



**IN THE EASTERN CAPE HIGH COURT, GRAHAMSTOWN****CASE NO.: 4074/2007****[REPORTABLE]**

In the matter between:

**ANDREW JORDAAN**

Plaintiff

and

**JOCOBUS P K KOEKEMOER**

First Defendant

**RIA KOEKEMOER**Second Defendant

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**JUDGMENT**

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**SUMMARY-** *LAND -land reform- Eviction- Extension of Security of Tenure Act 62 of 1997- Section 17, 19 and 20 of **ESTA** entrusted application of Act to the exclusive jurisdiction of the magistrate's Court and Land Claims Court. Jurisdiction of the High Court is expressly excluded by section 20(2) of Act unless all parties consent to such jurisdiction in terms of Sec 17(2). Section 2 thereof excludes a town house from land to which **ESTA** applies.*

**PRACTICE- PLEADINGS-** *Court cannot decide a case on a defence not specifically raised in plea. Purpose of pleading is to clarify issues between parties and a pleader cannot be allowed to direct attention of the other party to one issue and then, at trial, attempt to canvass another.*

**CONTRACT- Discharge of- Contract of unspecified duration- Unilateral termination- Whether contract of unspecified duration which is to endure in perpetuity can be terminated upon reasonable notice- Contract terminable on death of other party cannot be terminated on reasonable notice by owner of the land in which evicted defendants reside- Where intention of parties show that contract to endure indefinitely contract cannot be terminated upon reasonable notice unless there is indication in contract pointing to that direction.**

**TSHIKI AJ**

## **A) INTRODUCTION**

[1] In this action the plaintiff is seeking judgment for the eviction of the two defendants from his property situate at No 15 du Plessis Street, Cradock. According to the plaintiff the defendants are in occupation of the property having hitherto been permitted by plaintiff to occupy the property free of charge. The plaintiff has now withdrawn his consent for the defendants' continued occupation of the property and has demanded that they vacate the property. According to him they are unlawful occupiers of the property as defined in **section 1 of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act**<sup>1</sup> (hereinafter referred to as **PIE**).

[2] Defendants are resisting the claim on the grounds that in 2002 they reached an oral settlement agreement with the plaintiff for them to move out of the plaintiff's farm known as Spekboom Boerdery Farm. (hereinafter

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<sup>1</sup> Act 19 of 1998

referred to as the farm). The agreement was that they would move out of the farm of the plaintiff in which they had been staying, and where the first defendant had been employed by the plaintiff, to occupy the immovable property at No 15 du Plessis Street, Cradock. According to the defendants when they were occupiers of the farm in Cradock they were protected by the **Extension of Security of Tenure Act**<sup>2</sup> (hereinafter referred to as **ESTA**). The defendants' case is that the protection by **ESTA** also applies to the property at No 15 du Plessis Street, Cradock. The decision to move the defendants from the farm to the house in Cradock town was taken after the first defendant had retired from his employ with the plaintiff. It is in dispute whether this move was initiated by the plaintiff or the first defendant.

## B) ISSUES

[3] All the issues in this action remain contested . If the defendants' reliance on **ESTA** succeeds it would mean that this Court does not have jurisdiction to try this case. This is so because section 19 of **ESTA** provides:

'(1) A magistrate's Court-

(c) shall have jurisdiction in respect of

(i) proceedings for eviction or reinstatement; and

(ii) criminal proceedings in terms of this Act; and

(d) shall be competent-

(iii) to grant interdicts in terms of this Act; and

(iv) to issue declaratory orders as to the rights of a party in terms of this Act.

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<sup>2</sup> Act 62 of 1997

(2) Civil appeals from magistrates' Court in terms of this Act shall lie to the Land Claims Court;

(3) ....'

[4] Whereas section 17 of **ESTA** provides as follows:-

'(1) A party may, subject to the provisions of section 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.

(2) If all the parties to proceedings consent thereto, proceedings may be instituted in any division of the High Court within whose jurisdiction the land in question is situate.'

[5] It follows, therefore that, unless all the parties have consented to the matter being filed in the High Court which would ordinarily have jurisdiction, all proceedings of eviction in terms of this Act shall be instituted in the magistrate's Court. (**See Mkangeli v Joubert**<sup>3</sup>) where at 478 paragraph 15

**Brand JA** held:

'In terms of section 17, 19 and 20 of **ESTA** the application of its provisions at first instance are entrusted to the exclusive jurisdiction of the magistrate's Court and the Land Claim's Court, with limited exception that the High Court may exercise jurisdiction with the consent of all the parties to the proceedings (Section 17(2)). Save for the exception the jurisdiction of the High Court to apply the terms of the Act is expressly excluded by section 20(2).'

[6] In this case there is no suggestion that any of the parties to the present matter consented to the jurisdiction of the High Court. It follows that if the

<sup>3</sup> [2002] (2) ALLSA 473 (SCA) also reported at 2002 (4) SA 36 (SCA)

defendants are correct in their contention that the matter is governed by **ESTA**, it must be accepted that this Court has no jurisdiction to grant an order for the eviction of the defendants and for that reason the plaintiff's action would have to be dismissed. (**Mkangeli v Joubert**)

[7] In my view , the following issues arise in this matter:

7.1 whether or not the defendants are occupiers of No 15 du Plessis Street, Cradock (hereinafter referred to the house) in terms of **Extension of Security of Tenure Act**<sup>4</sup>, and

7.2 If so, whether this Court has jurisdiction or is competent to hear this action.

7.3 If not, whether the plaintiff is entitled to relief under the **Prevention of Illegal Eviction and Unlawful Occupation of Land Act**<sup>5</sup>. In particular;

7.3.1 Whether the agreement allowing the defendants to stay at No 15 du Plessis Street, Cradock was for an unspecified duration and, if so, whether it was terminable upon giving reasonable notice.

#### **D) APPLICABLE LEGISLATION**

[8] Section 2 of **ESTA** provides:

'(1) Subject to the provisions of section 4, this Act shall apply to all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law or encircled by such a township or townships, but including-

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<sup>4</sup> Act 62 of 1997

<sup>5</sup> Act 19 of 1998

- (a) any land within such a township which has been designated for agricultural purposes in terms of any law; and
- (b) any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect of only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition.'

[9] The importance of the above section is that it determines the categories of land to which the act finds application and can be enforced. The provisions of section 4 referred to in subsection 2 are not relevant to the discussion and I need not mention them.

[10] In terms of section 1 of **ESTA**, an occupier is defined as; a person residing on land which belongs to another person, and who has or [sic] on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding –

- (a) ....
- (b) a person using or intending to use the land in question mainly for industrial , mining , commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and
- (c) a person who has an income in excess of the prescribed amount'. [which is presently determined at R5 000-00].

[11] In my view section 2 of the act is decisive on whether or not **ESTA** applies to house No 15 du Plessis Street, Cradock. The said property is, according to the evidence, property situate in the residential area of Cradock town and is one of the many houses in that area. The question is whether section 2 of **ESTA** includes or excludes this house. The answer to the question lies with the definition of township. This is so because section 2 of **ESTA** makes application of the act to all land other than a township and including any land in a township which has been designated for agricultural purposes in terms of the law.

[12] **ESTA** does not define a township and therefore recourse has to be made to the dictionary meaning of the word. The new shorter Oxford English dictionary defines township at page 3353 as:

‘[F] Town n. t ship. The inhabitants of a village collectively, the community occupying an enclosed piece of ground. ....Each of the local divisions or districts of a large parish each containing a village or small town *usu.* having its own church. An independent or self-governing town or village. A division of a country having certain corporate powers of local administration.’

[13] The above description of a township clearly excludes No 15 du Plessis Street from the types of land to which **ESTA** applies. The house in question is a residential property within the town of Cradock. It is within the township of Cradock and is therefore excluded from the defined land to which **ESTA** applies.

[14] Over and above what I have mentioned above, the case of the defendants on the pleadings is that in 2002 they had reached a settlement agreement with the plaintiff in terms of which they moved out of the farm of the plaintiff and were allowed by the plaintiff to occupy the immovable property situate at No 15 du Plessis Street, Cradock. This took place after the first defendant was put on pension and was no longer the employee of the plaintiff. On the first defendant's version he was put on pension by the plaintiff. It is apparent from the evidence in this case that the agreement referred to by the defendants is the same agreement referred to and pleaded by the plaintiff in his particulars of claim being:

“14.1 The plaintiff is the owner of the immovable property at No 15 du Plessis Street, Cradock;

14.2 The defendants are in occupation of the property having hitherto been permitted by the plaintiff to occupy the property free of charge ;

14.3 The plaintiff has withdrawn his consent for the defendants' continued occupation of the property and has demanded that they vacate the property, alternatively hereby does so, and notwithstanding which the defendants remain in occupation of the property;

14.4 The defendants are, in consequence, unlawful occupiers of the property as defined Section 1 of the Prevention of Illegal Occupation of Land Act 19 of 1998.”

[15] Further, in terms of section 25(2) of **ESTA**, the defendants cannot be entitled to claim their rights in terms of **ESTA** which they had waived if they were aware of such rights. Section 25(2) of **ESTA** provides as follows :

'(1) The waiver by an occupier of his or her rights in terms of this Act shall be void, unless it is permitted by this Act or incorporated in an order of a Court;

(2) A Court shall have regard to, but not be bound by, any agreement in so far as that agreement seeks to limit any of the rights of an occupier in terms of this Act;

(3) Notwithstanding the provisions of section (1) and (2) if an occupier vacates the land concerned freely and willingly, while being aware of his or her rights in terms of this Act, he or she shall not be entitled to institute proceedings for restoration in terms of section 14.'

[16] The defendants' case, as I understand their pleadings and evidence, is that they were aware of their rights in terms of **ESTA** at the time they were staying at the farm. It is not therefore a situation where the defendants were taken for a ride and did not know their rights in terms of **ESTA**. It should be noted that at this stage of the judgment I am not yet dealing with the credibility findings of the witnesses of either party. I only refer to the evidence for the purposes of showing that all along the defendants have always been aware of their rights in terms of **ESTA**. They left the farm with full knowledge of those rights.

[17] For the above reasons my conclusion is that the land in issue and the defendants' occupation of the house in Cradock is not governed by the application of **ESTA**. Consequently, and in view of my conclusion, there may no longer be a need for me to refer to **ESTA** (See **Malelane (Edms) Bpk v Godfrey and Another**<sup>6</sup>).

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<sup>6</sup> [2008] 2 ALLSA 97 (T)

## **E) MERITS OF THE CASE**

[18] The next question is whether the plaintiff is entitled to evict the defendants from the said premises.

[19] From the evidence of the plaintiff's son, Mr Welhem Jordaan, it appears that the first defendant was requested by the witness to look for the house in which the defendants could live. It is not clear from the evidence why the plaintiff was so generous to the defendants. In any event, the agreement according to the plaintiff, was that the defendants would stay in the house in Cradock for an indefinite period. His evidence is that the defendants had voluntarily moved away from the farm to stay in Cradock town at the given address.

[20] It is, however, important for me to consider the case of the defendants as stated in the pleadings. In paragraph 3.1-3.3 of the defendants' plea the defendants state thus:

‘3.1 The Defendants, who are 70 and 63 years old respectively were occupiers at Spekboom Boedery Farm Cradock under the protection of the Extension of Security of Tenure Act 62 of 1997 (**ESTA**).

3.2 The plaintiff attempted to evict the defendants in 2002, but the attempted eviction was resisted;

3.3 The parties reached a settlement in terms of which the defendants would move out of Spekboom Boedery Farm and occupy the immovable property situated at No 15 du Plessis Street, Cradock in 2002;

3.4 In the premises the defendants are not staying free of charge but are exercising the land rights in terms of the law.

[21] In his replication to the defendants' plea the plaintiff replied as follows:

'1.2 The plaintiff denies that the defendants were at any time occupiers as defined in the **Extension of Security of Tenure Act No 62 of 1997** more particularly in that.

1.2.1 The Defendants' occupation of plaintiff's farm *AL TE KLEIN* was contingent upon the First defendant's continued employment by plaintiff;

1.2.2 The first Defendant resigned his employment with plaintiff and upon such resignation his entitlement to remain in occupation on the farm *AL TE KLEIN* came to an end;

1.2.3 The first defendant's income was, at the time he was in occupation of plaintiff's farm property, *AL TE KLEIN* in excess of the prescribed amount stipulated in section 1 of the **Extension of Security of Tenure Act.**'

[22] In his evidence Mr Welhem Jordaan on behalf of the plaintiff testified that the first defendant was allowed to stay in the house for an indefinite period. However, during the argument Mr De la Harpe for the plaintiff contended that the defendants' occupation of the house in Cradock was permitted by Plaintiff without obligations and subject to the *proviso* that plaintiff was at liberty, at any time, to terminate the agreement after giving reasonable notice. The defendants' case is that they were allowed to stay in the house in Cradock after the first defendant was put on pension by the plaintiff and their stay was for an indefinite period and would continue until the death of the first defendant.

[23] In his evidence Mr Welhem Jordaan testified that the first defendant resigned as the employee of the plaintiff even before they moved to stay at the house in Cradock. It, therefore, follows that according to the plaintiff when the first defendant resumed occupation of the house in issue he was no longer an employee of the plaintiff. Therefore, the arrangement for them to go and stay in the plaintiff's house in town was made with the first defendant willingly and without any duress. Welhem Jordaan further testified that the first defendant was paid a salary by the plaintiff although he had already resigned. The first defendant obtained other employment whilst staying in Cradock. At the time of the case first defendant was employed at Precision Steel whilst he and his family were staying at the house in issue .

[24] During cross-examination of the plaintiff's witness Mr Simoyi for the defendants never put to the witness that the plaintiff had threatened to cut the supply of water and electricity if the first defendant was refusing to vacate the farm house. This was only revealed when the first defendant was giving evidence. It was also not pleaded by the defendants that they left the farm house under duress or coercion. In those circumstances, in my view, this threat is an afterthought and cannot be accepted as the truth. This is so especially when the defendants have pleaded that they left the farm house to Cradock by way of an arrangement with the plaintiff. If there was any duress or threats the defendants were reasonably expected to have disclosed this in their plea or at least to confront the plaintiff's witness with such allegation during cross-examination.

[25] Factual issues which form the basis of a party's case must be pleaded and not only raised during the trial. In **Robinson v Randfontein Estates Gold Mines Co Ltd**<sup>7</sup> **Innes CJ** held as follows:

'The object of pleading is to define the issues, and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry.'

[26] The parties are limited to their pleadings and no pleader is allowed to direct the attention of the other party to one issue, and then at the trial attempt to canvass another. (See **Nyandeni v Natal Motor Industries Ltd**<sup>8</sup>)

In **Middleton v Carr**<sup>9</sup> **Schreiner JA** warned as follows:

'Generally speaking the issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in the original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely in the hope, perhaps of obtaining some tactical advantage or of avoiding a special order as to costs on the court's readiness at the argument stage or on appeal to treat unpleaded issues as having been fully investigated.'

[27] In the present case the defendants' case is that they agreed with the plaintiff that they would be accommodated at No 15 du Plessis Street, Cradock and there is no duress mentioned allegedly applied by the plaintiff against the defendants. Once that is mentioned at the evidence stage, more so during the defendants' evidence, cannot be allowed to operate to the

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<sup>7</sup> 1925 (AD) 173 at 198

<sup>8</sup> 1974(2)SA 274(D)

<sup>9</sup> 1949(2) SA 374(A) at 386

advantage of the defendants. The impression given by the defendants' plea was that the agreement was not coupled with duress or coercion.

[28] I am, therefore, of the view that the defendants are not being truthful to the Court to say there was a threat by the plaintiff to cut off the supply of water and electricity if they refused to leave the farm. Their evidence in this regard is rejected as false. This, however, does not mean that the whole of the defendants' evidence is rejected.

[29] As the first defendant has also pleaded that their stay at No 15 du Plessis Street, Cradock was by agreement with the plaintiff who initiated it, I have no reason to doubt that assertion. On the other hand he relies on the letter addressed to the managers of businesses that it gave him the right of ownership of the house in question. I cannot accept the latter explanation. If the plaintiff had intended to donate the house to the first defendant he would have had it registered in the first defendant's name.

#### **F) WAS THE CONTRACT INDEFINITE OR TERMINABLE**

[30] It appears from the evidence of the plaintiff's witness Welhem Jordaan that the contract was for an indefinite period. There was no specific period stipulated on which the residence of the defendants would be terminated. On the other hand the first defendant testified that he was told by the plaintiff and his son to move to the house in issue for an indefinite period. Both parties do not specify any conditions attached which governed the defendants' stay in this house. It, therefore, becomes an issue in this case whether the

defendants were allowed to stay in the house indefinitely or that the contract was terminable at the instance of the plaintiff upon giving the defendants reasonable time within which to vacate the premises. From the evidence of the plaintiff there is nothing to suggest that the agreement was terminable after giving reasonable notice. This aspect has only been raised in argument by Mr De la Harpe.

[31] In order to decide this issue, which is crucial to my decision of this case, I have to consider, *inter alia*, the probabilities of the case. This will also include the circumstances which led to the defendants having to be accommodated in this house.

[32] Welhem Jordaan testified in Court that the first defendant initiated the move to look for the house in town. At the same time he says that the first defendant had intended to resign from his work. I do not believe his version of events in this regard. If the first defendant had intended to resign or retire how could he initiate a move to buy a house in Cradock. In the evidence he was described as a poor man. How would he afford the bond repayments or the price of that house. The first defendant testified that it was plaintiff who committed the first defendant to move into the house in Cradock. He says that for his stay in the house in question there were no conditions. Apart from the fact that he was to stay for life there was no mention of the period of his stay in this house and that the plaintiff could not have meant temporary residence. The first defendant further testified that the plaintiff said 'I could stay for as long as I live'. In my view there is very little difference in meaning

and effect between staying in the house indefinitely as the plaintiff's witness says and staying in the house 'for as long as I live'. (According to what the first defendant alleges) Both mean that he was allowed to occupy the land for an indefinite period. If the plaintiff had meant that the defendants would have to stay for a defined period the agreement would have said so. Further, the plaintiff would easily have told the defendants that their stay in the house would end on a defined date. I, therefore, come to the conclusion that the contract in issue between the plaintiff and the first defendant was for an unspecified duration and was initiated by the plaintiff and or his witness.

[33] There is scarcity of decided cases in this country which specifically deal with the situation under discussion. However, those few available judgments and other authorities express the view, though indirectly, that a contract which is for an unspecified duration could not be terminated by notice (See **Sasficor Ltd v Datsun Motor Vehicle Distributors (Pty) Ltd**<sup>10</sup>). In this case the contract was expressed to be for an unlimited period and could be cancelled only in certain specified circumstances, so **De Kock J** had little difficulty in concluding that it could not be terminated by notice (See **R H Christie on The Law of Contract 5<sup>th</sup> Edition at page 435**).

[34] Such contracts are not void for uncertainty or vagueness but they may require careful examination in order to decide, after examining their contents, whether they are truly perpetual or whether they can be terminated by notice. Although such contracts cannot be unlawfully terminated unless they contain

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<sup>10</sup> Unreported judgment of De Kock J decided in the then TPD  
Delivered on 27 February 1973

a clause to that effect, principally, they are perfectly valid. There can be no justification for assuming that a truly perpetual contract can be terminated upon reasonable notice by either party unless there is a clear indication gleaned from the terms of the contract which points to that direction. That must be something which must be gathered by implication from the language of the document or from the terms of the agreement. It was held in **Ntsobi v Berlin Mission Society**<sup>11</sup> that in order to be effective a notice of termination of a contract must be clear and unequivocal (**Putco Ltd v TV and Radio Guarantee**<sup>12</sup>).

[35] The fact that the contract contained express provisions for termination in certain circumstances *prima facie* excludes any implied power to terminate by notice outside those circumstances. By the same power of reasoning where there is no indication in favour of termination and the specific terms of the agreement are that it will operate for an indefinite period there could be no justification to conclude that the contract can be terminated by giving reasonable notice (**R H Christie quoted above at page 436**)

[36] In **Trident Sales (Pty) Ltd v A H Pillman and Son (Pty) Ltd**<sup>13</sup> the contract was expressed to be one that would continue indefinitely, and it contained express provisions for termination in certain circumstances, but was silent on the question whether, outside those circumstances, it was truly perpetual or terminable by reasonable notice. **Coetzee J** examined a number

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<sup>11</sup> 1924 (TPD) 378

<sup>12</sup> 1984(1) SA 443 (WLD)

<sup>13</sup> 1984(1) SA 433 (W) at 441D-G

of English cases and authorities which he considered to be in accordance with the principles of our law and concluded thus:

- “(1) It is a question of construction of the agreement according to the ordinary principles of construction;
- (2) Since, however, such agreement *ex hypothesi*, contains no express provision dealing with determination by the party who asserts that it should be inferred, it is a question of construction in the wider sense of ascertaining what the intention of the parties was when they entered into the agreement.
- (3) This intention is determined in the light of all the admissible evidence and in the light of what the parties have said or omitted to say in their agreement;
- (4) There is no presumption one way or the other;
- (5) The *onus* is on the party who asserts that the parties intended something which they omitted to state expressly to demonstrate that this was so.”

[37] Once one is persuaded that on a proper construction of their agreement the parties intended to be bound in perpetuity there is no reason why this bargain like any other should not be enforced. Equally true in the present case the parties had intended that their contract should bind each one of them indefinitely. There is no indication of an intention, at any stage, to terminate the agreement whether by notice or otherwise. I therefore conclude that the agreement between the plaintiff and the first defendant was an indefinite or perpetual contract and cannot be terminated in the manner suggested by the plaintiff.

[38] In **Vans Vanadium SA LTD v Registrar of Deeds And Others**<sup>14</sup> the second and third respondents concluded a contract executing a notarial

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<sup>14</sup> 1997(2)SA 784(T)

prospecting and option contract in respect of the Winnershoek properties which was registered in the Deeds Office. The third respondent granted the second respondent, for an indefinite period and upon the terms set out hereunder, the sole and exclusive right to prospect and search for platinum group metals in and upon the properties.

Clause 3 of the contract provides that:

‘This agreement shall be deemed to have commenced on 1 October 1978 and shall continue for an indefinite period until terminated or cancelled in terms hereof.’

[39] In interpreting the salient clause of this contract **McCreath J** held as follows at 791F-H:

“The expression ‘for an indefinite period’ in clause 1 and 3 accordingly means in my view, without limitation as to time. The contract is to endure in perpetuity unless terminated by the second respondent on three months notice or cancelled by the applicant on the grounds of a breach of contract by the second respondent.” [The emphasized portion formed a term of the contract.]

[40] In our case there is no such provision and the clear intention is that the contract would endure in perpetuity. It could only be terminated by the death of the first defendant. (See **Golden Lions Rugby Union and Another v First National Bank Of South Africa Ltd**<sup>15</sup> .)

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<sup>15</sup> 1999(3)SA 576(SCA)

[41] In another relevant judgment in **Transnet Ltd v Rubenstein**<sup>16</sup> **Lewis JA** at 596F and 599B held as follows:

‘Whether a contract, which is silent on its duration is terminable on reasonable notice, is a matter of construction..... Given the absence of evidence as to what the parties intended, it is not possible to impute into the contract between the parties a term that is in conflict with their express agreement as to its duration. This is all the more since the evidence that we do have conflicts with the proposition argued by **Transnet** that the contract was terminable on reasonable notice.’

[42] In a situation where the parties have expressly agreed upon a term and given expression to that agreement in unambiguous terms no reference can be had to surrounding circumstances (or to input a tacit term into their contract) in order to subvert the meaning to be derived from a consideration of the language of the agreement only. (vide **South Africa Mutual Aid Society v Cape Town Chamber of Commerce**<sup>17</sup>).

[43] In the present case there can be no room for imputing a tacit term of termination of the agreement, eg upon reasonable notice, because the parties have expressly agreed that the contract would endure indefinitely and until the death of the first defendant. Whether the plaintiff had entered into this agreement with a view to escape the consequences of the provisions of **ESTA** in respect of the farm house is neither here nor there but it may have influenced him to agree to the perpetuity of the agreement.

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<sup>16</sup> 2006(1) SA 591 (SCA)

<sup>17</sup> 1962(1) SA 598 (A) at 615D-E

[44] Lastly, the question whether or not the provisions of **Section 2(1) of the Alienation of Land Act<sup>18</sup>** are applicable to the said contract has never been an issue before me.(vide **Alex Campbell (Pty) Ltd v Erickson- Miller<sup>19</sup>**.) Without the parties having raised or ventilated the issue during the pleadings and trial it would be prejudicial to the parties if I were to consider their application at this stage. It should also be borne in mind that it is the plaintiff who contended that he is relying on the oral agreement when evicting the defendants, and he, therefore, bears the *onus* to prove the existence of the agreement. Whether in resisting the eviction based on the agreement the defendants rely on **ESTA** they do not have an *onus* to prove the existence of the agreement but only to show that it is **ESTA** and not common law or **PIE** that applies in their agreement with the plaintiff. Bear in mind that the agreement for defendants to stay in the said land was pleaded by the plaintiff in his particulars of claim.

[45] On the version of the plaintiff alone the defendants are not in unlawful occupation of the house in Cradock because they have not breached any conditions of the agreement. On the contrary, it is the plaintiff who is unlawfully seeking to evict the defendants because the latter are still in the premises in accordance with the terms of the agreement. The defendants have raised a valid defence to the plaintiff's claim because, according to their agreement with the plaintiff, they are not unlawful occupiers of the house in question. Even if they were, they have raised a valid defence in terms of

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<sup>18</sup> Act 68 of 1981

<sup>19</sup> 1954(4) SA 465 (N)

section 4(8) of the **PIE Act** <sup>20</sup> and for those reasons I cannot grant the order for their eviction. The valid defence has nothing to do with **ESTA** and is based on the fact that they have a right to remain in the premises in terms of their agreement with the plaintiff.

[46] In the result I make the following order:

46.1 Judgment is granted in favour of the defendants and the plaintiff's action is dismissed with costs.

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**P.W. TSHIKI**  
**ACTING JUDGE OF THE HIGH COURT**

Date Case Heard : 09-04-2009

Judgment delivered : 21-05-2009

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<sup>20</sup> Act 19 of 1998. Section 4(8) of the PIE Act provides that: 'If the Court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier...' [it follows that no such order will be granted if a valid defence has been raised]

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