IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER:** LCC 41R/99
In Chambers: **DODSON J** **MAGISTRATE COURT CASE NUMBER:** 2109/98

In the review proceedings in the case between:

R V FERGUSON Plaintiff

and

A BUTHELEZI 1st Defendant
SS BUTHELEZI 2nd Defendant

JUDGMENT

DODSON J:

Introductory

[1] The plaintiff in this matter is the owner of the farm Clifton in the district of Vryheid. I will refer to it as "the farm". The defendants occupy the farm together with their families. The plaintiff's attitude is that their occupation is illegal. He has demanded that they vacate the farm. On 14 August 1998, the plaintiff served on the defendants a notice, purportedly in terms of section 9(2)(d)(i) of the Extension of Security of Tenure Act[1] (I will refer to it as "ESTA"), informing them that if they did not vacate the farm within two months, he would bring legal proceedings to evict them and their minor children. On 18 November 1998, the plaintiff issued summons for eviction against the defendants out of the Vryheid Magistrate's Court.

[2] The defendants defended the action. They filed a plea in which they admitted their occupation of the farm, but said that they were occupiers in terms of ESTA.[2] They said that the steps taken by the plaintiff towards their eviction, being the notices to vacate and the notice of the legal proceedings, were illegal. They asked that the action be dismissed.

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1 Act 62 of 1997.

2 The term "occupier" is defined in section 1 of ESTA. Compliance with that definition is, generally speaking, a prerequisite for a tenant to benefit from the protection afforded by ESTA.

[3] The matter was set down for hearing on 29 June 1999. However, on that day, the parties entered into a settlement agreement, which was made an order of the magistrate's court on the same day. The settlement agreement reads as follows:

> "**WHEREAS** the parties, duly represented by their respective Attorneys, have negotiated with each other towards finding a settlement;
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> **AND WHEREAS** the parties have agreed to settle this matter and are desirous to reduce the terms of their settlement to writing, which terms they hereby agree are just and equitable bearing all their circumstances in mind;
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> **NOW THEREFORE** the parties agree as follows and hereby request the Honourable Court to make their settlement an Order of Court in terms of the provisions of Rule 27(6) of the Rules of the Magistrate's Court, as follows:
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> **1.**
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> 1.1 The First and Second Defendants namely, AGNES BUTHELEZI and SIPHIWE SAMSON BUTHELEZI together with their four undermentioned minor children, will vacate the Plaintiff's farm Gegund, better known as Clifton, where they presently reside (hereinafter called "the farm"), by not later than 31 December 1999 together with all their belongings, animals and possessions.
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> **2.**
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> 1.2 The said children are:
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> 1.2.1 TENDE DAVID BUTHELEZI born 12 April 1980;
> 1.2.2 EMELLY CEBILE BUTHELEZI born 12 July 1984;
> 1.2.3 NTOMBENHLE KHANYILE BUTHELEZI born 15 July 1986;
> 1.2.4 EUNICE ZANELE BUTHELEZI born 30 March 1988.
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> **3.**
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> In the period from the date upon which this settlement will be made an Order of Court, until the Defendants and their said children will leave the farm by not later than 31 December 1999, as aforesaid, the Defendants and their said children will comply with the following conditions:
>
> 3.1 No other persons apart from the two Defendants and their said children will be allowed to stay with them on the farm. Bona fide visitors will be allowed for bona fide visits;
>
> 3.2 The Defendants and their said minor children (collectively hereinafter referred as "the Defendants") will use only the existing access and egress road to and from the property towards their homestead where they presently stay (hereinafter "the premises") which road is situated directly behind the present said premises;
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> 3.3 The Defendants will not stray over the farm or allow any bona fide visitors to stray over the farm and shall only make use of the access and egress route mentioned in 3.2 above;
>
> 3.4 The Defendants shall not be allowed to erect any further structures on the farm;
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> 3.5 The Defendants will not be allowed to keep any livestock on the farm;
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> 3.6 The Defendants shall only be allowed to continue to plant vegetables on the small patch of garden on the premises, the size of which is approximately 6m x 6m. The Defendants

specifically agree that when they vacate the farm as is provided for herein, they will reap whatever fruits there may then be in the garden but will have no further rights to "harvest crops" that have not matured or ripened by then;

3.7 The Defendants will be allowed to keep one medium size dog on the farm, (not of the hunting type) and shall keep such dog within the bounds of the premises by securing the said dog appropriately to a leash and by providing sufficient water and food for the dog on a daily basis. Any dogs found hunting or straying on the farm, will forthwith be destroyed by the Plaintiff on site (sic);

3.8 The Defendants agree that they will not be allowed to hunt any wildlife on the farm or to remove any medicine plants, unless the Plaintiff has in writing granted permission for them to do so;

3.9 The Defendants will be allowed to collect firewood from a specifically identified area on the farm, that will be pointed out to them by the Plaintiff, where the Defendants will be allowed to collect reasonable quantities of firewood for domestic purposes;

3.10 The Defendants will prepare an appropriate waste/rubbish pitt (sic) in the immediate vicinity of the premises, where all waste and rubbish will be discarded into (sic). The Defendants agree not to litter at all and especially not with plastic bags;

3.11 The Defendants shall not be permitted to make any open fires. It is placed on record that the only fires permitted for cooking purposes will be made within an appropriate shelter to prevent any risk of the spreading of veld fires;

3.12 The Defendants will not be permitted to make any firebelts. All firebelts, will be burned by the Plaintiff himself or an employee of the Plaintiff under the Plaintiff's supervision;

3.13 The Defendants will not be allowed to travel on any vehicle, trailer, tractor or implement on the farm. First and Second Defendant take personal responsibility for their minor children in this regard and will see to it that the children will not be transported on any such vehicle on the farm. If, despite the Defendants' undertakings in this regard, they do or allow so, they hereby unconditionally indemnify the Plaintiff from any damages sustained by either of them as a result of injury to any of them resulting from the transporting of them on such vehicles;

3.14 The Defendants shall not commit any criminal offence involving the persons and/or property of the Plaintiff, his family members and/or the persons employed by the Plaintiff on the farm or other persons occupying the farm.

4.

When, by no later than 31 December 1999, the Defendants vacate the farm, they will remove all the structures erected by them on the premises, and will leave the place where they have been staying, in a neat and tidy condition. In this regard the Defendants shall remove whatever material or belongings that they wish to remove from the farm when leaving the farm. Whatever remains behind, will be demolished by the Plaintiff so as to leave the premises in a condition to the Plaintiff's own satisfaction.

5.

The Plaintiff undertakes, to make available 1 tractor and 1 trailer plus a driver to cart one full load of material and/or belongings of the Defendants from the premises to where the Defendants will be relocating themselves, on the condition that such place will not be beyond a distance of 30km radius from the farm.

6.

Subject to the provisions of Paragraph 7 below, should the Defendants fail to comply strictly with any of the conditions set out in this agreement, the Plaintiff will be entitled to approach this Honourable Court on Affidavit setting out the basis upon which it is alleged that the Defendants did not comply with the terms hereof, and by Notice to the Defendants' attorneys, for the issuing of a Warrant of Eviction. Such an Affidavit may be filed under the same case number and the Honourable Court will be entitled to grant an Order on the same papers upon which these proceedings were commenced.

7.

In the event of the Defendants failing to vacate the farm on own accord by no later than 31 December 1999, the parties agree that upon submission by the Plaintiff of an Affidavit to that effect to the Clerk of this Honourable Court, a Warrant of Eviction may be issued by the Clerk of the Court directing the Sheriff of this Honourable Court to evict the Defendants, all their animals, belongings and possession from the farm and to hand over the premises to the Plaintiff after having done so.

8.

It is further agreed and ordered that in the event of the Defendants not complying with any of the terms of this agreement and Order of Court, all the legal costs of the Plaintiff occasioned by such failure, will be borne by the Defendants on a scale as between attorney and own client, including any costs to be incurred by the Sheriff towards the eviction of the Defendants from the farm, where applicable.

9.

Subject to the provisions of Paragraph 8 the parties agree that each of them will be responsible for their own legal costs to date."

[4] After making the settlement agreement an order of court, the magistrate then decided that the matter should be sent to this Court on automatic review in terms of section 19(3) of ESTA. His decision is recorded in the record of proceedings as follows:

"**POSTEA**

Synde effektief 'n uitsetting word die saak vir hersiening verwys na die Grondeisehof."

This gives rise to a number of issues.

Is the order making the settlement agreement an order of court an order in terms of section 19(3)?

[5] This Court's automatic review jurisdiction only extends to an "order for eviction by a magistrate's court in terms of [ESTA]".[3] Is the order confirming the settlement in this case such an order? Although the plaintiff did not allege that the defendants were occupiers in terms of ESTA, he did give notice in terms of section 9(2)(d)(i) and (ii) of ESTA. The defendants in their plea also relied expressly on their status as occupiers in terms of ESTA. In *Skhosana and Others v Roos T/A Roos se Oord and Others*,[4] Gildenhuys J held as follows:

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3 Section 19(3) of ESTA.

4 [1999] 2 All SA 652 (LCC).

> "Where, in an action for eviction under common law, the defendant raises a defence based on ESTA and the magistrate finds that ESTA is not applicable and grants the eviction order, must the magistrate send the order to the Land Claims Court for automatic review? On a narrow interpretation of "in terms of this Act" it will not be necessary, because the eviction order was made under common law. However, the legislature in providing for the automatic review of ESTA cases clearly intended that the Land Claims Court must scrutinise the records of those cases to ensure that the provisions of ESTA were correctly applied. It would be absurd if, on the one hand, an eviction order made under the provisions of ESTA has to be reviewed by this Court while, on the other hand, an eviction order under common law consequent upon a decision that ESTA does not apply, is not subject to such review."[5]

[6] The defendant having raised a defence based on ESTA in this case, means that the case is one which if not settled would certainly have been subject to automatic review in terms of section 19(3) of ESTA. But does the settlement of the matter on the basis that the defendants agree to vacate the premises mean that it is not an order for eviction? "Evict" is defined in section 1 of ESTA as follows:

> "'evict' means to deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of this Act, and 'eviction' has a corresponding meaning;" (my emphasis)

[7] The effect of making the agreement an order of court was that the terms of the settlement agreement became the terms of the magistrate's order. Clause 1.1 of the settlement agreement places an obligation on the defendants and their minor children to vacate the premises by a certain date. Clause 4 provides for the removal, on an agreed basis, of all the defendants' possessions from the farm. The question may be asked whether an agreement to vacate can be construed as deprivation "against his or her will"? The answer in relation to this particular agreement is to be found in clauses 6 and 7. Clause 6 provides for potential early (ie before 31 December 1999) eviction of the defendants if they do not comply with the terms of the settlement agreement. Clause 7 provides for the issuing of a warrant of eviction if the defendants do not vacate the farm by the date in clause 1. Both these clauses contemplate scenarios where the dispossession of the defendants would potentially be against their will. Once the agreement was given the force of a court order, I am satisfied that it became an eviction order as contemplated in section 19(3) of ESTA. The magistrate, therefore, correctly referred the matter to this Court on automatic review.

Can a settlement agreement of this nature be made an order of court?

[8] Once it is accepted that the order was an order for eviction subject to automatic review, the question arises whether the order was made in accordance with the provisions of ESTA. Section 9 of ESTA provides as follows:

> "9 **Limitation on eviction**

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5 *Skhosana* above at 659 d - f.

(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.

(2) A court may make an order for the eviction of an occupier if-

(a) the occupier's right of residence has been terminated in terms of section 8;

(b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;

(c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and

(d) the owner or person in charge has, after the termination of the right of residence, given-

(i) the occupier;

(ii) the municipality in whose area of jurisdiction the land in question is situated; and

(iii) the head of the relevant provincial office of the Department of Land Affairs, for information purposes,

not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Land Affairs not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with."

[9] On the face of it, that section would seem to suggest that any order for eviction can only be granted in terms of ESTA if there is compliance with the requirements of subsection (2). Unless there is, before the court, a concession by the occupier that the requirements of section 9(2) have been complied with, a factual enquiry into such compliance would be necessary. That is impossible if the only information before the Court is a set of pleadings and a settlement agreement which do not contain sufficient information to make that enquiry, as is the case here. This is to be expected. It is in the very nature of a settlement that the parties agree to put aside an enquiry into the legal and factual differences between them and to find a solution which suits their respective interests to the extent that consensus will allow. If courts were compelled to enquire into the requirements set out in section 9(2), notwithstanding a settlement, there would be little point in settling. An interpretation of section 9 which has this consequence would seem to be out of kilter with other provisions in ESTA. Section 21, for example, specifically envisages the appointment of a mediator "to mediate and settle any dispute in terms of this Act". The notice provisions in section 9(2)(d)(ii) and (iii) also appear to be aimed at promoting the involvement

of the relevant authorities in finding satisfactory solutions to disputes arising in terms of the Act. The amicable settlement of disputes is an end which the legal system, in general, favours.[6]

[10] The solution, in my view, lies in section 25 of ESTA. It reads:

> "25 **Legal status of agreements**
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> (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.
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> (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.
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> (3) Notwithstanding the provisions of subsections (1) and (2), if an occupier vacates the land concerned freely and willingly, while being aware of his or her rights in terms of this Act, he or she shall not be entitled to institute proceedings for restoration in terms of section 14."

[11] Section 25(1) contemplates the waiver by an occupier of his or her rights in terms of ESTA, provided such waiver is either permitted by ESTA or incorporated in an order of court. Section 25(2) contemplates the limitation of an occupier's rights by way of an agreement. Section 25(3) seems to be one instance of a waiver (in this instance waiver by a particular form of conduct) which is permitted by ESTA. The effect of these provisions is that the rights conferred on an occupier in ESTA are not absolute and may be waived or limited by the occupier, provided certain conditions are met. Save where a waiver is permitted by ESTA, both subsections (1) and (2) contemplate that it is a court, exercising a judicial discretion, which will determine to what extent such waivers or limitations of rights by agreement will be given legal recognition.

[12] Various rights are conferred on occupiers in ESTA.[7] One right is the right to security of tenure. This right is stated in general terms in section 6(2)(a) of ESTA, but is given content by section 9. The effect of section 9 is that an occupier has a right not to be evicted from land other than in accordance with the requirements of that section. Although there does not appear to be an express provision in ESTA permitting the waiver of this particular right, such a waiver would still be permitted in terms of section 25(1) if it was incorporated in an order of a court. If the right was limited in some way by agreement, a court could still have regard to such limitation in

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6 *Schierhout v Minister of Justice* 1925 AD 417 at 423, where the following is stated:

> "The law, in fact, rather favours a compromise (*transactio*), or other agreement of this kind; for *interest reipublicae ut sit finis litium*. Accordingly, if there exists no objection in the nature or terms of such compromise or other agreement between the parties, embodied in a consent paper, the practice of the Courts is to confirm it, and make the agreement arrived at a rule or order of Court."

See also *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co. (Pty) Ltd and Others* 1978 (1) SA 914 (A) at 923C-D.

7 Sections 5 and 6.

terms of section 25(2), although it would not be bound to apply the agreement.[8] Thus a court would be entitled to make a settlement agreement an order of court, notwithstanding that the agreement contemplated a waiver or limitation of the occupier's right not to be evicted otherwise than in accordance with section 9.

What must a court consider when asked to make an agreement an order of court?

[13] There are three aspects of ESTA which the court must consider when asked to make a settlement agreement of the type under consideration in this case, an order of court. Firstly, the court must determine whether the agreement includes any waiver or limitation of the occupier's rights. If it is conceded in the agreement that the requirements of section 9(2) have been complied with, there is no need to consider section 25 of ESTA. If this is not conceded, the court must consider section 25. Section 25(2) makes it clear that a court is not bound by an agreement reached between the parties, but must have regard to it. A waiver is treated more strictly in section 25(1). It is void until it is incorporated in a court order (unless permitted by the Act). It could not have been intended that a court faced with a waiver contained in a settlement agreement and a request that the settlement agreement be made an order of court, should rubber stamp the agreement. Both sections 25(1) and (2) contemplate the exercise of a judicial discretion. ESTA is not explicit about what the court should consider in exercising such a discretion. Guidance can nonetheless be found by reading these sections in the context of the Act as a whole and in the law regarding waiver of statutory rights. The law regarding waiver of such rights was stated in *Ritch and Bhyat v Union Government (Minister of Justice)*[9] as follows:

> "The maxim of the Civil Law (C 2, 3, 29), that every man is able to renounce a right conferred by law for his own benefit was fully recognised by the law of Holland. But it was subject to certain exceptions, of which one was that no one could renounce a right contrary to law, or a right introduced not only for his own benefit but in the interests of the public as well. (Grot 3, 24, 6; n 16; Schorer, n 423; Schrassert, 1, c 1, n 3, etc). And the English law on this point is precisely to the same effect. In *Hunt v Hunt* (31 L J Ch 175) Lord Westbury expressed himself as follows: 'The general maxim applies *quilibet potest renuntiare juri pro se introducto*. I beg attention to the words *pro se*, because they have been introduced into the maxim to show that no man can renounce a right which his duty to the public, which the claims of society, forbid the renunciation of.'
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> And Alderson, B, in *Graham v Ingleby* (1 Exch 657) remarked that 'an individual cannot waive a matter in which the public have an interest.'"[10]

[14] The common law thus prevents individuals from waiving statutory rights once this impacts on the public interest. One category of legislation which is nowadays considered to impact on the

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8 Precisely what significance is to be given to the distinction between a waiver and a limitation of rights, it is not necessary to decide here.

9 1912 AD 719.

10 *Ritch* above 734-5. This dictum has been followed in numerous subsequent cases, albeit in a few cases with qualification (see paragraph 16 of this judgment). See, for example, *Bezuidenhout v AA Mutual Insurance Association Ltd* 1978 (1) SA 703 (A) at 710A - C; *South African Co-operative Citrus Exchange Ltd v Director-General, Trade and Industry and Another* 1997 (3) SA 236 (SCA) at 242I - 243D; *ABSA Insurance Brokers (Pty) Ltd v Luttig and Another NNO* 1997 (4) SA 229 (SCA) at 241E; *Govender v Sona Development Co (Pty) Ltd* 1980 (1) SA 602 (D) at 604H - 605E.

public interest is that which seeks to protect persons who, in the absence of such legislation, do not bargain from a position of equal strength. This category of legislation was referred to in *Govender v Sona Development Co (Pty) Ltd*:[11]

> "The related question, whether the protection of certain classes of persons who bargain from an inferior position is a matter of public interest, was considered in the recent House of Lords decision of *Johnson v Moreton* (1978) 3 All ER 37. Lord Hailsham in his speech at 49 of that report said:
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> > 'The truth is that it can no longer be treated as axiomatic that, in the absence of explicit language, the Courts will permit contracting out of the provisions of an Act of Parliament where that Act, though silent as to the possibility of contracting out, nevertheless is manifestly passed for the protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest. Such acts are not necessarily to be treated as simply '*jus pro se introductum* ', a 'private remedy and a private right' which an individual member of the class may simply bargain away by reason of his freedom of contract. It is precisely his weakness as a negotiating party from which Parliament wishes to protect him.'"[12]

[15] Apart from the fact that ESTA is the type of legislation which is referred to in the above extract, section 25(1), in restricting an occupier's power to waive the statutory rights conferred by ESTA, signals that such waivers are not to be treated as a private matter between the parties concerned. Such matters are considered as ones in which the public have an interest. However, section 25(1) departs from the common law in so far as it still allows the waiver of those rights if they are incorporated in a court order. This suggests that the court which decides whether or not to give effect to the waiver is tasked with weighing up the public interest implications of the waiver. There is no reason for the approach to be any different when such a court decides in terms of section 25(2) whether an agreement which limits an occupier's rights should be given legal effect.

[16] Based on the above, the following considerations, I suggest, should be taken into account by a court when deciding whether or not to give legal effect to a waiver or agreement limiting an occupier's rights:

(i) It emerges from an analysis of ESTA that the achievement of justice and equity in the dealings between occupiers and land owners is considered to be in the public interest.[13] That must be a relevant consideration when a court exercises a discretion in terms of section 25(1) or (2). If a settlement agreement contains terms which are patently neither just nor equitable, that may be a reason not to give the waiver or limitation legal effect.

(ii) In the context where the parties have reached a settlement agreement in relation to a dispute, the public interest also requires that a court consider, as a counterbalancing consideration to subparagraph (i), the principle that agreements freely reached should

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11 *Govender* above n 11.

12 *Govender* n 10at 608H to 609A.

13 The criterion of what is just and equitable pervades ESTA. See sections 3(2)(b); 8(1); 10(3); 11(1), 11(2), 11(3); 12(1)(a), 12(2); 13(1)(a), 13(2); 14(4)(b).

generally be recognised and given effect to.[14] As I have pointed out in paragraph [9] above, ESTA and the legal system in general promote the amicable settlement of disputes, which is plainly in the public interest. An excessively interfering court may undermine the achievement of that object.

(iii) In the contractual context, a waiver is only effective if the party who waives is aware of the rights which she is waiving.[15] That this is intended to be a relevant consideration in the context of the waiver of rights conferred by ESTA is apparent from section 25(3) which permits one form of waiver if the occupier does so "while being aware of his or her rights in terms of this Act". This would also be a relevant consideration when a court exercises the discretion contemplated by subsections (1) and (2) of section 25.

The parties will have to place before the court sufficient information to enable it to apply its mind to these criteria. This could be done in the preamble to the agreement, in the body of the agreement or otherwise.

[17] The second aspect of ESTA which must be considered is those provisions in the Act which do not simply confer rights on occupiers, but give powers to, and place duties on, courts applying ESTA and do so in peremptory terms. In *Ritch and Bhyat v Union Government (Minister of Justice)*,[16] Innes ACJ said:

> "Cases in which the result of the renunciation or waiver would be to effect something either expressly forbidden by statute or absolutely illegal by common law of course present no difficulty. But the same principle must necessarily apply where the result of a renunciation by an individual would be to abrogate the term of a statute which in their nature are mandatory and not merely directory. (See Craies at 83). Because otherwise the result would be not merely to destroy private rights, but to defeat the provisions of an enactment intended on general and public grounds to be peremptory and binding on all concerned."[17]

It was pointed out in *South African Co-operative Citrus Exchange Ltd v Director-General, Trade and Industry and Another*, that this statement is too wide.[18] For example, reliance on a shortened, peremptory prescription period imposed in favour of the State may be waived by the State if it does not affect the public interest.[19] Despite the fact that the dictum of Innes ACJ has been qualified, it must still be recognised that there are statutory provisions, beyond those "expressly forbidden" or "absolutely illegal", which are not capable of waiver, whether or not they are in the

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14 See, for example, *Law Union & Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593 at 598; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9E.

15 Christie *The Law of Contract in South Africa* 2nd ed (Butterworths, Durban 1991) 527 and the authorities referred to at footnote 25.

16 Above n 10

17 Above n 10 at 735.

18 *South African Co-operative* case above n 10 at 243C - D.

19 *South African Co-operative* case above n 11 at 241I - 242G and the cases referred to there.

public interest. In *Bezuidenhout v AA Mutual Insurance Association Ltd*,[20] Kotzé JA made the distinction on the following basis:

> "The English authorities distinguish sharply between cases where there is a statutory grant of jurisdiction and those merely governing the procedure of civil courts not affecting the jurisdiction. In the first-mentioned type of case strict compliance is, as a rule, necessary (*Edwards v Roberts*, (1891) 1 QB 302) whereas in the last-mentioned type of case the benefit may generally be waived. An illustrative example is furnished by the decision in *Park Gate Iron Company Ltd v Coates*, 1870 LR 5 CP 643. Sec 14 of the County Court Act, 1850, allowed an appeal in certain circumstances from a determination or direction of a county court to 'any of the superior courts of common law at Westminster'. The right of appeal was subject to a proviso in mandatory form that the appellant:
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> > 'shall, within ten days after such determination or direction, give notice of such appeal to the other party... and also give security... for the costs of the appeal... and for the amount of the judgment if he be the defendant and the appeal be dismissed...'
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> It was held that provisions requiring notice of appeal and security are not conditions precedent to the jurisdiction of the Court to hear the appeal, and they may therefore be waived by the respondent. Bovill CJ, said at p. 637:
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> > 'The provisions of sec. 14, that there shall be notice of appeal and security, seem to me more in the nature of procedure and practice, and to have been intended for the benefit of the respondent. It is not a matter with which the public are concerned. If this be so, it falls within the rule that either party may waive provisions which are for his own benefit, and it comes within the case of *Graham v Ingleby*... We have been pressed with the cases which have been decided on 20 and 21 Vict. c 43 and, no doubt, in them it was held that the provisions of the Act not having been complied with, the Court had no jurisdiction. In *Peacock v The Queen*... the procedure was of a criminal nature, where no one for that reason had a right to waive any irregularity, and in *Morgan v Edwards*... the parties really interested in the provisions of the Act being complied with were the justices, and the parties, therefore, were not competent to dispense with their fulfilment. Consistently with those cases it seems to me that in this case, where the provisions of the Act are entirely for the benefit of the respondent, we may hold him able to dispense with their fulfilment.'
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> . . . I hold the view that the approach of the English Courts, as above set out, is sound in principle and ought to be followed . . ."[21] (my emphasis).

[18] In my view sections 12(1) and (2), 13(1)(a) and (b) and 19(3) of ESTA are far more akin to the "jurisdictional" type of provision than a provision which simply regulates procedure. They impose duties and powers on courts in peremptory terms.[22] This goes further than those provisions which simply create rights and duties as between occupiers and owners. Section 25(1) allows the waiver (subject to the conditions identified above[23]) of an occupier's rights in terms of ESTA. It does not provide for the waiver of powers and duties conferred on the court. To the extent that sections 12 and 13 may confer rights on occupiers, those rights are completely tied up

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20 Above n 10.

21 *Bezuidenhout v AA Mutual Insurance Association Ltd* above n 10 at 710D - 711A.

22 The provisions are quoted in paragraphs [19] and [22]. Note the use of the word "shall".

23 See paragraphs [10] to [13].

with and dependant on the powers and duties of the courts applying those provisions. In the circumstances, sections 12 and 13 cannot be waived by the parties or ignored by the courts, either in terms of section 25(1) or the common law. Nor can section 19(3). With reference to the judgment of Bovill CJ in the *Park Gate Iron Company* case, (cited in *Bezuidenhout v AA Mutual Insurance Association Ltd* in paragraph [17]) the courts are also parties interested in seeing that there is compliance with these provisions, and the parties themselves are, therefore, not competent to dispense with their fulfilment.

[19] Subsections (1) and (2) of section 12 provide:

> "12 **Further provisions regarding eviction**
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> (1) A court that orders the eviction of an occupier shall-
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> (a) determine a just and equitable date on which the occupier shall vacate the land; and
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> (b) determine the date on which an eviction order may be carried out if the occupier has not vacated the land on the date contemplated in paragraph (a).
>
> (2) In determining a just and equitable date the court shall have regard to all relevant factors, including-
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> (a) the fairness of the terms of any agreement between the parties;
>
> (b) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land; and
>
> (c) the period that the occupier has resided on the land in question."

[20] Notwithstanding that a court is faced with a settlement agreement regulating the eviction, the court is still required to apply its mind to these provisions. If either of the dates referred to in subsection (1) were not provided for in the settlement agreement, the court would have to determine a date with reference to the criteria in subsection (2). Even if the dates are provided in the settlement agreement, paragraph (a) of subsection (2) still requires the court to assess whether or not the agreement is fair in this respect. In terms of section 25(2) it is not bound by the agreement. To the extent that dates have been agreed upon, the criteria referred to in paragraphs (ii) and (iii) of paragraph [16] above would also be relevant factors for the court to consider in deciding whether or not to accept those dates. Again, the parties will need to place sufficient information before the court to enable it to exercise the discretion contemplated by subsections (1) and (2), whether or not the dates are provided for in the agreement.

[21] If the court is not satisfied with the dates determined in the agreement, then in terms of section 12 read with section 25(2), it would have to decline to give effect to that part of the agreement and determine a date or dates itself, provided that the parties have been given a fair hearing in that regard beforehand.

[22] Section 13(1)(a) and (b) and section 13(2) are also in peremptory terms. They provide:

> "13 **Effect of order for eviction**

(1) If a court makes an order for eviction in terms of this Act-

(a) the court shall order the owner or person in charge to pay compensation for structures erected and improvements made by the occupier and any standing crops planted by the occupier, to the extent that it is just and equitable with due regard to all relevant factors, including whether-

(i) the improvements were made or the crops planted with the consent of the owner or person in charge;

(ii) the improvements were necessary or useful to the occupier; and

(iii) a written agreement between the occupier and the owner or person in charge, entered into prior to the making of improvements, provides that the occupier shall not be entitled to compensation for improvements identified in that agreement;

(b) the court shall order the owner or person in charge to pay any outstanding wages and related amounts that are due in terms of the Basic Conditions of Employment Act, 1983 (Act 3 of 1983) the Labour Relations Act or a determination made in terms of the Wage Act, 1957 (Act 5 of 1957);

(c) the court may order the owner or person in charge to grant the occupier a fair opportunity to-

(i) demolish any structures and improvements erected or made by the occupier and his or her predecessors, and to remove materials so salvaged; and

(ii) tend standing crops to which he or she is entitled until they are ready for harvesting, and then to harvest and remove them.

(2) The compensation contemplated in subsection (1) shall be determined by the court as being just and equitable, taking into account-

(a) the cost to the occupier of replacing such structures and improvements in the condition in which they were before the eviction;

(b) the value of materials which the occupier may remove;

(c) whether any materials referred to in paragraph (b) or contributions by the owner or person in charge were provided as part of the benefits provided to the occupier or his or her predecessors in return for any consideration; and

(d) if the occupier has not been given the opportunity to remove a crop, the value of the crop less the value of any contribution by the owner or person in charge to the planting and maintenance of the crop."

Again, notwithstanding that the parties have settled the matter, the court which is asked to make the settlement an order of court is compelled to apply its mind to these provisions and the parties will have to provide the court with sufficient information to enable it to do so.

[23] The third aspect of ESTA which must be considered is really just the converse of the second. Just as there are certain provisions which must be applied by a court when making a settlement agreement an order of court, so too a court may not make provisions of an agreement

an order of court which it does not have the power to order. Given that the courts primarily tasked with the adjudication of cases arising from ESTA, (the magistrates' courts and the Land Claims Court) are creatures of statute, any settlement agreement which is sought to be made an order of court would have to be confined to matters which are within the jurisdiction of the court concerned. The parties cannot by agreement confer on those courts any jurisdiction which they do not already have in terms of their constitutive statutes or ESTA.[24]

Application to the settlement agreement in this case

[24] That brings me to the settlement agreement in this case. There is no indication in the papers before me that the magistrate performed the exercise which is contemplated in paragraphs [13] to [23] above. This is not a criticism. There is no prior authority on how a settlement agreement of this nature should be dealt with in terms of ESTA. It will be necessary for the order making the agreement an order of court to be set aside and for the parties to be given the opportunity of remedying the deficiencies to which I refer. In order to assist the parties in framing any amendments to the agreement and the magistrate in reconsidering the matter, I will set out my views on the agreement as it stands.

Is there a waiver to which legal effect should be given?

[25] There is no concession in the agreement or elsewhere that the requirements of section 9(2) have been complied with. The pleadings suggest that no such concession is made. It must, therefore, be assumed that the intended effect of the agreement is that the defendants waive their right to insist on adherence to that section and that the agreement has the effect of limiting their rights.

[26] With reference to factor (i) referred to in paragraph [16] above, the parties record in the preamble to the agreement that they agree that the terms are "just and equitable bearing all their circumstances in mind". The defendants are accorded a period of six months to vacate the farm from the date of signature of the agreement ie 29 June 1999. The conditions under which they will reside on the farm during those six months are strict but not patently unfair. They are not required to pay any rent or provide any labour. The agreement however falls short of the requirements of justice and equity in one respect. Clause 6 envisages a procedure whereby a breach of any of the conditions of the agreement (other than the 31 December vacation date) justifies the plaintiff in approaching the magistrate's court on the existing pleadings, together with an affidavit detailing the breach, for an order issuing a warrant of eviction, even if this is before 31 December 1999. The sanction of an eviction predating 31 December 1999 for a minor infringement of one of the conditions referred to in clause 3 of the agreement would not be in

24 See *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 (4) SA 883 (AD) where the court held that consent to jurisdiction is insufficient, one or other of the grounds of jurisdiction must be present. See also LAWSA Vol 11 at par 543.

accordance with justice and equity. For this reason, clause 6 ought not to have been made an order of the court.[25]

[27] With reference to factors (ii) and (iii) in paragraph [16] above, the plaintiff's attorney said the following in his written submissions to the Land Claims Court regarding the circumstances in which the agreement was signed:

> "Both First and Second Defendant and their lawyer attended the settlement negotiations in the offices of Cox & Partners where the Plaintiff was also present and during which meeting the terms of the Settlement Agreement was (sic) negotiated in the presence of all the parties. . . .. After the settlement negotiations had been conducted in the offices of Cox & Partners the parties moved to the Magistrate's Court where, in the presence of both First and Second Defendant and their lawyer as well as the Plaintiff and his lawyer, the presiding Magistrate read out the terms of the Settlement Agreement with the assistance of a Zulu interpreter who interpreted the contents of the Settlement Agreement once more to the Defendants. The writer hereof can clearly recall that emphasis was placed by the presiding Magistrate, through the Court interpreter, on the fact that the settlement will be binding upon both the Defendants. The Court then explained to the Defendants that the Settlement Order was made an Order of Court. No objection was raised by either the Attorney acting on behalf of the Defendants or either of the Defendants who were personally present in the Court Room."

This was not disputed by the defendants' attorney. Given those circumstances, it is reasonable to infer that the agreement was freely entered into and that the defendants were aware of the rights which they were waiving or limiting. This Court must accept, in the absence of any indications to the contrary, that a person who is duly represented by an attorney has had the legal position properly explained to him or her by that attorney. It would, nonetheless, be a salutary practice in future if some additional information was placed before courts considering such settlements confirming that there has been such an explanation to the person waiving or limiting his or her rights and that she understands the implications.

Application of the peremptory provisions

[28] With reference to section 12(1) and (2) of ESTA, clause 3 of the agreement provides a date for vacation of the premises as contemplated by section 12(1)(a), that is 31 December 1999. A date on which the eviction may be carried out as contemplated in section 12(1)(b) was not provided. Nor was any information provided on the basis of which either the appropriateness of the date of 31 December 1999 could be assessed or a date could be determined in terms of section 12(1)(b). The magistrate also made no attempt to determine a date in terms of section 12(1)(b).[26]

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25 I raised my difficulty with clause 6 with the parties. The plaintiff's attorneys, in response, suggested that the court amend the agreement and proposed a draft clause to replace the existing clauses 6 and 7 of the agreement. I doubt whether the court would have the jurisdiction to do this. In any event the draft clause does not cure the defects which I have referred to. It is also based on rule 41(4) of the Uniform Rules of the High Court which, for reasons referred to in paragraph [34] , is not applicable in the circumstances.

26 I do not accept the magistrate's suggestion in his submissions that the s12(1)(b) date could be determined if and when there is a failure to vacate by the agreed date of 31 December 1999. Again, this would allow the determination of the s12(1)(b) date without any further review in terms of s19(3). In this regard, I refer to my remarks in n 27 below.

I have already referred to certain problems in relation to clause 6 of the agreement.[27] A further difficulty I have with clause 6 is that it is open to an interpretation which would allow a circumvention of section 12(1) and (2) and 19(3) of ESTA in the event of an eviction under that clause.[28] These were further shortcomings in the proceedings which will have to be remedied when the matter is reconsidered.

[29] With reference to section 13(1) of ESTA, the agreement does not make any provision for the payment of compensation by the plaintiff to the defendants. There are clauses dealing with matters which are referred to in section 13(1)(a) and (c). Clause 3.6 confines the defendants to the cultivation of a small vegetable garden for the remainder of their tenancy. They are only allowed to harvest what is ripe at the end of their tenancy and are precluded from harvesting anything after that. I will assume in favour of the defendants that unharvested vegetables which are not ripe at the end of their tenancy could be considered a "standing crop". Section 13 obliges the court to order the plaintiff to compensate the defendants for standing crops -

> "to the extent that it is just and equitable with due regard to all relevant factors, including whether . . . the crops were planted with the consent of the owner or person in charge".

It is a relevant factor of great significance that the parties have reached an agreement regulating the matter of standing crops, which they consider just and equitable, and which provides for the payment of no compensation. It is also relevant that the potential crop is small, coming as it does from a garden which is only 6m x 6m. In my view, these considerations are sufficient to outweigh the fact that the crops were planted with the consent of the plaintiff.[29] I am accordingly satisfied that the qualification "to the extent that it is just and equitable" will justify the magistrate's court in declining to order the payment of any compensation in respect of standing crops when the matter is reconsidered.[30]

[30] Clause 4 of the settlement agreement obliges the defendants to remove whatever material or belongings from their structures they wish to remove from the farm. Whatever is left behind must be demolished. Clause 5 obliges the plaintiff to provide limited assistance to the defendants in removing their materials and belongings. Section 13(1)(c) of ESTA allows the court to make an order compelling the owner to allow an occupier a fair opportunity to demolish improvements

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27 See paragraph [26] above.

28 The magistrate in his further submissions sought to justify this clause on the basis that the present process in which the court is engaged satisfied the review requirement (s19(3)), that the date of 31 December satisfied s12(1)(a) and that s12(1)(b) could be determined if and when there was a breach. The problem with this argument is that clause 6 of the agreement envisages a vacation and eviction date before 31 December 1999. Thus s12(1)(a) is not complied with in relation to clause 6. Moreover, on his approach, the Land Claims Court would never have the opportunity of reviewing the setting of those dates by the magistrate's court. The review of the exercise of the magistrate's discretion in terms of s12(1) and (2) is an integral part of the s19(3) review process.

29 Section 13(1)(a)(i).

30 This is on the assumption that no additional information is placed before the court upon reconsidering the matter relating to this specific issue of compensation which suggests that it should exercise its discretion differently.

and remove salvaged materials. Although this is not expressly provided in section 13 of ESTA, it is implicit that such an order either operates as an alternative to the payment by the owner of compensation for such structures or improvements or mitigates any potential obligation to pay such compensation in terms of section 13. If that were not so, an owner may have to compensate for improvements which she never received. The occupier, on the other hand, could potentially receive compensation for materials which she was entitled to remove. Clause 5 of the settlement agreement has the same effect as an order in terms of section 13(1)(c). This, together with the fact that the parties have reached an agreement in terms of which no compensation is payable and which they consider to be just and equitable, justifies a finding that the court should not order the plaintiff to pay compensation for structures erected or improvements made in this matter.[31]

[31] Section 13(1)(b) is also in peremptory terms.[32] However, before a court is compelled to order the payment of outstanding wages and related amounts, such amounts must be due. There is no provision in the agreement dealing with the payment of outstanding wages. In the defendants' plea, they deny the plaintiff's assertion that they were never employed by him on a permanent basis. Still, it can reasonably be inferred from the absence of any reference to outstanding wages in the settlement agreement, that no such amounts are due. The magistrate's order is, therefore, not open to criticism on the basis of section 13(1)(b). It would, nonetheless, be a salutary practice in future for the parties to such a settlement agreement to record the fact that no such amounts are due.

[32] There is a final aspect of the settlement agreement which needs to be considered in relation to provisions of ESTA which might not be capable of waiver.[33] Throughout the proceedings in this matter, the parties purported to act in terms of the Rules of the Magistrates' Courts. In making the settlement agreement an order of court, the magistrate, in accordance with the terms of the agreement,[34] purported to act in terms of rule 27(6) of the Rules of the Magistrates' Courts. This was in conflict with section 17(4) of ESTA which provides as follows:

> "Until such time as rules of court for the magistrates' courts are made in terms of subsection (3), the rules of procedure applicable in civil actions and applications in a High Court shall apply mutatis mutandis in respect of any proceedings in a magistrate's court in terms of this Act."

No rules have been made in terms of section 17(3), so the Uniform Rules of the High Court apply to ESTA cases brought in the magistrates' courts.

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31 This is on the basis of a similar assumption to that referred to in n 30 above.

32 It should be noted that s 13(1)(b) refers to the Basic Conditions of Employment Act No 3 of 1983 and the Wage Act No 5 of 1957, both of which have been repealed by s 95(5) read with schedule four of the Basic Conditions of Employment Act No 75 of 1997. It is not necessary for me to consider the implications of this for the adjudication of this matter.

33 As will become apparent, it is not necessary for me to decide whether or not the provisions concerned are capable of waiver.

34 See the third paragraph of the preamble to the agreement quoted in paragraph [3].

[33] This issue was raised with the parties. The plaintiff's attorney conceded that the Uniform Rules of the High Court applied to proceedings in terms of ESTA. However, he pointed out that it was the practice countrywide for practitioners and magistrates' courts to ignore section 17(4) and to proceed on the basis of the Rules of the Magistrates' Courts.[35] The plaintiff's attorney goes on to suggest that the Land Claims Court has the power to condone non-compliance with section 17(4). Alternatively, he indicates the plaintiff's willingness to amend the agreement so as to refer to rule 41(4) of the Uniform Rules of the High Court which reads:

> " Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof on at least five days' notice to all interested parties."

[34] Unfortunately, that rule only provides for the settlement acquiring the status of a court order once there has been a default.[36] That is not appropriate to the type of settlement contemplated in this case where, in terms of ESTA, the agreement only becomes effective when it is made an order of court. In fact I have not been able to find any provision in the Uniform Rules of the High Court which could comfortably be applied when making an agreement such as the present one an order of court at the stage when it is necessary to do so.[37] In my view, the source of the authority to make a settlement agreement an order of court in these circumstances is that which was described in *Hodd v Hodd; D'Aubrey v D'Aubrey*[38] as follows:

> "[In the case of *Rawlins v Rawlins*] the learned judge said:
>
> > 'the defendant consents to the Order for maintenance, and the request for judgment on that item is made jointly by the plaintiff and the defendant. . . . The first principle to be applied is that the Court has jurisdiction to give judgment, as *Voet* says in 4.6.17, according to the wish of the parties (and see *Digest*, 42.1.26). That also appears to be the law of England according to 18 *Halsbury*, paragraph 501, p188.'

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35 Contra *De Kock v Juggels* LCC 7R/99 11 March 1999 as yet unreported, internet web site address www.law.wits.ac.za/lcc/1999/dekocksum.html at para [9].

36 This is clear from a reading of the rule and was implicitly accepted in, for example, *Massey-Ferguson (South Africa) Ltd v Ermelo Motors (Pty) Ltd and Others* 1973 (4) SA 206 (T) at 214H-215A.

37 Rule 31(1)(a) provides for the situation where a defendant "confess[es] in whole or in part the claim contained in the summons." Rule 31(1)(c) provides for a plaintiff to apply in writing through the registrar for a judge to give "judgment according to such confession". A settlement agreement, part of which incorporates such a confession and preserves the right of the plaintiff to fall back on the relief claimed in the summons in the event of a default, may, in effect, be made an order of court via that rule, to the extent of the confession: *Barbour v Herf* 1986 (2) SA 414 (N) at 417-9. This is not an appropriate mechanism for making the settlement agreement in this case, in its entirety, an order of court before there has been any default.

38 1942 NPD 198.

> Now so far as the *Digest* passage is concerned, it certainly seems to convey in general terms that if the litigants have agreed what the decision shall be, ('*quid pronuncietur*'), the '*judex*' will not go wrong in making an order ('*sententiam*') to give effect to their agreement."[39]

In *Schierhout v Minister of Justice*,[40] it was referred to as a "practice of the Courts". The law in those cases is stated in relation to the High Courts. In this case we are dealing with an order of a magistrate's court. However, it seems to me that this is a function which is so central to that of a court, that it must be an implied power of a magistrate's court,[41] quite apart from the power conferred by rule 27(6) of the Rules of the Magistrates' Courts. That magistrates' courts are also envisaged as having this power in relation to cases under ESTA is apparent from the fact that the reference to "a court" in section 25(1) clearly includes a magistrate's court.[42] It follows that, when making a settlement agreement of the kind now under consideration an order of court, a magistrate's court must not act in terms of any rules, but rather under the general powers conferred on it by law to do so.

[35] It is arguable that the joint decision of the parties to apply rule 27(6) of the Rules of the Magistrates' Courts contemplates the type of waiver of a purely procedural provision which is allowed in terms of the test referred to in the *Bezuidenhout* case.[43] It is not, however, necessary for me to decide this issue because I, in any event , intend setting aside the magistrate's order and giving the parties an opportunity to amend the agreement and reapply to the magistrate to have the agreement made an order of court. If the same agreement is placed before the magistrate without any amendments, he could remedy the situation by expressly declining to act in terms of the Rules of the Magistrates' Courts and acting, instead, in terms of his general powers.

Are all the terms of the settlement agreement within the court's jurisdiction?

[36] Subject to what I have said above, the terms of the agreement are in all other respects within the jurisdiction of the magistrate's court if they are to be given the status of a court order.[44]

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39 Above at 203-4. Note that the Court goes on to point out that this general statement must be qualified and that it will not always be appropriate to make a settlement agreement an order of court.

40 Above n 7.

41 Erasmus and Van Loggerenberg *Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa* 9th ed (Juta, Cape Town 1996) at 34 and the authorities referred to at footnote 6.

42 Section 25(1) is quoted in paragraph [10]. "[C]ourt" is defined in s 1 of ESTA to mean:

> "a competent court having jurisdiction in terms of this Act . . ."

43 See paragraph [17].

44 A substantial part of the agreement relates to the conditions subject to which the defendants will reside on the farm between the date of the agreement and the vacation date. The power to determine such conditions is specifically conferred on the court making the eviction order by section 12(4).

Order

[37] As I have indicated, I intend setting aside the magistrate's order. The parties will then have the opportunity of considering the implications of this judgment and amending the agreement, before re-applying to have it made an order of the magistrate's court. The parties are encouraged to act speedily in order to ensure that the process of re-applying, including the review in terms of section 19(3), may be completed well before the date set for vacation of the farm in the agreement or any amended version of it. I, accordingly, make the following order in terms of section 19(3):

(i) the order of the Magistrate, Vryheid, dated 29 June 1999, making the settlement agreement an order of court is set aside;

(ii) the order is substituted with the following order:

(a) the court declines to make the settlement agreement an order of court;

(b) any party may re-apply to the Magistrate's Court, Vryheid, under the same case number and on the same papers, duly supplemented, to have the settlement agreement, or any amended version of it, made an order of court.

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JUDGE A DODSON

Handed down on: 23 September 1999

For the Plaintiff: *Cox and Partners, Vryheid*

For the Defendants: *Loots Attorneys, Vryheid*