

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **VRYHEID** on **21 to 22 June**
before **Moloto** and **Gildenhuys JJ**

CASE NUMBER: LCC28/98

In the matter between:

C F LABUSCHAGNE

Plaintiff

and

M A SIBIYA
S SIBIYA

First Defendant
Second Defendant

JUDGMENT

MOLOTO J:

Introduction

[1] Plaintiff commenced common law proceedings on 16 May 1997 for the eviction of both defendants in the Magistrate's Court for the district of Vryheid under case number 931/97. The defendants pleaded that they are labour tenants as defined in the Land Reform (Labour Tenants) Act¹ (hereinafter referred to as "the Labour Tenants Act"); alternatively that they are occupiers as defined in the Extension of Security of Tenure Act² (hereinafter referred to as "ESTA"). The matter came up for hearing before the Magistrate on 12 March 1998. In between the dates of issuing summons and hearing the matter, the Labour Tenants Act was amended by the Land Restitution and Reform Laws Amendment Act, 1997³ (hereinafter referred to as "the Amendment Act, 1997") which commenced on 21 November 1997. Whereas before the amendment the magistrate's court had jurisdiction to hear a case in which the Labour Tenants Act was to be interpreted or applied, it only had jurisdiction under certain circumstances after the amendment.

1 Act 3 of 1996, as amended.

2 Act 62 of 1997, as amended.

3 Act 63 of 1997.

The relevant amendment is contained in section 34 of the Amendment Act, 1997 which introduced section 13(1A) to the Labour Tenants Act, and reads as follows:

“If an issue arises in a case in a magistrate’s court or a High Court which requires that court to interpret or apply this Act and -

- (a) no oral evidence has been led, such court shall transfer the case to the Court⁴ and no further steps may be taken in the case in such court;
- (b) any oral evidence has been led, such court shall decide the matter in accordance with the provisions of this Act”.

[2] Relying on the amendment the defendants , at the time of hearing of the case by the Magistrate, applied for the transfer of the matter to this Court as no oral evidence had been led. The plaintiff’s attorney did not oppose the application but sought an award of wasted costs for the day. The Magistrate made the following ruling:

“The court rules that the words ‘shall transfer’ and ‘no further steps’ in section 13(1A)(a) are peremptory. Therefore this court has no choice but to transfer the case to the Land Claims Court. The words ‘no further steps’ preclude this court from making a costs award today relating to wasted costs for today. The court does note on the record Mr Van der Merwe’s request that he be allowed to argue the issue of wasted costs for today in the Land Claims Court.

In terms of section 13 of Act 3 of 1996 the court transfers this case to the Land Claims Court.”

[3] The case was duly transferred, but counsel for plaintiff did not argue the question of wasted costs in the Magistrate’s Court before us. I will consider the question of costs later. The defendants abandoned their Special Plea so it is not necessary to elaborate on that issue here. The matter proceeded on its merits.

The facts

[4] In an attempt to narrow down the issues, the parties addressed questionnaires to each other for admission or denial. The defendants admitted the following facts:

4 In terms of section 1(iv) of the Labour Tenants Act, “‘Court’ means the Land Claims Court established by section 22 of the Restitution of Land Rights Act, 1994.”

1 the plaintiff is the owner of the farm Groothoek, district of Vryheid, KwaZulu-
Natal (hereinafter referred to as “the farm”);

2 first defendant was employed by the plaintiff; and

3 first defendant was dismissed on or about 11 September 1996.

[5] On the other hand, plaintiff admitted the following facts in reply to the defendants’
questionnaire:

1 the first defendant was born on the farm Kransdeel, which was consolidated with
the farm Kliprand into the farm;

2 the first defendant worked for plaintiff on the farm and, amongst other duties, he
drove plaintiff’s tractor;

3 the first defendant’s father’s name is Alson Sibiya;

4 the first defendant’s father worked on the farm;

5 the first defendant’s father worked for the plaintiff and was paid an amount of
approximately R150,00 per month;

6 the first defendant’s father had the right to keep cattle on the farm;

7 the first defendant’s father is also the second defendant’s father;

8 the plaintiff bought the farm from a teacher, one Erasmus;

[6] In addition to the above admitted facts, the plaintiff testified and called a witness to testify for him. The defendants closed their case without leading evidence. The evidence for the plaintiff was to the effect that -

- 1 According to the Deeds Office search, Exhibit "C", the plaintiff acquired the farm Kransdeel on 10 November 1983 by virtue of Deed of Transfer No T28609/83 and acquired the farm Kliprand by Deed of Transfer No T9250/92 dated 13 April 1992. The two farms were consolidated into the farm Grootfontein under Certificate of Consolidated Title No T9251/92 dated 13 April 1992.
- 2 When the plaintiff acquired Kransdeel, defendants' father lived and worked on that farm. First defendant attended school and second defendant worked for the plaintiff for two months and then left for Johannesburg.
- 3 Mr Alson Sibiyi left the farm approximately at the end of 1984, or the beginning of 1985 for Hlabisa, a black reserve. Mr Alson Sibiyi had seven cattle when plaintiff got to the farm and he gave him permission to keep the seven cattle. Mr Alson Sibiyi had no cropping rights, but had a garden around his home, where he planted mealies. In addition to the R150,00 per month remuneration, Mr Alson Sibiyi received a bag of mealie meal.
- 4 In 1987, first defendant started working for plaintiff and he stayed in a room provided by the plaintiff. He had neither a wife nor children staying with him. Around 1989/90 he asked for and obtained permission to establish a home on the farm. He moved into the home with his wife, having married in the interim. He had no livestock. He had no cropping rights, but had a garden about one hectare in area, including the area occupied by his homestead. Mr Alson Sibiyi returned to work for plaintiff around 1990/1991. He stayed with first defendant in the latter's home. He worked in the plaintiff's garden and was paid R250,00 per month. The plaintiff had no problem with him staying with first defendant. Around 1994, Mr Alson Sibiyi left plaintiff's employment for reasons that are not relevant to this

case. First defendant remained on the farm. In 1994, and on the advice of the Landbou Werkgewer Unie (“LWU”), the plaintiff reduced his relationship with first defendant to writing because unemployment insurance had become payable. According to the plaintiff, the written instrument did not change the relationship as it had been before, except the requirement to pay unemployment insurance. The written instrument was a mere recordal of their relationship. However, the contract documents and all other documents he used thenceforth were pro forma documents supplied by the LWU.

- 5 The plaintiff states that second defendant came to visit with first defendant from time to time. He (plaintiff) did not interfere in that arrangement. In about 1996, first defendant complained to him that second defendant was chasing his (first defendant’s) wife away. Relying on a term of one of the written agreements (the “bywonerskontrak”), plaintiff demanded that first defendant evict second defendant from the farm. Plaintiff’s reason for this attitude was that the “bywonerskontrak” prohibited first defendant from having people who were not his direct family members staying with him. Plaintiff did not at that stage evict second defendant himself because he did not know how to do it. He left it to first defendant to evict second defendant. According to plaintiff, failure by first defendant to remove second defendant rendered him in breach of the “bywonerskontrak”. First defendant told plaintiff he would not remove second defendant from the farm because he is his brother. He withdrew his complaint about second defendant chasing his wife away. Plaintiff would hear nothing of this. When first defendant did not remove second defendant, plaintiff instituted disciplinary proceedings against first defendant and dismissed him. Plaintiff then issued notices to first and second defendants to leave the farm. They did not, and plaintiff issued summons in the Magistrate’s Court, Vryheid. That was the evidence.

[7] As mentioned earlier, defendants did not testify.

Agreed facts

[8] At the close of the defence case counsel for the parties submitted a list of agreed facts, which facts, although repetitive of some of the admitted facts, are as follows-

- “(1) the plaintiff is the registered owner of the farm known as Groothoek;
- (2) first defendant was dismissed by the plaintiff during (sic) or about 11 September 1996;
- (3) Annexures ‘B1’, ‘B2’, ‘C1’, and ‘C2’, to the Particulars of Claim (being pages 9, 10, 11, 12 and 13 of the record) were served on Alson Sibiya;
- (4) the farms Kransdeel and Kliprand were consolidated into the farm known as Groothoek during 1990 (see Exhibit ‘C’ for the correct date);
- (5) first defendant was born on the farm known as Kransdeel during 1967;
- (6) the said Alson Sibiya is the father of first defendant.”

Requirements for Labour Tenancy

[9] In order to qualify as labour tenants as defined in the Labour Tenants Act, and therefore succeed in their defence based on labour tenancy, the defendants must satisfy the requirements for labour tenancy as defined in that Act. A labour tenant means:

“a person-

- (a) who is residing or has the right to reside on a farm;
- (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and
- (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm,

including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3(4) and (5), but excluding a farmworker.”⁵

[10] A “farmworker” means:

“a person who is employed on a farm in terms of a contract of employment which provides that-

- (a) in return for the labour which he or she provides to the owner or lessee of the farm, he or she shall be paid predominantly in cash or in some other form of remuneration, and not predominantly in the right to occupy and use land; and
- (b) he or she is obliged to perform his or her services personally;”⁶

The first defendant

(a) Ad paragraph (a) of the definition

[11] Plaintiff’s evidence was to the effect that first defendant was born on the portion of the farm Groothoek which was known as Kransdeel before the consolidation. There is no evidence that he ever left the farm. In 1987, he started working for the plaintiff. Later he sought and obtained plaintiff’s permission to establish a home of his own on the farm, a home into which he moved with his wife.

[12] That satisfies the requirements of paragraph (a) of the definition of labour tenant in that he resides or has the right to reside on the farm of the plaintiff.

(b) Ad paragraph (b) of the definition

[13] The plaintiff testified that the first defendant worked for him in 1987 and the relationship was fine. He (first defendant) had no livestock and no permission to crop, but had a garden of about one hectare in area, inclusive of the area occupied by the homestead. The plaintiff left the impression that by characterising the land first defendant cropped on as a garden, it should not

5 Section 1(xi) of the Labour Tenants Act.

6 Section 1(ix) of the Labour Tenants Act.

be accepted as cropping land. If that was indeed the impression he wanted to give, I disagree. The Labour Tenants Act does not specify the size of the cropping land.

[14] The argument of Mr De Wet, counsel for the plaintiff, that the first defendant cannot qualify under this paragraph of the definition because he paid rent in cash under a separate contract, cannot hold. The service contract provides for a total remuneration and then stipulates that the following deductions may be made :

UIF R3,00

Housing R300,00

Administration R20,00

Firewood R10,00.

The nett remaining wage was stipulated at R300,00. The combined effect⁷ of the two contracts (the “bywonerskontrak” and the service contract) is that the plaintiff earns R633,00 and has housing and cropping rights.

[15] The first defendant was paid a minimal cash wage and applying the approach adopted by the Supreme Court of Appeal⁸ it is overwhelmingly clear that the other rights enjoyed by the first defendant far outweigh his cash remuneration. I am satisfied, therefore, that residence and cropping rights were granted by the owner of the farm in return for the provision of labour. He, therefore, satisfies the requirements of paragraph (b) of the definition of labour tenant.

7 See section 2(6) of the Labour Tenants Act, which reads as follows:

“(6) For the purpose of establishing whether a person is a labour tenant, a court shall have regard to the combined effect and substance of all agreements entered into between the person who avers that he or she is a labour tenant and his or her parent or grandparent, and the owner or lessee of the land concerned.”

8 *Ngcobo and others v Salimba CC; Ngcobo v van Rensburg* [1999] 2 All SA 491 (A) at 510

(c) **Ad paragraph (c) of the definition**

[16] It is plaintiff's testimony that when he bought the farm Kransdeel, Mr Alson Sibiya, lived on the farm with his family including his two sons, the defendants. Mr Alson Sibiya worked for the plaintiff and was, at that stage paid R150,00 per month and received one bag of mealie meal per month. He had seven cattle on the farm, which remained on the farm after plaintiff bought it. He also had a garden around his house where he planted mealies, although the plaintiff says he had no cropping rights.

[17] Mr Alson Sibiya was paid a minimal cash wage. It is once again overwhelmingly clear that the other rights enjoyed by Mr Alson Sibiya far outweigh his cash remuneration. I am satisfied, therefore, that residence, cropping and grazing rights were granted by the owner of the farm in return for the provision of labour. Consequently I am satisfied that the first defendant satisfies paragraph (c) of the definition of labour tenant.

(d) **Whether first defendant is a farmworker**

[18] It remains to determine whether first defendant is a labour tenant or farmworker. In 1994, so the evidence went, the plaintiff, on the advice of the LWU, reduced the terms of his relationship to writing. In his own words, nothing of the previous relationship was changed, it being a mere recordal thereof. The reason for reducing the terms to writing was the fact that unemployment insurance was then payable. It is in these written documents [pages 32(1), 32(2), 33(1) and 33(2) of the record] that first defendant's remuneration is mentioned. If one accepts that the documents are a mere record of what prevailed before, then one must accept that the remuneration was the same before as stated on the documents. According to the latest service contract, first defendant earned R633,00 per month of which R300,00 was retained by the plaintiff as rental, R20,00 as an administration fee and R10,00 for firewood. This makes a total of R333,00 retained by the plaintiff, thus leaving first defendant with R300,00. These amounts do not include the one hectare of land given for cropping. In a previous service contract, R25,00 per month was deducted for the cropping land. Oosthuizen, the farm manager, testified that the R25,00 per month is less than market value. The effect (if the cropping land is added) of this is thus that the value of the first

defendant's right to occupy and use the land, exceeds the cash value of the remuneration; accordingly he is not a farmworker.

[19] The first defendant is found to satisfy the requirements for labour tenancy and in the light of the determination I intend to make with respect to him, I do not find it necessary to analyse the evidence and argument with regard to his alternative plea that he is an occupier in terms of ESTA.

The second defendant

[20] Whereas the second defendant was also on the farm when the plaintiff acquired it, it is said that he left the farm for Johannesburg at some stage. It is not clear how long he was away for, but on his return to the farm he did not provide any labour to the plaintiff. Neither did he have any grazing or cropping rights.

[21] Accordingly I find that second defendant is not a labour tenant as defined in the Labour Tenants Act.

Whether second defendant is an occupier

[22] Having found that the second defendant is not a labour tenant as defined in the Labour Tenants Act, it becomes necessary to investigate whether he qualifies as an occupier under ESTA.

[23] The term "occupier" is defined in section 1 of ESTA thus-

“‘occupier’ means a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding -

- (a) a labour tenant in terms of the Land Reform (Labour tenants) Act, 1996 (Act No 3 of 1996);
- (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.”

[24] The prescribed amount in terms of paragraph (c) above is R5 000,00 per month.⁹

[25] The evidence shows that the plaintiff acquired the two farms, Kransdeel and Kliprand; the second defendant worked for him for two months and then left for Johannesburg. When the plaintiff acquired the first farm Kransdeel, second defendant was living with his father on that farm. The first farm was acquired on 10 November 1983. The plaintiff states that the second defendant worked for him from August 1983 to October 1983; presumably plaintiff leased the first farm before buying it. Plaintiff said that he was aware that the second defendant came to visit the first defendant from time to time. This did not cause him concern.

[26] The plaintiff further gave evidence that it was a term of the agreement under which the first defendant was allowed occupational rights on the farm that only the first defendant and his direct family would be entitled to live on the farm. This would exclude his brother, the second defendant.

[27] During the middle of 1996 the first defendant complained to the plaintiff that the second defendant was causing problems relating to the wife of the first defendant. The plaintiff testified that, when the complaint was made, he became aware for the first time that the second defendant was living permanently on the farm. He considered this to be a breach of the agreement under which first defendant occupied the farm. Accordingly, he delivered a letter to first defendant on 8 July 1996 which read as follows:

“Jy word hiermee in kennis gestel dat jou broer Sheya Sibiya die plaas Groothoek tesame met al sy besittings moet verlaat binne 7 (sewe) dae vanaf bg. datum.

Aangesien jy verantwoordelik is vir jou stat omdat jy die enigste werknemer al hier is, en ook die kontrak aangegaan het, word aan jou opgedra om hom van die plaas af te kry.”

A further letter was handed to first defendant on the same date, for delivery to second defendant. This letter reads as follows:

9 Regulation 2(1) of the Regulations contained in Government Notice R1632 in Government Gazette No 19587 of 18 December 1998.

“Jy word hiermee in kennis gestel dat jy die plaas Groothoek tesame met al jou besittings moet verlaat binne 7 (sewe) dae vanaf bg. datum.”

Second defendant did not leave the farm.

[28] A week later, on 15 July 1996, the plaintiff delivered two further letters to the first defendant. The first letter was addressed to first defendant, requiring him to cause second defendant to leave the farm. The second letter was addressed to second defendant, requiring him to vacate the farm. The first defendant refused to sign an acknowledgment of receipt, saying that he could not get his brother to leave the farm.

[29] Plaintiff received a letter dated 22 July 1996 from the General United Workers Union of South Africa, a portion of which reads as follows (I quote *verbatim*):

“Jy word hiermee kennis gestel dat Sheya Sibiyi ons se kliënt is. Ons verskyn namens hom as die unie waar hy ’n kliënt is. Jy moet opmerkings neem dat hulle is op daar plaas vir jare, en hulle kwalifiseer as huurarbeiders.”

The letter concluded with an allegation that second defendant was entitled to remain on the farm.

[30] The plaintiff delivered further written warnings to the first defendant on 2, 9 and 28 August 1996 and 9 September 1996 to remove his brother (the second defendant) from the farm. Despite all these warnings the first defendant refused to take steps to remove his brother from the farm.

[31] A disciplinary hearing was held on 11 September 1996. The first defendant was charged with failing to remove his brother from the farm. The first defendant’s defence was that his brother refused to go. The first defendant was found guilty at the disciplinary enquiry, and was dismissed from plaintiff’s employment on 12 September 1996. The first defendant did not accept his dismissal and instituted proceedings in terms of the applicable labour legislation. Those proceedings eventually came before the Agricultural Labour Court on 12 May 1997 and were struck from the roll because the first defendant failed to appear. During June 1997, the plaintiff caused a summons for ejectment to be served on the two defendants.

[32] It has already been found that the second defendant is not a labour tenant. The second defendant bears the onus of establishing that he is an occupier in terms of ESTA. To do so, he must show that he occupied the property with the consent of the plaintiff. Such consent may be explicitly or tacitly given.

[33] It was argued on behalf of second defendant that plaintiff's delay in commencing action against second defendant amounts to tacit consent. After the plaintiff became aware of second defendant's permanent presence on the farm, there was no delay in delivering letters requiring him to vacate the farm, as I have indicated earlier in this judgment. It is clear from the letter by the General United Workers Union of South Africa of 22 July 1996 that the second defendant was aware that the plaintiff did not consent to his presence on the farm and required him to vacate the farm. After first defendant's dismissal, there was a delay of some nine months before a summons for the eviction of both defendants was served on the defendants. Eight of these nine months were taken up by proceedings between plaintiff and first defendant under the labour laws. These proceedings ended on 12 May 1997, and summons for the eviction of the two defendants was served on 5 June 1997.

[34] The plaintiff was not cross-examined on the delay in the service of the summons and the possible tacit consent which could emanate therefrom. A probable explanation for the delay is that plaintiff wanted to take a prudent course by proceeding against both defendants in the same action, and that he waited for the proceedings under the labour legislation to end before commencing the action. None of the defendants gave evidence. They did not tell us what impression the delay implanted in their minds.

[35] I have been able to find two decided cases where it was accepted that a person was an occupier under ESTA because he had tacit consent to occupy. The first of these cases is an unreported review judgment by Dodson J in the case of *Atkinson v Van Wyk and Another*,¹⁰ where he reviewed an eviction order granted by default against two defendants. Dodson J held as follows:

10 LCC case 7R/98 as yet unreported.

“Paragraph 2 of the attorney’s certificate quoted in paragraph 4 above states that the second defendant occupied the premises with the consent of the first defendant while the latter’s employment with the plaintiff subsisted. It does not say that the second defendant had the consent of the plaintiff at the time that she so occupied the premises. However, in the absence of any explanation to the contrary, the probability is that the plaintiff, as owner, would have been aware of a person who occupied one of his employee’s cottages with the consent of the employee. If he was aware of her occupation and did not object to it when the employment contract still subsisted, that would have been sufficient to constitute tacit consent. Tacit consent is sufficient for purposes of the ESTA.”

In the present case, as soon as the plaintiff became aware that the second defendant was living permanently on the farm, he did object to second defendant’s occupation, and second defendant was aware of his objection.

[36] The second case on the subject of tacit consent is *Rademeyer and Others v Western Districts Council and Others*.¹¹ In that case, certain persons erected informal dwellings on land belonging to a local authority. The local authority resolved to take steps for the provision of basic water and sanitation facilities to those persons. Nepgen J held that the persons concerned were occupiers under ESTA because they had the tacit consent of the local authority to occupy the land concerned. His reasoning is as follows:

“It seems to be clear, however, that upon becoming aware of the presence of the intervening respondents on the respondent’s property, or at the latest by 4 November 1997, the respondent’s attitude was that the intervening respondents could remain on the respondent’s property until alternative arrangements could be made to house them elsewhere. In my view this is apparent from the resolution taken by the executive committee of the respondent on 4 November 1997 that basic water and sanitation facilities be made available as a matter of urgency for the families at Fitches Corner and the further resolution that a request be made to obtain funds as a matter of urgency to finance such basic facilities. This being so, it is my view that, at the time this application was launched, the intervening respondents and their families were occupying the respondent’s property with the knowledge of the respondent and that the respondent had acquiesced therein.”

In that case, there was positive action by the local authority from which tacit consent could be inferred. In the present case, there is none.

[37] Should the plaintiff in the present case have consented to the second defendant living on his farm without receiving any consideration in return, he would have been yielding some of his ownership rights. This would have been tantamount to a waiver of those rights (albeit for the period of second defendant’s occupation only), and court decisions on the tacit waiver of a right

11 1998 (3) SA 1011 (SE) at 1016.

might be of assistance. In the case of *Margate Estates Limited v Urtel (Pty) Ltd*,¹² Fannin J dealt with an alleged tacit waiver of a servitudinal right constituted by the inaction of the dominant owner. It was held at 291G that:

“ . . . the inaction of the dominant owner must be such that, in the circumstances of the case, it can properly be construed as the grant of a right to do something which is inconsistent with the continued existence of the servitude.”

Burne J (in the same case) held that waiver is a bilateral process. He said at 294E:

“Prominence is seldom given to the question whether the person in whose favour waiver operates has accepted the process, thereby making it bilateral.”

[38] In my view, the same requirements apply to tacit consent. A person relying on tacit consent must show firstly, that the person who allegedly gave the consent acted, or refrained from acting in a way which manifested consent and, secondly, the recipient acted or refrained from acting in a way which manifested acceptance of the grant of tacit consent. The second defendant did not give evidence on either aspect. Plaintiff was not examined or cross-examined on the averment that his inaction could have put second defendant under that impression.

[39] In the matter of *Collen v Rietfontein Engineering Works*,¹³ Centlivres JA (as he then was) said at 436:

“[T]he *onus* of proving waiver is strictly on the party alleging it and he must show that the other party with full knowledge of his right decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.”

In the matter of *Cape Town Municipality v Allie NO*,¹⁴ Marais AJ considered an alleged tacit acknowledgment of liability raised by way of defence to a prescription claim. He held as follows on 7H:

12 1965 1 SA 279 (N).

13 1948 (1) SA 413 (A) at 436.

14 1981 2 SA 1 (C) on 7H.

“Thirdly, the test is objective. What did the debtor’s conduct convey outwardly? I think that this must be so because the concept of a tacit acknowledgment of liability is irreconcilable with the debtor being permitted to negate or nullify the impression which his outward conduct conveyed, by claiming *ex post facto* to have had a subjective intent which is at odds with his outward conduct.”

[40] The plaintiff made it well known that he required the second defendant to vacate the farm. The mere delay in proceeding with legal action against the second defendant for the period during which the labour dispute with the first defendant was being dealt with cannot objectively be construed as tacit consent to occupy the farm. It can, at most, give rise to an inference that consent was granted.¹⁵ The evidence by plaintiff rebuts such an inference. There is also no evidence that the second defendant acted as if he had accepted permission to remain on the farm. Accordingly, I hold that second defendant, after he returned to the farm, did not have and never obtained consent from the plaintiff (expressly or tacitly) to live there.

[41] Mr Van der Walt argued in the alternative that second defendant should be deemed an occupier in terms of section 3(2) of ESTA. Mr de Wet argued that section 3(2) of ESTA is not applicable in this case because the case was pending at the commencement of ESTA and the sections made applicable to pending cases are listed in section 16. Section 3 is not one of them. Section 3(2) reads:

- “(2) If a person who resided on or used land on 4 February 1997 previously did so with consent, and such consent was lawfully withdrawn prior to that date -
- (a) that person shall be deemed to be an occupier, provided that he or she has resided continuously on that land since consent was withdrawn; and
 - (b) the withdrawal of consent shall be deemed to be a valid termination of the right of residence in terms of section 8, provided that it was just and equitable, having regard to the provisions of section 8.”

[42] The applicability or otherwise of section 3 to pending cases at the commencement of ESTA was considered by this Court in *Masondo and others v Woerman*.¹⁶ In that case the Court found that section 3 is not applicable to pending cases and I have found nothing in the present case to convince me to the contrary. The section is unambiguous in its provisions. It is retrospective

15 *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others* 1997 (1) SA 526 at 531H.

16 LCC case 139/98, as yet unreported.

in its operation but not to pending cases. Sections applicable to pending cases are listed in section 16 and section 3 is not one of them. Section 16 reads:

“The provisions of sections 5, 6, 7, 8, 9, 10, 11, 12, 13 and 15 shall apply to proceedings for eviction pending in any court at the commencement of this Act.”

[43] It is evident from ESTA that the legislature applied its mind to all possible situations which might have arisen before the commencement of ESTA. First, it enacted section 3 to operate retrospectively for people for whom consent was withdrawn prior to 4 February 1997. Second it enacted section 16 for pending cases and finally it enacted section 14 for people who were evicted between 4 February 1997 and the commencement of ESTA. Section 14(2) reads:

“(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).”

[44] If the legislature had wanted section 3 to apply to pending cases, it was the simplest thing to add it to the sections listed in section 16. Accordingly second defendant is not deemed an occupier in terms of section 3. Therefore, he is not an occupier under ESTA.

Whether the defendants stand to be evicted

(a) **The first defendant**

[45] Having been found to be a labour tenant, any eviction of the first defendant must be in accordance with the provisions of the Labour Tenants Act. Section 7(2) of the Labour Tenants Act provides :

- “(2) No order for eviction in terms of section 5 shall be made unless it is just and equitable and-
- (a) subject to the provisions of section 9(1), the labour tenant has, contrary to the agreement between the parties, refused or failed to provide labour to the owner or lessee and, despite one calendar month's written notice having been given to him or her, still refuses or fails to provide such labour; or
 - (b) the labour tenant or his or her associate has committed such a material breach of the relationship between the labour tenant or associate and the owner or lessee, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship.”

[46] First defendant did not refuse to provide labour, therefore may not be evicted in terms of section 7(2)(a). He refused to evict second defendant when plaintiff demanded that he does so. It is noteworthy that plaintiff instituted this action against second defendant and yet said in evidence that he required first defendant to evict second defendant because he did not know how he could do it himself. In the circumstances, the first defendant's failure to evict second defendant cannot be such a material breach of the relationship between the plaintiff and the first defendant as to justify the latter's eviction. Accordingly, Mr De Wet's submission that first defendant be evicted in terms of section 7(2)(b) of the Labour Tenants Act, even though that section was not pleaded, cannot be accepted. Even if I am wrong in finding that first defendant's breach is not material, he can still not be evicted because the plaintiff has not complied with the formalities as prescribed in section 11 of the Labour Tenants Act.¹⁷

17 Section 11 provides :

- “(1) An owner who intends to evict a person in terms of the provisions of this Chapter, shall give the labour tenant and the Director-General not less than two calendar months' written notice of his or her intention to obtain an order for eviction.
- (2) the notice referred to in subsection 1 shall, in addition to any prescribed particulars, also contain the grounds on which such intended eviction is based.
- (3) the Director-General shall during the period referred to in subsection (1) convene a meeting between the labour tenant and the owner in order to attempt to mediate a settlement of the dispute between the labour tenant and owner.”

(b) **The second defendant**

[47] Having found that second defendant is neither a labour tenant nor an occupier it remains to enquire whether this Court has jurisdiction to evict him. Section 22(2)(c) of the Restitution of Land Rights Act¹⁸ states:

“22(2) Subject to Chapter 8 of the Constitution, the Court shall have jurisdiction throughout the Republic and shall have-

- (a) . . . ;
- (b) . . . ;
- (c) the power to decide any issue either in terms of this Act or in terms of any other law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the Court considers it to be in the interests of justice to do so.”

[48] This paragraph of section 22(2) was introduced on 23 April 1999.¹⁹ It is, therefore, doubtful whether it confers jurisdiction on the Court for purposes of pending matters at the time of its enactment. I will not decide this issue, as I am satisfied the Court has jurisdiction from other sources which I consider presently.

[49] Section 29 of the Labour Tenants Act reads:

“29 The 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 to grant interlocutory orders and interdicts, and shall have all such powers in relation to matters falling within its jurisdiction as are possessed by a provincial division of the Supreme Court having jurisdiction in civil proceedings at the place where the affected land is situated, including the powers of such a division in relation to any contempt of the Court.”

18 Act 22 of 1994, as amended.

19 Introduced by section 7(b) of the Land Restitution and Reform Laws Amendment Act, 1999 (Act 18 of 1999).

[50] Determining this matter finally, even though second defendant is neither a labour tenant nor occupier, is ancillary or reasonably incidental to the performance of the Court's functions under the Labour Tenants Act. Similar powers are conferred by section 20 of ESTA.

[51] Section 13(1A)(a) of the Labour Tenants Act²⁰ lends support to my view that this Court has jurisdiction. The relevant portion reads:

“(a) . . . such court shall transfer the case to the Court and no further steps may be taken in the case in such court.” (my emphasis)

If the underlined words do, as I believe, divest the magistrate's court and the High Court of jurisdiction to deal with the case any further, then this Court, must by necessary implication, have the power (as an ancillary power under section 29) to finalise the matter on whatever cause of action might entitle the parties to relief. This case came to this Court under circumstances envisaged in section 13(1A). Besides, if this Court does not finally decide the matter, the parties will be put to the expense of instituting fresh proceedings which would be costly, inconvenient, and a waste of time. This would be neither in the public interest nor fair and equitable.²¹

[52] Accordingly, I find that this Court has jurisdiction to evict second defendant.

Costs

[53] This Court does not usually award costs except in exceptional circumstances.²² The reason for this is that the legislation being dealt with is social legislation. Both parties in this case were entitled to litigate and neither side appears to have been frivolous or vexatious.

20 The full sub-section is quoted in paragraph 1 of this judgment.

21 See *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and others*; *Transnet Ltd (Autonet Division) v Chairman, National Transport Commission and others* [1999] 3 All SA 365 (A) at 372 and *Minister of Public Works v Haffejee NO* [1996] 4 All SA 355 (A); 1996(3) SA 745 (A) at 754B-G.

22 *New Adventure Investments 19 (Pty) and Another v Mbatha and Another* 1999 (1) SA 776 (LCC); *City Council of Springs v the Occupants of the farm Kwa Thema 210* [1998] 4 All SA 155 (LCC); *Ntuli and Others v Smith and Another* 1999(2) SA 540 (LCC); [1999] 2 All SA 1(LCC).

[54] The following order is made:

- 1(a) Plaintiff's claim is dismissed with respect to first defendant and granted with respect to second defendant.
 - (b) Second defendant is ordered to vacate plaintiff's farm within 30 days of service on him of this order, failing which the sheriff is authorised to remove him from the land immediately on expiry of the 30 day notice period.
- 2 Each party to pay its own costs.

JUDGE J MOLOTO

I agree

JUDGE A GILDENHUYS

Heard on: 21 and 22 June 1999

Handed down: 4 August 1999

For the plaintiff:

Adv A de Wet instructed by *Cox & Partners*, Vryheid.

For the defendants:

Adv C G Van der Walt instructed by *Loots Attorneys*, Pietermaritzburg.