IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Heard at **RANDBURG** on 24, 27, 28 and 31 May 2002 **CASE NUMBER**: LCC 16/01
before **Gildenhuys AJ**

Decided on: 28 June 2002

In the matter between:

ERASMUS ALBERTUS SWANEVELDER First applicant

JOHANNA CORNELIA SWANEVELDER Second applicant

and

JOHANNES MPEDI First respondent

REBECCA MPEDI Second respondent

JOHANNA MPEDI Third respondent

DAVID MPEDI Fourth respondent

JUDGMENT

GILDENHUYS AJ:

Background

[1] The applicants applied to this Court on notice of motion for the eviction of the respondents from the property known as the remaining extent of the farm Rietgat no 8, registration division KR, Transvaal. I will refer to this property as "Rietgat". The applicants are married to each other in community of property and they are the owners of Rietgat. They farm Rietgat as part of a farming unit which also includes portions of the farms commonly known as Steenbokfontein and Zeekgat.

[2] The first respondent lives on Rietgat together with the second respondent, who is his wife, and some other family members. The first respondent is an occupier, as defined in the Extension

of Security of Tenure Act.[1] I shall refer to this Act as "ESTA". The first respondent is a farm labourer. He cannot read or write. It was alleged that the second respondent is also an occupier (as defined). I will consider that allegation later in this judgment. The other respondents are family members of the first and second respondents, and are not occupiers as defined in their own right.[2]

[3] The respondents opposed the eviction application. The first respondent delivered answering affidavits. No replying affidavits were delivered. A probation report was submitted by Mr M M Mohapi, a project officer of the Department of Land Affairs, in terms of section 9(3) of ESTA. Both the first applicant and the first respondent delivered affidavits in response to the probation report.

[4] Together with this application, the applicants brought a similar application for the eviction of one Salomé Phatudi and her family from Rietgat. Ms Salomé Phatudi is a sister of the second respondent. The two eviction applications were heard by me consecutively, first the Phatudi case and then this case.

[5] The parties concurred (through their legal representatives) during a pre-trial conference on 10 April 2002 that there are certain factual disputes which should be referred to oral evidence. These were subsequently agreed to be the following:

- whether the right of residence of the first respondent arose solely from his employment with the applicants;
- whether the first respondent has breached section 6(3) as contemplated in section 10(1)(a) of ESTA;

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1 Act 62 of 1997, as amended.

2 The difference between the legal position of occupiers (as defined in ESTA) and the legal position of family members who are not occupiers (as defined) has been demonstrated and analysed in the decision of *Die Landbou Navorsingsraad v Klaasen* LCC 83R/01, 29 October 2001, available from www.law.wits.ac.za at para [19]-[36].

- whether the first respondent has committed such a fundamental breach of the relationship between him and the applicants that it is not practically possible to remedy it, as contemplated in section 10(1)(c) of ESTA;
- the ages of the first and second respondents; and
- whether the second respondent has an independent right of residence.

Oral evidence was heard on these issues.

The facts

[6] This case deals with the sad history of disintegration of a cordial relationship which existed over many years between the applicants and the respondents. I will, in this part of my judgment, deal with the facts very briefly, to provide a general background. Later in the judgment, when examining specific issues, I will set out and consider the evidence relating to those issues in greater detail.

[7] The first respondent grew up in Vaalwater. His first employment was on the farm Rietbokhoek, where he lived with his grandparents. After his employment on Rietbokhoek came to an end, he worked on public roads for some years. Thereafter he took up employment with Mr Lood Swanevelder on a portion of the farm Steenbokfontein.[3] Mr Lood Swanevelder is an uncle of the first applicant. Whilst employed by Mr Lood Swanevelder, the first respondent married the second respondent, Rebecca Mpedi. Sometimes the second respondent uses her maiden name, Sehodi.[4]

[8] After the first respondent had worked for Mr Lood Swanevelder for a few years, a misunderstanding occurred, involving the second respondent. At that time, there was not a good social relationship among the workers on Mr Lood Swanevelder's farm. The respondents left, and the first respondent took up employment with a certain Mr Ras Labuschagne on his farm,

3 Not the portion which now forms part of the applicants' farming unit.

4 Her identity document is in the name of Ramokomi Elizabeth Sehodi.

some 4 kilometers away from Rietgat. The first and second respondents and their household moved to Mr Labuschagne's farm.

[9] It is necessary, at this stage, to say something about the various farms involved in this case. For ease of reference, and unless otherwise required, I shall refer to the farms by their names only, omitting any subdivision descriptions. The first applicant's father originally owned a portion of the farm Steenbokfontein, but sold it some time during 1976. I shall refer to him as Mr Swanevelder senior. Thereafter his elder son Pieter Stephanus Swanevelder (to whom I shall refer as Mr Piet Swanevelder) negotiated for the acquisition for his own benefit of the farms Goedgedacht and Rietgat. His younger brother, the first applicant, negotiated the acquisition for his own benefit of the farm Werkendam. These three farms were bought and registered in the name of Mr Swanevelder senior, although his sons paid for them. This was, according to them, done to facilitate the acquisition of possible future Landbank loans. The Landbank then only gave loans to full time farmers. The first applicant, at the time, was employed in Secunda and Mr Piet Swanevelder was employed in Kempton Park. Their father was a full time farmer. Mr Mokhari, on behalf of the respondents, cross-examined the first applicant and Mr Piet Swanevelder intensely on this evidence, and submitted that it was false.

[10] After working for Mr Labuschagne for about a year, the first respondent, according to his evidence, approached Mr Swanevelder senior during 1982 "for a place to stay". At that time, Mr Swanevelder senior was living on Werkendam. The first respondent stated that Mr Swanevelder senior gave him a "place to stay" on Rietgat, and that his consent to stay there was not linked to any employment contract. Mr Piet Swanevelder, to the contrary, testified that during 1982 the first respondent applied to him for work. At that time he intended to do crop farming on Goedgedacht, where he would be willing to employ the first respondent. Goedgedacht is some 50 kilometers away from Rietgat. The second respondent did not want to live at Goedgedacht, because it was too far removed from the home of her parents, who at that stage lived on Werkendam. Mr Piet Swanevelder testified that he gave the first respondent a place to build his house on Rietgat, which is adjacent to Werkendam. He had stipulated that the right to build the house and to live on Rietgat was part of the first respondent's employment contract, and would endure only for so long as the first respondent remained in his employ. The first respondent was

prepared to commute from Rietgat to work on Goedgedacht when the crop farming commenced, leaving his family at Rietgat.

[11] Mr Piet Swanevelder testified that in 1982 Mr Swanevelder senior tended to cattle belonging to himself and to the first applicant on Werkendam, and to Mr Piet Swanevelder on Rietgat. The first respondent commenced his employment with Mr Piet Swanevelder in 1982 by working together with Mr Swanevelder senior in herding cattle on Rietgat and Werkendam. The first respondent denied that Mr Piet Swanevelder had any cattle on Rietgat, or that he ever worked for him on Rietgat and Werkendam. He said that Mr Piet Swanevelder employed him on Goedgedacht at the request of Mr Swanevelder senior some three months after he was given his "place to stay" on Rietgat.

[12] Mr Piet Swanevelder also employed the first applicant for his crop farming venture on Goedgedacht. He commenced the venture during 1983. The first respondent them moved to work on Goedgedacht, returning home to his family on Rietgat once every month. The crop farming venture was not successful. In 1986 the first applicant started a fencing business. The first respondent joined him. It is not clear on what basis: possibly as an employee seconded to him by Mr Piet Swanevelder.

[13] During 1988 the first applicant bought portion 4 of the farm Steenbokfontein from one Roy Boshoff. Because this property is adjacent to Rietgat, the first applicant and his brother decided to exchange Rietgat and Werkendam, the first applicant taking Rietgat and his brother taking Werkendam. During 1990, registered ownership of Rietgat was transferred to the first applicant by Mr Swanevelder senior. Mr Swanevelder senior died that same year.

[14] During 1988, after it was decided that the first applicant would become the registered owner of Rietgat, the first respondent was asked to choose whether he wanted to enter into an employment contract with the first applicant and remain living on Rietgat, or whether he wanted to be employed by Mr Piet Swanevelder. The first respondent chose to be employed by the first applicant. According to the first applicant, an oral employment agreement was then entered into, in terms whereof the first respondent could remain living on Rietgat for as long as he remained

in the first applicant's employ. In terms of that agreement, he was allowed to keep some livestock. The first applicant's evidence relating to that agreement was not seriously questioned in cross-examination. After the 1988-agreement, the first respondent remained employed in the first applicant's fencing business, progressing to the position of team leader. The fencing business operated country-wide, and required him to be away from his home on Rietgat for long periods.

[15] In 1995 the applicants bought the property known as the remainder of Steenbokfontein. They decided to convert Rietgat into a game farm. They built houses for their labourers on an odd portion of Steenbokfontein, including a house for the respondents, which the first applicant alleged is a better house than the one on Rietgat. The first applicant testified that the respondents refused to move to that house. The first respondent denied that any such house was allocated to him, and also denied that he was requested to move.

[16] The first applicant testified that the first respondent approached him on 5 January 1999 with a request to be relieved from his fencing work and to be employed as a farm labourer on Rietgat, where his family lived. The first applicant agreed. The first respondent, in his evidence, gave an entirely contradictory version. He said that he discovered during December 1998 that one of his calves went missing on Rietgat. He informed the first applicant thereof. The first applicant then took him away from the fencing business and brought him back to the farm "so that he [first respondent] could look after his cattle".

[17] According to the first applicant there was, during the beginning of 1999, tension between the respondents and Ms Salomé Phatudi (who also lives on Rietgat) on the one hand, and one Frans Pitsi and Mr Pitsi's family on the other. Mr Pitsi was employed as a herdsman at the time, looking after the cattle of the first applicant and also after the cattle which the farm labourers were allowed to graze on the farm. According to what the first applicant had heard, the tension involved the impregnation of one of the first respondent's daughters by a member of the Pitsi family, some vituperation between family members and a charge that Mr Pitsi allowed two calves, one belonging to the first respondent and another to Ms Phatudi, to go missing. The first applicant convened a meeting for 8 February 1999 in an attempt to mediate the differences and

break up the tension. The meeting was attended by the first applicant, the first and second respondents, Ms Phatudi, Mr Pitsi and some other persons, about whose presence there is no unanimity. At the meeting, the second respondent and Ms Phatudi confronted Mr Pitsi with the loss of the two calves. According to the first applicant, they used crude language, and together with the first respondent demanded the dismissal of Mr Pitsi. The first respondent, in his testimony, admitted to acrimony between his wife and Mr Pitsi, but denied that any crude language was used by his wife and sister-in-law, and accused the first applicant of using crude language. He also denied that any of them had called for the dismissal of Mr Pitsi.

[18] The following day the second respondent went to the police and laid a charge of stock theft. In her written statement to the police made on 9 February 1999, the second respondent accused the first applicant of selling two of her cattle. The first respondent denied that he or his wife accused the first applicant with the sale of any of their cattle, and stated that the police were merely requested to help them search for the missing calves. He could not explain his wife's contrary statement. I will deal with this in greater detail later in this judgment.

[19] On 28 February 1999, the first applicant received a complaint from his brother-in-law, who was supervising the first respondent fixing pipes on the farm. The first applicant discussed the complaint with the first respondent. According to him, the first respondent was inexplicably aggressive. He complained that it was not his work to fix pipes, but Mr Pitsi's work, that he got all the bad work on the farm, and that the first applicant intended to oust him from the farm. He informed the first applicant that he would take the rest of the day off, and would only return on the following day. The first respondent's version is that the first applicant told him that he was working too slow, that he should leave his work straight away and come back the following day.

[20] The first applicant testified that, at the time, he was busy concluding written agreements with all his workers, as required by law. He considered it appropriate to enter into a written agreement with the first respondent at that stage, because the first respondent seemed to be uncertain of what his duties were. He prepared a written agreement and presented it to the first respondent on the next day. Despite a full explanation of the contents of the document, the first respondent, using crude language, refused to sign it. He said he would reconsider his position

after the court case relating to the theft of the two calves had been concluded, and left, never to return to work. The first respondent's testimony is quite different. He said that the first applicant demanded that he sign a document without any explanation. He requested that he be given the document so that somebody could read it for him. This was refused. The first respondent then refused to sign the document. The first applicant told him that, because he refused, there was no more work for him on the farm. He then left.

[21] After waiting for some time, the first applicant obtained legal advice and initiated disciplinary proceedings against the first respondent. On 17 April 1999 he attempted to serve a written notice of a disciplinary hearing on the first respondent. He found the first respondent in the veld with his cattle. The first respondent would not accept service of the notice. The first applicant then left the notice on a nearby fence pole. The first respondent admitted that the first applicant had accosted him in the veld but testified that the first applicant again demanded that he sign a document, which he alleged came from the government. He was given no further explanation of the document. When the first respondent refused to sign, the applicant took the document back with him.

[22] On 21 April 1999 a disciplinary hearing of the first applicant's charge against the first respondent was held. The first applicant's attorney, Mr Ettiene Rossouw, acted as chairperson. Although the first respondent attended, he refused to say anything. Mr Rossouw, in his evidence, described the first respondent's attitude as obstreperous. The first respondent did not respond to the charge against him. Mr Rossouw, following the practice used in criminal trails, entered a plea of not guilty. The first applicant gave comprehensive evidence at the hearing. The first respondent did not put any questions to him. Mr Rossouw testified that he kept running minutes of the proceedings, comprising some four handwritten pages. These were handed up to the Court as exhibit "D". At the end of the hearing, the first respondent was found guilty and was dismissed from his employ. His outstanding wages were paid to him. The first respondent denied that any hearing took place or that any minutes were kept in his presence. He testified that, on his arrival, Mr Rossouw told him that the first applicant no longer wanted him on his farm, and that he must take his money and sign some papers, without explaining the contents of the papers. He refused to sign, took his money and left.

[23] After his dismissal, the first respondent took the matter to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The CCMA scheduled a meeting, which the first applicant attended. The first respondent was absent. Apparently he and his representative arrived later that day, and since the Commissioner certified on 24 June 1999 that the dispute remained unresolved.[5]

[24] Early in February 2000 the first applicant received a telephone call from an official of the Department of Land Affairs, requesting a meeting. The first respondent had asked the Department to intervene. The first applicant agreed to a meeting. Two officials from the Department arrived on the farm. They went to the first applicant and asked him to show them the housing on Steenbokfontein to which the first applicant wanted to move the respondents, and also the housing which they then occupied on Rietgat. After showing them the housing on Steenbokfontein, the first applicant drove them to the respondents' house on Rietgat. They encountered the first respondent and Ms Phatudi along the way. The first respondent and Ms Phatudi were very abusive towards the two officials, and refused to participate in any discussions. The first respondent admitted their refusal to participate, and explained it by stating that "it was us who went to ask for help from them, and instead of them coming to us, they went to the applicants".[6]

[25] After the CCMA certified that the labour dispute remained unresolved, the first respondent took the matter to arbitration. On 15 August 2000 the first applicant attended arbitration proceedings, while the first respondent was absent. The matter was postponed to 1 September 2000 with notice to all parties. On 1 September 2000 the first respondent was once again absent. The Commissioner, Mr Francis Kganyago, then dismissed the proceedings. The first respondent explained his absence by stating that notice of the proceedings was given to his previous advisers, the Warmbaths Advice Office, and not to his present advisors, the Nkuzi Land Rights Legal Unit. Despite the alleged defective notice, the first respondent did nothing to upset the dismissal of the arbitration proceedings, nor did he take the labour dispute any further.

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5 Annexure G2 to the founding affidavit.

6 Para 34 of the first respondent's answering affidavit dated 28 June 2001.

[26] After the labour dispute had been finalised, the first applicant again served a notice of termination of the first respondent's right of occupation in terms of section 8(2) of ESTA. He called upon the first respondent to vacate Rietgat within 30 days together with his family. He also caused the requisite notices to be served in terms of section 9(2)(d) of ESTA. The first respondent did not comply with the demand to vacate Rietgat, and he is still living there with his family.

[27] After the first respondent stopped working for the first applicant, he took up jobs with various farmers. The nature and extent of those jobs are in dispute, but are not really important for my decision in this case. It is common cause that as from November 2001 the first respondent worked for a certain Mr van Onselen, erecting fencing for him. He still works for Mr van Onselen. His home remains on Rietgat.

The legal requirements for an eviction order

[28] In accordance with section 9 of ESTA, an eviction order may be granted if:

firstly,	the first respondent's right of residence has been terminated in accordance with section 8;
secondly,	the first respondent has not vacated the property within the period of notice given to him;
thirdly,	the conditions of section 10 have been complied with; and
fourthly,	the requisite written notice of the applicants' intention to obtain an eviction order has been given to the first respondent, the relevant municipality and the head of the relevant provincial office of the Department of Land Affairs.

Compliance with the first and third requirements is disputed. It is not contested that the notices envisaged in the second and fourth requirements were given, and that the respondents have not vacated the property.

[29] The applicants rely mainly on section 10(1)(c), alternatively also on section 10(1)(a), for compliance with the third requirement for an eviction order. These sections read as follows:

> "(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if -
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> (a) the occupier has breached section 6 (3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;
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> (b) . . .
>
> (c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or
>
> (d) . . ."

Section 10(1)(a) refers to a breach of section 6(3). The relevant subsections of section 6(3) read as follows:

> "(3) An occupier may not -
>
> (a) intentionally and unlawfully harm any other person occupying the land;
>
> (b) intentionally and unlawfully cause material damage to the property of the owner or person in charge;
>
> (c) engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or
>
> (d) . . ."

[30] The issues to be adjudicated in this case revolve around whether the first and third requirements for an eviction order have been complied with. Before proceeding with these issues, it is necessary to record my impressions of the witnesses who testified before me.

The witnesses

[31] The first applicant and his brother, Mr Piet Swanevelder, gave evidence. Their evidence can be criticised in some minor respects, such as that they referred to themselves as owners of Goedgedacht, Rietgat and Werkendam whilst these farms remained registered in their father's name. I am also inclined to regard with some scepticism the first applicant's evidence that the respondents allowed some of their friends to steal firewood from his farm. That notwithstanding,

both the first applicant and his brother gave their evidence clearly and succinctly. On the principal issues, I have no reason to reject it. They tried their best to assist the Court.

[32] Mr Mokhari made much of the fact that Mr Swanevelder senior was the registered owner of Rietgat as well as of Werkendam until 1990. He submitted that the evidence of the two Swanevelder brothers to the effect that the first applicant bought Werkendam and Mr Piet Swanevelder bought Rietgat, that the farms were registered in their father's name to facilitate the granting of future Landbank loans, and that the brothers exchanged the farms between them in 1988, is false. He pointed out that no Landbank bonds were actually registered, and that the alleged contracts had to be in writing to be valid. Although the first applicant can be criticized for stating in his founding affidavit[7] that his brother was "die vorige eienaar van Rietgat" and for alleging that he and his wife "het die plaas Rietgat in terme van 'n ruiltransaksie aangekoop by my broer en sy eggenote", I accept that he was referring to property arrangements between his father, his brother and himself which were neither registered nor formalised. Informal arrangements such as these are not uncommon between family members. The title deed of Rietgat, which the applicants annexed to their papers, shows that the legal ownership of Rietgat was transferred to the applicants by Mr Swanevelder senior during 1990. If the first applicant wanted to mislead the Court, I doubt that he would have annexed that document.

[33] The last witness for the applicants was Mr Ettiene Rossouw. He is an attorney and acts as attorney of record for the applicants. He chaired the disciplinary enquiry which preceded the first respondent's dismissal. He gave evidence on what happened at the enquiry. He was a good witness, and could not be upset under cross-examination.

[34] The first respondent testified. He was not a good witness. He was well versed in a narrow rendering of his case. When asked difficult questions which went beyond that rendering, he tended to repeat part of his earlier evidence in his reply, even though it was not pertinent to the question, or he tried to duck the question. When that was not possible, he pleaded ignorance, aggravated by his age and his illiteracy. Some of his evidence is clearly untrue, as I will indicate later in my judgment. However, I remain cognizant of the first respondent's lack of

7 Para 7.1 of the founding affidavit.

sophistication, and realise that the translation of his evidence from Northern Sotho into English may lessen its impact. For these reasons, I took particular care before rejecting portions of his evidence.

[35] Lastly, Mrs Maria Moloantoa gave evidence concerning the first respondent's age, and Mr Malase David Segodi gave evidence concerning the second respondent's age. Their evidence was not particularly helpful on these issues. I will deal with it when I make my findings.

The right of residence

[36] The origin and scope of the first respondent's right of residence must be ascertained before it can be decided whether such right of residence was properly terminated in accordance with section 8 of ESTA. The first respondent submitted that he obtained an unconditional right of residence from Mr Swanevelder senior during 1982. The applicants submitted that the right of residence of the first respondent originally arose from an employment contract between him and Mr Piet Swanevelder, which was concluded during 1982. That employment contract was replaced with a new employment contract between the first applicant and the first respondent during 1988, which similarly bestowed a right of residence on the first respondent.

[37] The section 9(3) report contains the following "background information":

> "Mr Johannes Mpedi stayed and worked for Mr Bert Swanevelder on the farm Rietgat 8 KR from 1982 until Mr Bert Swanevelder advised Mr Mpedi to work for his son Piet Swanevelder."[8]

The first respondent denied under cross-examination that he ever worked for Mr Swanevelder senior, or that he worked on Rietgat and Werkendam before he left in 1983 to work for Mr Piet Swanevelder on Goedgedacht. This is contrary to the section 9(3) report[9] (which the first respondent confirmed to be correct[10]), and it is also contrary to the evidence given by the first applicant and by Mr Piet Swanevelder. This denial casts some doubt on the dependability of the

8 Para 5 of the report.

9 See the extract quoted above.

10 Para 2 of his affidavit of 26 April 2002.

testimony given by the first respondent, and accentuates the apprehension of why Mr Swanevelder senior would give the first respondent a place to stay if the first respondent did not work for him. At some stage during his cross-examination, the first respondent suggested it was because Mr Piet Swanevelder required employees, although he insisted that when he got his place on Rietgat, he did not know that he would be called upon to work for Mr Piet Swanevelder. This latter statement is difficult to believe.

[38] On the probabilities and also because of the contradictions in the first respondent's evidence, I have no doubt that the evidence given by the first applicant and by Mr Piet Swanevelder must prevail. It is, in my view, highly unlikely that Mr Swanevelder senior would have given the first respondent a place to stay without linking it to a service agreement, and without any other form of recompense. Accepting, as I do, that Rietgat was under control of Mr Piet Swanevelder at the time, it is even more unlikely that he would have encumbered Mr Piet Swanevelder's land in such a manner. The fact that the first respondent took up employment with Mr Piet Swanevelder points to the likelihood that Mr Piet Swanevelder was the person who allowed the first respondent to live on Rietgat.

[39] The first applicant testified that in 1988, after he had taken control of Rietgat, he entered into a service agreement with the first respondent. It is to be expected that the first applicant would have made his own agreements with the first respondent relating to service and occupation, rather than letting any previous consent to occupy Rietgat, continue. It was part of the service agreement between the first applicant and the first respondent that the first respondent and his family would be allowed to live on Rietgat for as long as he worked for the first applicant. The existence of this agreement was not seriously questioned on behalf of the first respondent during cross-examination. It was entered into well before ESTA was promulgated, and in my view it superceded all previous agreements relating to the first respondent's right of occupation of Rietgat. I accordingly conclude that the right of the first respondent to reside on Rietgat arose solely from his employment agreement with the first applicant.

[40] The parties are *ad idem* that the first respondent was dismissed from his employment with the first applicant, although they differ on the circumstances of the dismissal. In terms of section

8(2) of ESTA the right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier is dismissed in accordance with the provisions of the Labour Relations Act.[11] Section 8(3) of ESTA prescribes that any dispute over whether an occupier's employment has terminated as contemplated in section 8(2), shall be dealt with in accordance with the provisions of the Labour Relations Act.

[41] In this case, the first respondent did challenge the validity of his dismissal in the *fora* established under the Labour Relations Act. The upshot is that the dismissal of his claim in the arbitration hearing stands. It is not for this Court to decide whether the dismissal was fair or not. I must conclude that the dispute as to whether the first respondent was dismissed in accordance with the provisions of the Labour Relations Act, has been determined in accordance with the provisions of that Act. Under the circumstances, the first applicant was entitled to terminate the first respondent's right of residence under section 8(2) of ESTA. The first applicant caused a notice of termination of the right of residence to be served on the first respondent.[12]

[42] I ought to add, at this stage, that the right of cancellation given to an owner in terms of section 8(2) of ESTA is discrete from the right of cancellation provided in section 8(1). In deciding whether a right of residence was validly terminated under section 8(2), it is not necessary to consider whether such termination was just and equitable, as is required for a cancellation under section 8(1). The circumstances surrounding the cancellation will, however, be relevant in deciding whether the preconditions for an eviction order as set out in section 10 or 11 of ESTA, have been complied with.

[43] Receipt of the notice terminating the first respondent's right of residence was not disputed. The validity of the purported cancellation was contested, firstly on the basis that the first respondent's right of residence did not arise solely from his employment agreement and

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11 Act 66 of 1995.

12 Service took place on 24 November 2000, after the dismissal of the first respondent's claim by the arbitrator. See Annexure O to the first applicant's founding affidavit.

secondly on the basis that the first respondent is more than 60 years old and is protected under section 8(4) of ESTA. Section 8(4) provides:

> "(4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and-
>
> (a) has reached the age of 60 years; or
>
> (b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge,
>
> may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach."

I have already found that the first respondent's right of residence arose solely from his employment agreement. I will now consider whether section 8(4) prevented the termination of that right of residence.

[44] The first respondent stated in his answering affidavit:

> "According to my identity document, I am presently 57 years old. However that is not correct because when I applied for this identity document the Department of Home Affairs made an error when issuing my identity document. I was born in 1936 and as such the correct age is 65."[13]

The first respondent's oral evidence did not cover this aspect of the case at all. He did not explain how he knew that he was born in 1936, how the mistake occurred, and what, if anything, he did to have it rectified.

[45] The only evidence given in support of the allegation that the first respondent was born in 1936, was given by his elder sister, Mrs Maria Moloantoa. She does not know in what year she was born, nor does she know in what year the first respondent was born. She does not know how old she is. She only knows that the first respondent is about one year younger than she is. She heard that "from the elders". According to her identity document she was born on 11 March 1934.[14] This evidence is insufficient to show that the date of birth on the first respondent's

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13 Para 69.4 of the affidavit dated 28 June 2001.

14 A copy of the identity document was handed up and is exhibit "F".

identity document is wrong. It may just as readily be that the date of birth on her own identity document is wrong. At the request of Mr Havenga, who acted for the applicants, my registrar asked the Department of Home Affairs to let the Court have a certified copy of the completed application form for the first respondent's identity document.[15] This was done, and the application form was obtained.[16] The first respondent's date of birth is given as "1943-02-26" on the form, with the word "*beweer*" next to it. Someone deleted that date and replaced it with "1944-10-27". It is unknown who completed the form or altered the date of birth. The altered date is the date of birth which appears on the first respondent's identity document.[17] If the first respondent wants to rely on section 8(4) of ESTA, he bears the *onus* to show that he was older than 60 years when the first applicant purported to terminate his right of residence. In my view, the first respondent did not discharge that *onus*.

[46] I now turn to the second respondent. It was argued by Mr Mokhari that she is an occupier on Rietgat in her own right, because she was employed by the applicants up to 1996. The first applicant testified that the second respondent sold beer for the shop on the farm at a fixed commission per case, and that this arrangement was terminated long before 1996. The first respondent conceded that the second respondent was paid on a commission basis. That millitates against a master and servant relationship. The second respondent did not give oral testimony. There is no evidence that the second respondent, in her own right, had any consent to live on Rietgat. Her right to do so originates from her marriage relationship with the first respondent.[18] She was contracted to sell beer because she lived on Rietgat. She did not obtain a right to live in Rietgat because she sold beer for the applicants. The second respondent did not prove that she is an occupier on Rietgat in her own right,[19] and accordingly she cannot rely on section 8(4) of ESTA to prevent her eviction, even if she is older than 60 years of age.

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15 This Court has some inquisitorial powers. See section 32(3)(b) read with section 28O of the Restitution of Land Rights Act, Act 22 of 1994.

16 The form is exhibit "E1".

17 Para 1 of the section 9(3) report.

18 See *Venter NO v Claasen and Others* 2001 (1) SA 720 (LCC) and *Dique NO v Van der Merwe and Others* 2001 (2) SA 1006 (T). See also n 2 higher up.

19 She gave no evidence to refute the first applicant's version of the agreement under which she was allowed to sell beer, nor the termination of that agreement.

[47] I have considerable doubt as to whether the second respondent is indeed older than 60 years of age. The second respondent's identity document shows that she was born on 7 July 1940.[20] It appears from the application form for her identity document,[21] a certified copy of which was sent to this Court by the Department of Home Affairs, that "1946-01-06" was inserted as her date of birth. That date has the word "*beweer*" next to it. The date was deleted on the form and replaced by a different date, "1947-01-08". It is not known who filled out the application form, nor who altered the date of birth on the form. There is no explanation why the identity document carries a much earlier date.

[48] The second respondent's father, Mr Malase Segodi, gave evidence to support the date of birth as shown on the identity document. He said the second respondent was his eldest child. He does not know how old he is, nor how old the second respondent is. She is, according to him, considerably older than Ms Rika Swanevelder, the first applicant's sister. His second eldest child is Salomé. He said that the second respondent was little, just beginning to walk, when Salomé was born. It appears from the testimony given by Ms Salomé Phatudi in the eviction application against her that she was born in 1947.[22] Mr Piet Swanevelder testified that the second respondent is about the same age as his sister Rika, give or take a year, and that his sister was born during 1946. He furthermore testified that Mr Segodi confirmed to him that the second respondent and Rika were born in the same year. When that was put to Mr Segodi in cross-examination, he denied it. I conclude that, even if second respondent was an occupier on Rietgat in her own right, she did not prove, on a balance of probabilities, that she is older than 60 years of age.

Did the first respondent commit a fundamental breach the relationship between himself and the applicants?

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20 Exhibit "D" before the Court.

21 Exhibit "E2" before the Court.

22 Her identity number indicates her year of birth as 1950.

[49] To comply with the third requirement for an eviction order as contained in section 9(2)(c) of ESTA, the applicants must show that the eviction would be justified under section 10 of ESTA. The applicants relied mainly on section 10(1)(c), which allows an eviction order to be given if the occupier concerned has committed such a fundamental breach of the relationship between himself and the owner that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship. The applicants rely on the following circumstances to show that the relationship has irretrievably broken down:

- the unsubstantiated charge of cattle theft laid against the first applicant;
- the first respondent's abscondence from his work; and
- the first respondent's continued insolence, disdainfulness and uncooperative behaviour after he left his fencing job and started to work on the applicants' farm.

[50] I will commence my analysis by considering the issue of the calves which have allegedly gone missing, and the charge of theft laid with the police. The first respondent testified that he discovered during December 1998 that one of his calves was missing. He stated that he asked Mr Pitsi about the missing calf, and that Mr Pitsi told him that the calf was sold, without specifying who sold it.[23] He insisted that, in his own mind, he never thought of anybody selling the calf. He only thought that the calf got lost. In his answering affidavit[24] he stated that he had asked the first applicant during December 1998 about the missing calf. In reply to his enquiry, the first applicant told him "that since I want to know about the cattle, he will make me look after the cattle for me to be able to look after mine as well". This allegation is denied by the first applicant.

[51] The first respondent admitted that he attended the meeting called by the first applicant on 8 February 1999 where he and his wife, together with Ms Phatudi, Mr Pitsi, the first applicant and some other people, were present. The meeting was called to address the discord which the

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23 In para 15.1 of his answering affidavit of 28 June 2001, the first respondent alleged that Mr Pitsi responded to the question by telling him "to ask the applicant" about the missing calf. There is nothing about the calf being sold, despite the fact that the first respondent testified under cross-examination that he told his attorneys that Mr Pitsi said the calf was sold.

24 Para 15.1 of the affidavit of 28 June 2001.

first applicant observed between the Sehodi[25] and Pathudi families on the one hand, and the Pitsi family on the other. He said in cross-examination that he and his family had no dispute with Mr Pitsi and his family, although he later admitted that a boy who is related to Mr Pitsi's wife got one of his daughters pregnant. He testified that he learned for the first time at that meeting that a calf belonging to his sister-in-law, Ms Phatudi, had also gone missing. He denied that the loss of the calves were ever discussed prior to 8 February 1999 when the two families met. He denied that any accusations relating to the loss of the calves were made at the meeting.[26] He admitted that the first applicant alleged that the two calves had never been born. He denied that Ms Phatudi showed animosity towards Mr Pitsi. He admitted to an altercation between his wife and Mr Pitsi, his wife demanding that Mr Pitsi must tell the truth about what happened to the calves because he looked after the cattle. He maintained that neither himself nor Ms Phatudi insisted that Mr Pitsi should be dismissed. I get the impression that the first respondent shies away from admitting that accusations were made relating to the missing calves, because such accusations might jeopardise his chances of successfully resisting the eviction application against him and his family.

[52] The day after the meeting, so the first respondent testified under cross-examination, his wife at his behest went to the police at Nelspruit to ask for assistance in looking for the missing calves. He denied any intention to charge the first applicant with theft. He testified that, when the police subsequently interviewed him, he did not speak about theft.

[53] All of the above is contradicted in the section 9(3) report. The report contains the following allegations under the heading of "background information", which could only have come from one or both the respondents:

> "The underlying factor which led to Mr Johannes Mpedi's end of services was because of the fact that Mr E.A. Swanevelder started selling Mr Mpedi's cattle without consulting him. It is understood that in 1993 Mr Swanevelder sold one cow of Mr Mpedi without consultation and offered them R300 after they

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25 The second respondent comes from the Sehodi family.

26 If the evidence of the first respondent that he complained to the first applicant about his missing calf during December 1998, and that he was then brought back to the farm to look after the cattle (including the workers cattle) is correct, this statement would be difficult to believe.

> complained. The same situation occurred in 1998 and after the family complained he started threatening to evict them."

[54] When the conflicting section 9(3) report was put to the first respondent, he denied that the project officer who prepared the report ever interviewed him. I cannot accept that. The first respondent signed an affidavit in response to the section 9(3) report on 28 April 2002, which forms part of the papers before the Court. In that affidavit he stated:

> "At the time I was interview my eldest son Madumetja Jan Mpedi was working for Mr E.A. Swanevelder."[27] (my underlining)

Furthermore, in the same affidavit, he stated:

> "I have had the contents of the Section 9(3) report read and translated to me. Save for the following paragraphs which I wish to clarify and or correct, I confirm that the facts contained in the report are correct and I concur with the evaluation thereof."[28]

He did not clarify or correct any of the statements which are quoted above.

[55] The affidavit which the second respondent made to the police on 15 February 1999 is significant. It reads:

> "3. Op 1998-12-15 het Mnr Swanevelder beeste gelaai wat hy verkoop het. Twee (2) van die ossies was my beeste gewees. Dit is kruis Beefmaster ossies, ±1 ½ jaar oud. Rooibruin van kleur met brandmerk "Y" en geknip in die regteroor wat 1 "V" onder in oor geknip.
>
> 4. Mnr Swanevelder het nie vir ons gesê of gevra dat hy die beeste kan verkoop nie en hy het tot nou toe nog niks gesê nie. Ek en my man het aan Mnr Swanevelder gevra waar ons ossies is en dat ons gehoor het dat hy twee ossies van ons saam met syne verkoop het. Hy het dit egter ontken. My man het by Frans Pitsi die beeswagter gehoor dat Mnr Swanevelder ons ossies ook verkoop het.
>
> 5. My man het Mnr Swanevelder weer daaroor gevra waarop hy gesê het dat die twee ossies nooit gebore is nie. Kleinbooi Segabetla wat ook op die plaas werk weet dat die ossies wel gebore is en tot op daardie datum op die plaas was. Ek verlang verdere polisie ondersoek in die saak. Ek het niemand die reg of toestemming verleen om my ossies te vat of te verkoop nie. Die waarde van die ossies is ± R1 000-00 elk tesame R2 000-00."

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27 Para 5.1 of the affidavit.

28 Para 2 of the said affidavit.

The name "Johannes Mpedi" (the first applicant), appears on the front of the docket, obviously as complainant. The offence being investigated is described on the docket as: "*diefstal van vee gedurende Desember 1998, uit weikamp*." The police undertook a full investigation of the complaint, and submitted a complete docket to the public prosecutor. The public prosecutor declined to prosecute.

[56] The second respondent, who gave the affidavit of 15 February 1999 to the police, did not give oral testimony. I must draw a negative inference from that. Both the affidavit made by the second respondent to the police and the section 9(3) report give the lie to the first respondent's insistence that he never accused the first applicant of theft. The mystery of why the charge of theft was ever laid, remains. I do not believe that the first applicant sold the two calves. It was never put to him in cross-examination that he did. Mr Havenga suggested that the second respondent and her sister, Ms Phatudi originally cooked up the theft charge against Mr Pitsi in order to secure his dismissal. When they could not achieve that, they turned their vengeance on the first applicant. I do not know whether this suggestion is correct. I also cannot say whether there were in fact two calves which disappeared. It seems unlikely.

[57] I conclude that the second respondent, with the knowledge and support of the first respondent, did charge the first applicant with theft. His denial that the first applicant was ever accused of theft, is obviously untrue, and can only be explained as an attempt to improve his chances of winning this case. In my view, the mere bringing of the theft charge, which could not be substantiated, and the subsequent false evidence given by the first respondent constitutes a very serious breach of the relationship between the first applicant and the first respondent. Such a breach is unlikely to be healed.

[58] I now turn to the first respondent's alleged absconding from his work. The versions of the first applicant and the first respondent on the termination of the first respondent's employment differ entirely. The first applicant alleged that the dismissal followed upon a complaint by the first respondent concerning the work he was given to do, whilst the first respondent testified that it followed upon a complaint by the first applicant that he was working too slowly. Both agree that the actual walk-out was precipitated by the first respondent's refusal to sign an employment

agreement. The first respondent sought to justify his refusal by alleging that the document was never explained to him, and that the first applicant would not give him a copy. I find that unlikely. The first applicant employs more than a hundred people, and I cannot imagine that he would resort to such wrongfulness with one of them. The first applicant's evidence of a point-blank refusal to sign the "rubbish"[29] accords with the kind of behaviour which the first respondent subsequently adopted.

[59] In deciding which version is correct, the evidence given by the first respondent relating to the disciplinary enquiry is pertinent. He refused to sign an acknowledgment of receipt when notice of the enquiry was delivered to him, because he said the document was not explained to him. He denied that any evidence was adduced at the enquiry, and testified that when he presented himself for the enquiry, he was again put under pressure to sign a document that was not explained to him. Mr Rossouw, who acted as chairperson of the meeting, confirmed that the first applicant gave evidence at the hearing, that he recorded the evidence at the time, and that the evidence was not questioned by the first respondent. The minutes are before the Court.[30] I consider it unlikely that the minutes were contrived, and did not record what happened at the enquiry. After the first respondent was dismissed from his employ at the end of the meeting, he was given his outstanding wages and his blue card. He refused to sign for it. Mr Rossouw, who gave evidence on the proceedings at the enquiry, is an attorney. He could not be shaken in cross-examination. I accept his evidence. I reject the first respondent's version that no enquiry took place, and that he was merely asked by Mr Rossouw to sign a document without any explanation of its contents. Having rejected this evidence, it follows that the first respondent's evidence about the other occasions at which he was allegedly pressurized to sign a document without getting any explanation of its contracts, must be regarded with scepticism.

[60] I conclude that the first applicant's version of the circumstances which led to the first respondent's dismissal is correct, and that the first respondent did in fact abscond from his work. This absconding, which the first respondent persisted in over a long period, constitutes a

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29 The first applicant testified that the first respondent actually used a very crude Afrikaans swear word, but conceded in cross-examination that he could have said "rubbish".

30 Annexure D to the first applicant's founding affidavit.

fundamental breach of the employment relationship which existed between the first applicant and the first respondent.

[61] Lastly, I turn to the first respondent's alleged insolence, disdainfulness and uncooperative behaviour. His refusal, in crude language, to consider the draft employment agreement is insolent. So is the attitude he adopted at the disciplinary hearing. His refusal to move to the workers' accommodation on Steenbokfontein, thereby obstructing the use of Rietgat for a game camp, is uncooperative.[31]

[62] The first applicant, in his founding affidavit, expounded as follows on the general behaviour of the first respondent and his family:

> "As gevolg van die uiters onbeskofde wyse waarop die Eerste Respondent, Salomé Phatudi en hulle kinders die Applikante behandel, kan daar geen sprake meer wees van 'n herstel van enige verhouding tussen ons nie en is ek ook nie bereid om enige van hulle ooit weer in diens te neem nie. Die Applikante het 'n werksmag van 110 mense en goeie arbeidsverhoudinge met ons werknemers is dus vir ons besigheid van uiterste belang. Die voortgesette onregmatige optrede en openlik uittartende houding van die Eerste Respondent en Salomé Phatudi, sowel as hulle intimidasie van die ander werknemers, stel egter ook die voortgesette goeie arbeidsverhoudinge met my ander werknemers in gevaar. Dit skep ook vir die ander werknemers 'n uiters swak voorbeeld dat hierdie twee persone, wat al bykans twee jaar gelede reeds afgedank is, geen werk meer verrig nie, op 'n onbeskofde wyse met ons omgaan, maar nogtans toegelaat word om daar te woon."[32]

In his answering affidavit,[33] the first respondent contented himself by merely stating that he has "no knowledge" of the facts contained in the quoted paragraph.[34] Considering the behaviour of the first respondent after the meeting of 8 February 1999, I think that the applicants' exacerbation is justified.

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31 The evidence of the first respondent that, prior to his dismissal, he was never asked to move to Steenbokfontein, is highly improbable. Officials from the Department of Land Affairs, to whom the respondents went for assistance, knew about the request for the respondents to move to a house on Steenbokfontein. It is likely that they got to hear about the request from the respondents. Having turned Rietgat into a game farm frequented by hunters, it is to be expected that the applicants wanted the respondents to move, and would request them to do so. The first respondent admitted that he was asked to move to Steenbokfontein after his dismissal, pending the resolution of the current dispute, and that he refused to move. This subsequent request confirms the applicants' original intention to clear Rietgat of human habitation.

32 Para 11.7 of the affidavit of 28 February 2001.

33 Para 57 of the affidavit of 28 June 2001.

34 Unsubstantiated denials are insufficient to rebut otherwise credible assertions. See Erasmus *Superior Court Practice* (Juta, Cape Town 1997) at B1-44.

[63] Allegations recorded in the section 9(3) report, which could only have been made by the first and second respondents, and which were subsequently confirmed by the first respondent,[35] also point to a shattered relationship. It is stated in the report:

> "Visitors to the family are not allowed on the farm by Mr Swanevelder. It is understood that he sometimes threatens and harass their visitors."[36]

There is no evidence to support these allegations. On the contrary, the first applicant testified that there is a pedestrian gate which is open for visitors, and a vehicular gate which is locked, but to which both the first and the second respondent have a key. This evidence was not contested in cross-examination. If the allegations in the report were true, I would have expected a counter-application by the first respondent to stop such a fundamental invasion of their rights under ESTA.[37]

[64] In the same paragraph of the section 9(3) report it is stated:

> "There is a farm shop owned by the applicant (EA Swanevelder) around the vicinity but the family is not allowed to purchase anything from the shop."

In his response to the report,[38] the first applicant alleged that the respondents' children are regularly sent to make purchases at the shop, and that the first respondent periodically fills up his car with petrol at the shop. This was not contested in cross-examination.

[65] I now come to the first respondent's employment history after he was dismissed by the first applicant. It is stated in the section 9(3) report:

> "Mr Mpedi and his wife are currently not working and they only survive through his wife's pension."

It is not clear from the evidence whether the first respondent was employed at the time when the report was prepared. However, the first respondent commented on the report (which was

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35 In para 2 of his affidavit of 26 April 2002.

36 Para 6 of the report, under the heading: "The respondents' present circumstances on the farm."

37 Section 6(2)(b) of ESTA expressly provides that an occupier has the right to receive *bona fide* visitors.

38 Para 7.2 of the affidavit of 19 April 2002.

submitted to the Court on 28 August 2001) in an affidavit dated 26 April 2002. At that time he had been working for Mr van Onselen for almost six months, earning good money. He chose not to reveal this employment nor the income which he earns therefrom, in his response to the report.

[66] The section 9(3) report concludes with the following evaluation:

> "For a reasonable man like Mr E.A. Swanevelder who owns a number of farms, surely he can donate a piece of land to the family even though it can be far from his place of stay. The family is only interested in getting their own piece of land with secured tenure rights and less harassment. The family swears that they can do better in their own piece of land where they can produce agricultural products and sell to the local community of Vaalwater."[39]

The first respondent, under cross-examination, conceded that he expects the first applicant to meet that expectation. During settlement negotiations, he rejected the lesser relocation assistance which the first applicant was prepared to offer. Considering the history of the matter, there is in my view little chance of reconciliation while the aspirations of the first and second respondents remain as they are.

[67] In my view, the requisites set by section 10(1)(c) of ESTA for an eviction order, have been met. Accordingly, the third requirement for an eviction order as contained in section 9(2)(c) of ESTA, was complied with.

Did the respondents breach section 6(3) of ESTA?

[68] If the applicants show that the first respondent has breached section 6(3) of ESTA and the Court is satisfied that the breach is material and that the first respondent has not remedied the breach, it would constitute compliance with the provisions of section 10(1)(a) of ESTA. Such compliance will also satisfy the third requirement for an eviction order. It is not necessary for me to decide this issue, because I have already concluded that the third requirement for an eviction order was met through compliance with the provisions of section 10(1)(c) of ESTA.

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39 In para 11 of the report.

[69] I do, however, want to make some observations concerning a possible breach of section 6(3). The first applicant relied on the following:

- A continuous gathering of people at the respondents' house, where the second respondent allegedly conducted a shebeen and sold liquor and dagga. This allegation was not proved.
- The keeping of goats around the respondents' house. The house lies in a game camp. The goats are said to harm the veld. The damage caused to the veld by a small number of goats cannot be of any great significance.
- The refusal of the respondents to move to other accommodation on the odd piece of land on Steenbokfontein. Such a refusal cannot constitute a breach of any of the subsections of section 6(3), although it points to an uncooperative attitude.
- The unlawful use of wood gathered on Rietgat. The extent of that use, even if it was unlawful, cannot cause material damage to property.
- The false charge of theft. Although it might be argued that the charge caused emotional harm to the first applicant within the meaning of section 6(3)(a), it is more appropriate to consider such harm in the context of section 10(1)(c).
- The conducting of a fencing business by the first respondent outside the farm, whilst still living on the farm. I cannot fault the first respondent for embarking on a fencing business, even if it competes with the business of the first applicant. His residence on the farm is not connected to any such business. His conduct of the fencing business (if his work with Mr van Onselen and other farmers does constitute a business), is not a breach of any provision of section 6(3). Whether he should be allowed to continue living on the farm whilst doing outside work, is the subject of the present litigation.

<u>The section 9(3) report</u>

[70] It is necessary for me to say something about the section 9(3) report made in this matter. The officer who prepared the report consulted only with one or both respondents, not with the

applicants. This Court has stated on many occasions that an officer should consult with all parties.[40] The report blatantly favours the position of the respondents. It is not the task of a probation officer to promote the case of any of the parties. He must be objective. In his report, the officer puts forward allegations, evidently coming from the respondents, as being established facts. As this judgment has shown, many of them are overblown or false. It is not for the officer to decide factual issues in his report. If he finds it necessary to include allegations of fact, he should indicate that they are nothing more than allegations, and he should also indicate from where the allegations emanate.

[71] A substantial part of the report is devoted to alleged breaches of the constitutional rights of the respondents. The project officer reported that the eviction of the respondents would violate their rights to human dignity, freedom, security of person, privacy, freedom of religion, freedom of belief and opinion, freedom of association, freedom of movement and residence, and their right to housing.[41] The following examples will show how far-fetched most of the breaches are. It is alleged that the respondents' right of privacy will be affected should they be evicted, "as the couple is married and they will not have a place to sleep". The alleged breach of the respondents' right of freedom of religion is based on the allegation that if they are evicted, they will not have a place to say their daily prayer, and they will not be close to their graveyards. The first applicant, in his response to the report, alleged that there is no church nearby. The alleged breach of the respondents' right of "belief and opinion" is based on the averment that if they are evicted, "the family will not appropriately think because of the frustration of being evicted". These allegations are manifestly fallacious. Although a report on how an eviction will affect the constitutional rights of any person is required under section 9(3) of ESTA, I do not see how a constitutional right which is not enforceable against a land owner, can stand in the way of an eviction application by such land owner.[42]

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40 See *Glen Elgin Trust v Titus and Another* [2001] 2 All SA 86 (LCC) at para [4] and *Theewaterskloof Holdings (Pty) Ltd, Glaser Division v Noble and Another* 2002 (3) SA 401 (LCC) at para [14].

41 The right of access to adequate housing is not enforceable in terms of the Constitution against an individual land owner. See *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (CC) at 395A-B and *Theewaterskloof Holdings (Edms) Bpk, Glaser Afdeling v Jacobus and Others* 2002 (3) SA 401 (LCC) at 411, para [18].

42 *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) at 395A-B; and *Zorgvliet Farm & Estate (Edms) Bpk v Alberts and Another* [2001] 1 All SA 62 (LCC) at para [27].

[72] The Supreme Court of Appeal, in a case dealing with the interpretation of ESTA,[43] recently had occasion to issue the following admonition to judges:

> "Judges must avoid creating the impression, particularly in dealing with a statute of a socially contentious nature, that they are using their judgments as an opportunity to give vent to their own dissatisfaction with a political decision or that they are insensitive to the existence of conflicting views or interests in the community that they serve. Nor must judges create the impression, either through the content or the tone of their expressions, that they have so aligned themselves with a particular political point of view that they are not prepared to approach the interpretation of the statute dispassionately and with an open mind."[44]

These remarks are apposite, not only to the interpretation of ESTA but also to the application of ESTA. They are furthermore pertinent to reports by project or probation officers and other officials who are constrained to act in an impartial manner. It is apparent from the preamble to ESTA that, apart from occupiers, due recognition must also be given to the rights, duties and legitimate interests of land owners.

The order

[73] When making an eviction order in terms of ESTA, the Court must order the owner of the land to pay compensation for structures erected and improvements made by the occupier and for any standing crops planted by the occupier, to the extent that it is just and equitable to do so.[45] There is no evidence of standing crops. It is also clear that the structures in which the respondents live have no value for the applicants, as they want to break them down. The Court is entitled to order the applicants to grant the respondents a fair opportunity to demolish their structures and to remove any materials so salvaged.[46] In this case, it will be just and equitable for the Court to make such an order. Although it was not established that all the materials used in the structures belong to the respondents, Mr Havenga indicated that the applicants will have no objection to removal of all such materials.

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43 *Mkangeli and Others v Joubert and Others* [2002] 2 All SA 473 (SCA).

44 Para [26], per Brand JA.

45 Section 13(1)(a) of ESTA.

46 Section 13(1)(c)(i) of ESTA.

[74] The Court is furthermore obliged to order the applicants to pay any outstanding wages and related amounts that might be due to any of the respondents.[47] There is no evidence that any such amounts are due.

[75] When ordering the eviction of an occupier, the Court must determine a just and equitable date by which the occupier shall vacate the land. In determining such a date, the Court must have regard to all relevant factors, including:

> "(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."[48]

Bearing in mind that the respondents will have to find other accommodation, and considering the long period they have been living on the farm, I am of the view that they should be ordered to leave the farm by not later than 31 August 2002.

[76] This Court usually does not make cost orders, unless there are compelling circumstances which call for such an order. In this case I do not consider there to be such circumstances.

[77] For the reasons set out above:

(a) the eviction of the respondents from the farm known as the remaining extent of Rietgat 8, Registration Division KR, Transvaal, is hereby ordered;
(b) the respondents must vacate the farm by not later than 31 August 2002;
(c) should the respondents fail to vacate the farm by 31 August 2002, the eviction order may be carried out on or after 3 September 2002; the sheriff is hereby authorised to carry out the order;

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47 Section 13(1)(b).

48 Section 12(2).

(d) the applicants must allow the respondents to demolish the structures in which they live on the farm and to remove all materials so salvaged by not later than 31 August 2002; and

(e) no order is made as to costs.

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ACTING JUDGE A GILDENHUYS

For the applicants:
Adv H S Havenga instructed by *Ettiene Rossouw Attorneys, Vaalwater.*

For the respondents:
Adv W Mokhari instructed by *Nkuzi Land Rights Legal Unit, Pietersburg*.