion as the term is specifically not limited to the subject matter of section 19(1)(a) and its inclusion can be understood to indicate a broader ambit of competency (or jurisdiction) conferred independently by section 19(1)(b). It would, furthermore, have been a simple matter for the legislature to have made it clear that a restrictive

interpretation should be adopted if that is what it intended.[15]

[27] Thirdly, and importantly, the generous interpretation of section 19 better promotes the spirit, purport and objects of the Bill of Rights.[16] In *Wary Holdings*, the Constitutional Court held that where two conflicting interpretations of a statutory provision could both be said to promote the spirit, purport and objects of the Bill of Rights and the decision to be made is whether one interpretation is to be preferred over another, the Court is required to adopt the interpretation which better promotes the spirit, purport and objects of the Bill of Rights.[17] The generous interpretation better promotes the spirit, purport and objects of section 34 and section 25(1) and (6) of the

Constitution of the Republic of South Africa, 1996.

[28] Section 34 of the Constitution confers on everyone “the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum”. Section 17 of ESTA authorizes a party, subject to the provisions of sections 19 and 20, to institute proceedings in the Magistrate’s Court within whose area of jurisdiction the land in question is situated, or in the Land Claims Court.[18] In contrast, the High Court only has jurisdiction under ESTA if

all the parties to the proceedings consent thereto.[19] The conferral of jurisdiction on the Magistrates Courts in ESTA matters enhances access to justice because it makes access to court more affordable and swift, and allows people readily to access a court at a place close to their dispute.[20] This has particular importance for ESTA occupiers who, by virtue of the definition of ‘occupier’ and the territorial

application of ESTA, are low-earners who reside in rural areas. And as held in Thobejane, access to justice is imperative to ensuring the rule of law, which is a foundational value of our Constitution.[21] It follows that an interpretation which affords parties greater access to Magistrates Courts better promotes the spirit, purport and object of section 34. It ensures that Magistrates Courts are able to assist parties in a multitude of cases that arise under ESTA and which entail breaches of provisions which fall short of conduct that leads to eviction or reinstatement. This includes remedies for infringements of the rights conferred by section 6(2) of ESTA which range from the right not to be denied or deprived of access to water, educational or health services to the right to receive bona fide visitors at reasonable times and for reasonable periods and to receive postal or other communications. Section 6(2) also confers the right to family life and burial rights. Moreover, ESTA disputes are typically concerned with the balancing the rights of owners of property with the rights of occupiers to secure land tenure, both of which are the subject of section 25 of the Constitution.

Although ESTA regulates eviction and reinstatement of occupiers, it serves to regulate these rights more extensively. The preamble of ESTA states that the Act was: “[t]o provide for measures... to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; to regulate the conditions and circumstances under which persons... may be evicted and to provide for matters connected therewith” (emphasis supplied). The preamble later states that it is desirable “that the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners”. In our view, it would better promote not only section 34 but also section 25 of the Constitution if access to justice is enhanced for the resolution of these disputes concerning rights in land and security of tenure, which the generous interpretation achieves.

[29] We now turn to the jurisdictional objection raised in the notice of appeal. In line therewith, Mr Phalatsi submitted that the orders that were granted are neither an interdict nor a declaratory order as contemplated by section 19(1)(b)(i) or (ii). He submitted that the only provision in ESTA which deals with the holding of cattle is section 7, which regulates an owner’s right to have trespassing cattle impounded and it is common cause that the Appellants’ cattle are not trespassing cattle. We have concluded that the Magistrates Court is competent to grant interdicts of the sort granted and that they are interdicts “in terms of” ESTA, properly construed.

[30] In substance, the orders granted are interdicts in nature. The first and second orders are mandatory interdicts. The third order might be regarded as a prohibitory interdict in that it precludes the return of cattle until a certain time, or it might be regarded as an incidental

order mandated by section 18 of ESTA which empowers a court exercising jurisdiction in terms of ESTA, in addition to other powers set out in the Act, to “direct how the order of the court shall be executed, including the setting of time limits for the implementation of such orders.” It is not however necessary for purposes of this decision for this Court to decide the correct characterization of the third order. The question rather is whether the orders were “in terms of” ESTA as required by section 19(1)(b)(i).

[31] 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. [22] 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). [23] These personal rights may also entail “services” agreed upon as contemplated by section 6(1) of ESTA. [24]

[32] In *CSARS v Big G Restaurants*, [25] the Supreme Court of Appeal held that the phrase “in terms of” “has an ‘ordinary’ (narrow) or ‘wide’

meaning” with its meaning depending upon the subject-matter and the context in which it appears. It referred to its judgment in *Slims*, [26] which concerned the meaning of the word ‘under’ (in the signed Afrikaans text, ‘kragtens’), and specifically, the following statement of Botha JA:

“In my view the word ‘kragtens’ is clearly capable of bearing different shades of meaning. Used as a link word, connecting two concepts, it is capable of connoting varying degrees of closeness between the one concept and the other. In the narrow sense, at the one end of the spectrum, it may be used to denote a direct and immediately connection between the two concepts linked by it (“uit krag van”, “luidens”). In a wide sense, at the other end of the spectrum, it may connote no more than a loose and indirect relationship between the two concepts (“ten gevolge van”, “uit hoofde van”) ... In this sense the word could, I consider, be rendered appropriately as “voortspruitend uit” ... Similarly, the English word “under” has different shades of meaning. Some of the meanings ascribed to it in the cases are: “in terms of”, “in accordance with”, “in compliance with”, “in pursuance of”, “by virtue of”, and “pursuant to” ... In its wide meaning the word is certainly not confused, in my view, to the designation of a direct or exclusive connection between the two matters which it serves to link to each other.”

[33] In our view, the jurisdictional subject matter and context in which the phrase “in terms of” is found in section 19(1) warrants an interpretation which is not limited to statutory rights derived from ESTA but includes sufficiently connected rights derived from an agreement with an ESTA occupier to keep and graze cattle on the property in question. It will invariably be an implied (if not express or tacit) term of such an agreement that the owner or keeper of the cattle must comply with statutory obligations which concern the environmental protection of the allocated property, such as obligations in terms of CARA. As held in

Adendorffs Boerderye, a landowner is entitled to approach a Court for an interdict to secure a land user's compliance with CARA.[27]

- [34] As we understand Mr Phalatsi's submissions, they amount to a contention that a more restrictive interpretation of the term "in terms of" ESTA is warranted. Specifically, one that limits the Magistrates Court's jurisdiction to grant interdicts or declarators in respect of statutory rights conferred or expressly regulated by ESTA itself, such as section
7. In our view, such an interpretation would create an untenable and artificial system of parallel jurisdiction between this Court and the High Courts as many cases may involve subject matter in which the relevant statutory and contractual rights are both invoked or are closely connected. In turn, this will hamper effective access to justice in matters concerning rights of access to and use of land, which lie at the heart of the transformative project of the Constitution. Section 39(2) of the Constitution requires that such an interpretation be avoided as we explain above.
- [35] We pause to note that this does not mean that the Land Claims Court and Magistrates Courts have jurisdiction in any case that involves an ESTA occupier. The Supreme Court of Appeal stated in *Khumalo v Potgieter*: [28] "It is true that generally speaking the Act has not deprived the High Court of its common law powers. In the case postulated by counsel it can hardly be doubted that the High Court would have jurisdiction to interdict an owner from assaulting or threatening someone who happened to be an occupier of his land. But the position changes where the occupier invokes the provisions of the Act in order to establish a cause of action or defence. As soon as that occurs, the Land Claims Court has exclusive jurisdiction because it, and it alone, may apply the provisions of the Act (s20(1) and (2))." [29]
- [36] We are satisfied that the interdicts the Magistrate granted are in terms of ESTA. There is no dispute that the Appellants are ESTA occupiers. The personal right to keep cattle is integrally connected to the occupier's right to use the affected property. And notwithstanding the existence of disputes about the terms and conditions of the agreement in terms of which the Appellants may keep and graze cattle on the property, there is no dispute that they may do so and that in doing so they are bound to comply not only with ESTA, but with CARA and the Constitution.[30] [SC1]
- [36] In the result, we conclude that the jurisdictional objection must fail and we turn to deal with the merits of the appeal.

Were the Trustees entitled to the first order?

- [37] The question arising in respect of this issue is whether the Trustees were entitled to the first order, being an order requiring the removal of the Appellants' cattle to allow the allocated area to be rehabilitated?
- [38] The first relevant ground of appeal concerns the alleged historical practice to alternate grazing camps and the related contention that there are other camps available on the property to which the cattle may be moved and to which, the Appellants contend, the

Trustees are obliged to provide access. In this regard, the Appellants contend that this case should be distinguished from the Adendorffs Boerderye decision, in which the Supreme Court of Appeal concluded on the facts there was no other available camp on the property. There are three difficulties with these submissions.

[39] First, we do not think that the ratio in the Adendorffs Boerderye case is confined to a case where there is no alternative grazing land available on the relevant property. It is correct that the Supreme Court of Appeal concluded that there was no such land on the facts of the case, contrary to the findings of this Court a quo, and that finding informed the appeal court's decision not to uphold an order that the appellant should provide alternative grazing, if available.[31] However, the Court's conclusion that the landowner had no duty to supply alternative grazing was premised rather on its conclusion

that the obligations to manage the property in accordance with CARA is a joint responsibility of both the land owner and the land user and not that of the landowner alone.[32]

[40] Secondly, while there will be circumstances where the availability of alternative grazing land on a property will, and possibly should, inform the terms and conditions of any agreement regulating the keeping of livestock, the nature of a landowners' duties must always be discerned from the terms and conditions of the applicable agreement, whether express, implied or tacit. The difficulty facing the Appellants is that they have not pleaded any terms of any agreement which allow this Court to conclude that there is any contractual duty to supply alternative grazing land for rotational purposes. The existence of a historical

practice may well be relevant to the establishment of a tacit term of an agreement. But the Appellants have failed to allege any agreement, let alone its terms.

[41] Thirdly, the alleged historical practice is disputed and as a matter of evidence, the answering affidavit does not, in our view, establish that the Trustees have historically provided alternate grazing camps to rotate grazing. In the founding affidavit, it is expressly pleaded that the Appellants graze their cattle in the allocated area, constituting some 17.4 hectares, and have done so 365 days per year since at least February 1999 when the Trustees became the owners of the property. There is no suggestion that any other area has been used and it is the impact of this activity, specifically the keeping of cattle in excess of what the carrying capacity of the allocated area and the absence of rotational grazing within it, that, it is alleged and explained in the Grazing Report, has caused the allocated area to become degraded. That this area was specifically allocated is again pleaded in the supplementary affidavit. None of these allegations are pertinently disputed. At best for the Appellants there is a general allegation in the response to the founding affidavit (though not the supplementary affidavit) to the effect that in the past the Trustees have seen to it that the grazing area is alternated and that any allegation inconsistent therewith is denied. And as Mr Phalatsi submitted, the Trustees do not pertinently dispute that there is other available land that could be made available. This bald denial coupled with a general allegation as to what happened in the past does not, in our view suffice to create a genuine or real dispute of

fact in the sense contemplated in *Plascon-Evans and Wightman*.^[33] In *Wightman*, Heher JA held that: “a real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.”^[34] In this case, the allegation is made only in general terms (referred to above) and without reference to any details as to how this practice has worked over time, such as when, how often and which grazing areas are rotated and there is no indication that the Appellants have at any time requested the Trustees to return to the alleged practice to avoid the undisputed extensive overgrazing. Indeed, in the absence of such information and in the face of the conclusions of the Grazing Report, the allegation of the historical practice appears far-fetched. Rather, the evidence suggests that the intention has always been that rotational grazing should be practiced within the allocated area and CARA itself prescribes the number of large livestock units per hectare that may be kept (a matter to which we return below).

- [42] The second ground of appeal relevant to the first order is that the Appellants were not solely responsible for the overgrazing because the Trustees had reduced the allocated area and, though not pleaded in the notice of appeal, had introduced cattle of another person. In this regard, we accept the submission of Mr Phalatsi, in line with the notice of appeal, that this issue was not raised to seek related relief but to demonstrate joint responsibility for the overgrazed land. The difficulty facing the Appellants however is that the responsibility remains a joint one: the Appellants are jointly responsible for compliance with Regulation 9 of CARA. There is also nothing to suggest that the Appellants have sought to take steps to comply but have been precluded by the Trustees from doing so. Moreover, even accepting that there may have been a reduction in the size of the allocated area at a point or the introduction of another's cattle, the allegations too are made at such a high level of generality, that there is nothing before the Court that would allow it to conclude that this alleged conduct has materially contributed to the overgrazing.
- [43] The third ground of appeal that relates to the first order is that the Magistrate should not have accepted that allegations made for the first time in reply were common cause. The notice of appeal does not explain what allegations are referred to nor why the Magistrate's acceptance of them affects the order. Nor did Mr Phalatsi deal with this issue in any detail in his submissions. It is nevertheless apparent from the submissions that the concern relates to the findings regarding whether the Appellants themselves had been granted rights to keep cattle or only their late father. The Magistrate accepted evidence, tendered in reply, that the Appellants' late father had only been allowed to keep a maximum of seven head of cattle and had to pay rent for them. This informed his view that it cannot now be expected of the Trustees to keep the current increased number of cattle on the allocated area in circumstances where they neither work for the Trustees nor want to pay rent. In our view, these findings were not necessary to sustain the Magistrates' order and accordingly this ground of appeal does not assist the Appellants.

Were the Trustees entitled to an order authorizing the return of only 5 cattle after the rehabilitation period?

- [44] The complaint in the notice of appeal is that the Magistrate should not have made an order to reduce the number of the Appellants' cattle as no order was sought to that effect in the notice of motion and this was not the Respondents' case. Indeed, the Trustees did not seek any of the relief granted in the third order, which requires that the allocated area be completely rested for a minimum period of two growing seasons until September 2022 after which a maximum of five head of the Appellants' cattle (in line with the requirements of CARA) be returned to graze in the allocated area. However, the only impugned portion of this relief is that the Appellants are restricted to returning a maximum of five head of cattle after the rehabilitation period.
- [45] It is clear from the Magistrates' reasons that he was mindful that the Appellants were not entitled to relief of which there had been no prior warning and that did not fall within the Trustees' pleaded case, this issue having been the main concern of the Supreme Court of Appeal in *Adendorffs Boerderye*.^[35] In his reasons, the Magistrate explained that the Trustees' legal representative requested the third order at the hearing and the issue was argued, with the Appellants objecting. He explained however that the third order was in accordance with the recommendations of Mr Lamprecht in the Grazing Report which was pleaded. Moreover, and importantly, it served to place the Appellants in a better position than they would have been had no order regulating the removal period and the return of cattle been made.
- [46] The Magistrate in our view cannot be faulted for regulating and limiting the removal period and thereby restricting the effect of the prohibitory interdict granted in the first order. The relevant factual issues were pleaded, and if the Magistrate had not regulated or limited the period, there would be a position of untenable uncertainty inherent in the order regarding whether and when cattle can be returned. Indeed, no objection was raised in the notice of appeal in respect of this feature of the third order. The objection, rather, is that the Magistrate reduced the number of cattle that can be returned and the only question on appeal is thus whether the Trustees were entitled to that part of the order.
- [47] The Magistrates' purpose in reducing the number of cattle to be returned is clear: to ensure compliance with CARA. In this regard, section 1 of CARA defines "grazing capacity" as "the production capacity over the long term of that veld to meet the feed requirements of animals in such a manner that the natural vegetation thereon does not deteriorate or is not destroyed." Regulation 10 of CARA provides that the grazing capacity is expressed as a specified number of hectares per large stock unit indicated in a topo-cadastral map kept at the office of the relevant executive officer for this purpose. Regulation 11, titled "Number of animals that may be kept on veld", provides that every land user shall restrict the number of animals, expressed as large stock units, kept on the veld of the farm unit to not more than the number obtained by dividing the "area of the veld of his farm unit concerned, expressed in hectares by the applicable grazing capacity referred to in regulation 10, in respect of that

farm unit: Provided that such number may on occasion be exceeded on condition that the veld shall under all circumstances effectively be protected against deterioration and destruction.”. And the related facts were pleaded. In the founding affidavit, and with reference to the Grazing Report, the Trustees plead that the

grazing capacity of the allocated area (4.25 head of cattle) has been well-exceeded by the Appellants keeping of some 16 head of cattle and this is not disputed. In light thereof, there can be no difficulty with an order that restricts the return of cattle to a legally permissible number.

[48] However, in our view, the Magistrate was not in a position fairly or even correctly to determine that number to be five head of cattle, as he purported to do. The pleadings suggest that only 4.25 head of cattle would be permissible although the Grazing Report refers to four to five. But there is a further difficulty with the order as it presupposes that at the time the cattle may be returned, the legal requirements will be unchanged and that the Appellants intend to graze cattle on the veld rather than keep them in another way, such as with feed, that may not result in any breach of CARA, an issue which was not ventilated either factually or in argument. In the result, we vary the third order to deal with this difficulty.

The costs order

[49] The final issue raised in the notice of appeal concerns whether the Magistrate erred and misdirected himself in ordering the Appellants to pay the Respondents’ costs without justification. The Magistrate explained the costs order in his reasons for decision as informed by the fact that Appellants were responsible for the overgrazing of the allocated area, the undisputed evidence was that the overgrazing was severe and the Appellants had failed to reduce their livestock notwithstanding interventions from the relevant State department.

[50] It is trite that costs are only ordered in proceedings under ESTA in special circumstances. Disputes about the keeping of cattle are common and the importance of keeping cattle for some ESTA occupiers cannot be under-emphasised.[36] The history of cattle keeping is steeped in South Africa’s history of land dispossession which the Constitution seeks to redress.[37] And importantly, the history of impoundment itself has a draconian history that is intimately linked with the history of land dispossession.[38] ESTA occupiers who are authorized to keep cattle often face challenges of the sort that are highlighted by the circumstances of this case and the tensions between landowner and occupier which are manifest in this case can easily arise given South Africa’s

colonial and apartheid history.

- [51] The Appellants failed successfully to defend the Trustees' application before the Magistrate and have not succeeded in material measure in this appeal. However, the Magistrate did not consider whether the circumstances of the matter were such as to give rise to special circumstances that warrant a departure from the usual approach. This was a material misdirection.
- [52] The question remains whether the costs order against the Appellants was warranted and whether the costs of the appeal should be awarded. In our view, there are and were no special circumstances warranting a departure from the ordinary rule. Rather, what this case ultimately highlights is that parties (and their representatives) involved in litigation relating to ESTA occupiers' agreements to keep and graze cattle must plead their cases with sufficient clarity and particularity to allow the Court to engage the important issues at stake. This includes clearly pleading any material terms of any cattle keeping and grazing agreement. Moreover to the extent that a party wishes to raise a dispute of fact, Heher JA's reminder to parties in Wightman is apposite, where he remarked: "a litigant may not necessarily recognize or understand the nuances of a bare or general denial as a against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

Order

[51] The following order is made:

- (1) The appeal against the first and second orders made is dismissed. The date in the first order for the removal of livestock is varied to 15 February 2021.
- (2) The appeal against the third order is upheld and is replaced with an order in the following terms:

"3. The camp in question of 17.4 ha as assessed that was supplied to the 1st to 3rd Respondents shall be rested for a minimum period of two growing seasons until September 2023, after which the 1st to 3rd Respondents may return only the number of livestock permitted by the provisions of the Conservation of Agricultural Land Act 43 of 1983 and its Regulations applicable at that time."
- (3) The appeal against the costs order is upheld and is replaced with an order in the following terms: "Each party shall pay their own costs."
- (4) Each party is to pay their own costs in the appeal.

Cowen AJ

Acting Judge

Land Claims Court

I agree.

Meer AJP

Acting Judge President

Appearances

For the Appellants: NW Phalatsi, NW Phalatsi and Partners

For the Respondents: JS Stone instructed by Niemann Grobbelaar Attorneys.

[1]

It is common cause that this was the number of cattle kept at the date the application was instituted. In the judgment, the Magistrate refers to there being 18 cattle.

[2]

The description that follows does not precisely follow the wording used by the Magistrate, which has been

edited for present purposes to simplify the order, to use terminology consistent with what is used in this

judgment and to correct an obvious error of repetition in the second order.

[3]

As held by the Supreme Court of Appeal in *Adendorffs Boerderye v Shabalala and others*

[2017] ZASCA 37 (*Adendorffs Boerderye*). In terms of section 1 of CARA “a ‘land user’ means the owner of land, and includes— (a) any person who has a personal or real right in respect of any land in his capacity as fiduciary, fideicommissary,

servitude holder, possessor, lessee or occupier, irrespective of whether he resides thereon; ...”

[3]

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servitude holder, possessor, lessee or occupier, irrespective of whether he resides thereon; ...”

[4]

GNR 1048 of 25 May 1984. In terms of section 6 of CARA, the Minister may prescribe control measures to achieve the objects of the Act which shall be complied with by land users to whom they apply.

[5]

Regulation 9 is titled ‘Utilisation and protection of veld’. Regulation 9(1) provides – “(1) Every land user shall by means of as many of the following measures as are necessary in his situation, protect the veld on his farm unit effectively against

deterioration and destruction: (a) The veld concerned shall be utilised in alternating grazing and rest periods with due

regard to the physiological requirements of the vegetation thereon. (b) Animals of different kinds shall be kept on the veld concerned. (c) The number of animals kept on the veld concerned shall be restricted to not more than

the number of large stock units that may be kept thereon in terms of regulation 11. (d) A suitable soil conservation work shall be constructed and thereafter be maintained in

order to— (i) utilise the veld concerned in alternating grazing and rest periods; (ii) protect the veld concerned against excessive soil loss as a result of erosion through

the action of water or wind; or (iii) collect sediment from run-off water. (e) If the veld concerned shows signs of deterioration— (i) the number of animals kept thereon shall be suitably reduced; (ii) the portions showing signs of deterioration shall be withdrawn from grazing until they have recovered sufficiently; or (iii) a suitable grazing crop shall be established thereon in addition to the existing vegetation. (f) ...”

[5]

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“(1) Every land user shall by means of as many of the following measures as are necessary in his situation, protect the veld on his farm unit effectively against

deterioration and destruction:

(a) The veld concerned shall be utilised in alternating grazing and rest periods with due regard to the physiological requirements of the vegetation thereon.

- (b) Animals of different kinds shall be kept on the veld concerned.
- (c) The number of animals kept on the veld concerned shall be restricted to not more than the number of large stock units that may be kept thereon in terms of regulation 11.
- (d) A suitable soil conservation work shall be constructed and thereafter be maintained in order to—
 - (i) utilise the veld concerned in alternating grazing and rest periods;
 - (ii) protect the veld concerned against excessive soil loss as a result of erosion through the action of water or wind; or
 - (iii) collect sediment from run-off water.
- (e) If the veld concerned shows signs of deterioration—
 - (i) the number of animals kept thereon shall be suitably reduced;
 - (ii) the portions showing signs of deterioration shall be withdrawn from grazing until they have recovered sufficiently; or
 - (iii) a suitable grazing crop shall be established thereon in addition to the existing vegetation.
- (f) ...”

[6] Supra n 3.

[7] Supra n 3 at paras 30 to 34.

[8] Relying on *Hardenberg and another v Nedbank* 2015 (3) SA 470 (WCC) at para 26; *Bredenkamp v Du Toit* 1924 GWLD 15 at 19 and *Van der Walt v Abreu* 1999 (4) SA 85 (W) at 104 (D) A-E.

[9] Supra n 3 at para 28. See too *Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and others* 2019 (1) SA 154 (SCA) at para 59 to 60 in the context of the Land Reform (Labour Tenants) Act 3 of 1996. This Court approached the matter of *Ramohloki and Others v Radien (Pty) Ltd and others* [2020] ZALCC 31 (Ramohloki) on this basis.

[10] *Plascon-Evans Paints v Van Riebeeck Paints* 1984

(3) 623 (A) (Plascon-Evans) at 634H-635C.

[11] *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* [2008] ZASCA 6; 2008

(3) SA 371 (SCA) (Wightman) at para 13.

[12] Section 30 is titled ‘Arrests and Interdicts’ and provides: “Subject to the limits of jurisdiction prescribed by this Act, the court may grant against persons and things orders for arrest *tanquam*

suspectus de fuga, attachments, interdicts and mandamenten van spolie.”

[13] 1950

(2) SA 420 (A) at 424.

[14] Bryan A Garner A Dictionary of Modern Legal Usage (2 ed) Oxford 1995.

[15] Compare section 13(1A) of the Land Reform (Labour Tenants) Act 3 of 1996.

[16] Section 39(2) of the Constitution of the Republic of South Africa, 1996, requires Courts when interpreting legislation to “promote the spirit, purport and objects of the Bill of Rights.”

[17] Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another

[2008] ZACC 12; 2009 (1) SA 337 (CC) at para 45. This decision extended the well-established principle of statutory interpretation articulated in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001

(1) SA 545 (CC) at para 24 that where a statutory provision is reasonably capable of bearing a meaning which is in conformity with the Constitution, a Court should prefer that interpretation over one that would not be. It is thus not necessary to consider whether the restrictive interpretation might be inconsistent with the Constitution, which was not argued.

[18] Section 17 is titled ‘Choice of court’. Section 17(1) provides as follows: “A party may, subject to the provisions of sections 19 and 20, institute proceedings in the magistrate’s court within whose

area of jurisdiction the land in question is situate, or the Land Claims Court.” See *Mogotsi and others v Pienaar and others* 2000

(1) SA 577 (T) at 580.

[19] Section 17(2) of ESTA, which provides: ‘If all the parties to proceedings consent thereto, proceedings may be instituted in any division of the High Court within whose area of jurisdiction the land in question is situate.’ And see *Mkangeli and Others v Joubert and Others* 2002

(4) SA 36 (SCA) at para 15.

[20] *In re: Nedbank Limited v Thobejane and related matters* [2018] 4 All SA 694 (GP) (Thobejane) at paras 46 onwards.

[21] Section 1 of the Constitution. *Thobejane*, supra.

[22] *Margre Property Holdings CC v Jewula*

[2005] 2 All SA 119 (E) at 124 cited with approval in *Adendorffs Boerderye*, supra n 3.

- [23] Section 6(1) provides: “[s]ubject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly.” See too *Sibanyoni v Holtzhausen and Others* [2019] ZALCC 11 (*Sibanyoni*) at para 56 where Ngcukaitobi AJ held that “[w]here an occupier keeps cattle as part of an agreement with the owner, the right to use the land includes the right to graze one’s cattle.”
- [24] This was also recognized by Ngcukaitobi AJ in para 56 of *Sibanyoni*, supra n 23, where he stated: “[t]he rights of an occupier to keep cattle at a farm may, in certain circumstances, constitute a “service” agreed upon with the farm owner.”
- [25] 2019
- (3) SA 90 (SCA) at para 11.
- [26] *Slims (Pty) Ltd v another v Morris* NO 1988
- (1) SA 715 (A) at 744G-H.
- [27] Supra n 9.
- [28] 2001
- (3) SA 63 (SCA) at para 10.
- [29] The Supreme Court of Appeal was not dealing with the Magistrates Courts jurisdiction and the statement “and it alone” in the last sentence must be understood against that background.
- [30] Although not pleaded by the Trustees in this case, a transgression of CARA that results in severe overgrazing as has occurred in this case may result in a breach of section 6(3)(b) of ESTA which provides that an occupier may not ‘intentionally and unlawfully cause material damage to the property of the owner or person in charge.’
- [31] Supra n 3 at paras 22 and 25.
- [32] Supra n 3 at para 29.
- [33] Supra notes 10 and 11.
- [34] Supra n 11 at para 13.
- [35] The Magistrate refers in his reasons to the applicable principles restated in the *Adendorffs Boerderye* case, supra n 3 at para 24.
- [36] See *Ramohloki*, supra n 9 and *Sibanyoni* supra n 23.
- [37] See *Sibanyoni*, supra n 23 at paras 43 to 50.

[38] Sibanyoni, supra n 23 at para 50. See too the Constitutional Court decisions in Zondi v MEC for Traditional and Local Government Affairs 2005 (3) SA 589 (CC) at paras 38 to 42.

[SC1]I would rather keep this in but have moved to a footnote.

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