IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Heard at **RANDBURG** on 29 - 30 April and 2 - 3 May 2002 **CASE NUMBER**: LCC 15/01
before **Gildenhuys AJ**

Decided on 1 July 2002

In the matter between:

ERASMUS ALBERTUS SWANEVELDER	First applicant
JOHANNA CORNELIA SWANEVELDER	Second applicant
and	
SALOMÉ PHATUDI	First respondent
ANDRIES PHATUDI	Second respondent
JANEY PHATUDI	Third respondent
QUEENY PHATUDI	Fourth respondent

JUDGMENT

GILDENHUYS AJ:

Background

[1] The applicants in this matter are married to each other in community of property. They own, amongst other properties, the farm known as the remaining extent of Rietgat no 8, registration division KR, Transvaal. I will refer to this property as "Rietgat". They also own portions of the farms Steenbokfontein and Zeekgat. All these properties constitute a single farming unit.

[2] The first respondent is an occupier, as defined in the Extension of Security of Tenure Act.[1] I shall refer to that Act as "ESTA". She inhabits a house on Rietgat with three of her minor

1 Act 62 of 1997, as amended.

children. They are the second, third and fourth respondents. Those respondents stay in the house on Rietgat by virtue of their family relationship with their mother. They are not occupiers in their own right.[2]

[3] The applicants applied by notice of motion for the eviction of the respondents from Rietgat. The respondents defended the matter, and delivered answering affidavits. No replying affidavits were delivered. A probation officer's 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 officer's report.

[4] Together with this application, the applicants brought a similar application for the eviction of one Johannes Mpedi and his family from Rietgat. The first respondent in this matter is a sister of Mr Johannes Mpedi's wife. Their father is Mr Malase David Segodi. I heard the Mpedi case after I heard this case. Together with this judgment, I will also give judgment in the Mpedi 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 her employment with the applicants;
- whether the first respondent has breached section 6(3) as contemplated in section 10(1)(a) of ESTA;
- whether the first respondent has committed such a fundamental breach of the relationship between her and the applicants that it is not practically possible to remedy it, as contemplated in section 10(1)(c) of ESTA; and
- whether it would be just and equitable to grant an eviction order against the respondents as contemplated in section 10(3) of ESTA.

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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].

Oral evidence was heard on these issues.

The facts

[6] The occurrences in this case constitute a distressing chronicle of how a congenial relationship between a land owner and an occupier turned sour. At this stage I will deal with the facts very briefly, to provide a general background. Later in the judgment, when examining specific occurrences, I will set out and consider the evidence in greater detail.

[7] The first respondent testified that she was born during 1947.[3] She grew up on a portion of the farm Steenbokfontein which then belonged to the first applicant's father.[4] She left Steenbokfontein when she was about 18 years old and went to Pretoria to seek employment. Although she obtained employment in Pretoria, she alleged that she continued to regard Steenbokfontein as her home and that she frequently returned there during public holidays and when she took leave. Around 1977 she got married.[5] She continued working in Pretoria. Some time later, she and her husband separated. During 1989 she decided to return to her parents, who at that time stayed on the farm Werkendam, in close proximity to Rietgat and Steenbokfontein. The first applicant's father lived on Werkendam at the time of her return. Werkendam was then under the control of the first applicant's brother.

[8] The applicants operate a farm shop on portion 4 of Steenbokfontein. During 1989, they employed the first respondent to work in the shop. Originally, according to the first respondent's evidence, she stayed on Werkendam with her parents during weekends and in a room next to the shop or with the Mpedi family during the week.

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3 Her identity number indicates her year of birth as 1950. See para 1 of the probation officer's report.

4 This portion is not one of the portions of Steenbokfontein which now belongs to the applicants.

5 She did not move in with her husband at that time, because the *lobola* was not paid in full. In 1984, when the *lobola* was fully paid, she moved into his house in Winterveld, near Pretoria.

[9] During 1990 the applicants made a house on Rietgat available for occupation by the first respondent and her children. The terms on which she was allowed to stay in the house, is in dispute, I will deal with that dispute later in the judgment.

[10] During 1995 the applicants bought a portion of the farm Steenbokfontein, and decided to move the accommodation for their workers to that farm. They built a much better house for the first respondent on Steenbokfontein. According to the first applicant, the first respondent refused to leave Rietgat, as did the Mpedis. The first respondent testified that, before her dismissal, she was never asked to move to the house on Steenbokfontein. Rietgat is presently being used for game farming. There is commercial hunting on it. The continual presence of the first respondent and her family, and of the Mpedi family, is undesirable, both from a safety and aesthetic perspective.

[11] The first respondent was allowed to have cattle on Rietgat. They grazed with the applicants' cattle, and were looked after by one of the applicants' employees, a certain Mr Frans Pitsi. The first respondent testified that she discovered during the beginning of 1999 that one of her calves was missing. She asked Mr Pitsi about the loss. Mr Pitsi resented to her enquiry.

[12] The first respondent convened a meeting to address the situation on 8 February 1999. According to the first applicant, the first respondent demanded at the meeting that Mr Pitsi be dismissed. When the first applicant would not agree to that, she absconded from her work, using crude language towards him. The first respondent denied that she insisted upon Mr Pitsi's dismissal, that she absconded from her work, or that she used crude language. She insisted that she was dismissed from her employment immediately after the meeting by the second applicant. After she left her work, the first applicant initiated a disciplinary hearing for 21 February 1999. The first respondent did not attend the hearing. She was found guilty at the hearing and dismissed.

[13] The first respondent referred her dismissal to the Commission for Conciliation, Mediation and Arbitration (the "CCMA"). The matter could not be resolved by the CCMA. An application by the first respondent for arbitration followed. The arbitration hearing was arranged for 15 August 2000. The first respondent did not attend the hearing. The matter was postponed to 1

September 2000 with notice to all parties. On 1 September the first respondent was once again absent because, according to her, she did not know about the hearing. She alleged that the notice was given to her previous advisers, not to her present advisers. On 1 September 2000 the arbitration proceedings were dismissed in her absence by the Commissioner, Mr Francis Kganyago. No further steps under the labour legislation were taken by the first respondent.

[14] Following upon the dismissal of the arbitration proceedings, the first applicant served a notice terminating the first respondent's right of occupation in terms of section 8(2) of ESTA,[6] calling upon her to vacate the property, and informing her of the applicant's intention to obtain an eviction order. Despite service of the notices, the first respondent did not give up her residence on Rietgat. An attempt to settle the matter during February 2000 through the intervention of two officials from the Department of Land Affairs, a Mr Mohape and a Mr Matukane, came to nothing as the first respondent would not meet with them, because she "felt that the officials were biased and had not behaved properly".[7]

[15] It emerged from the oral evidence given at the hearing of the matter that the two young children of the first respondent (the second and third respondents) now attend school at Nylstroom. The first respondent has also lived in Nylstroom for the past few months. She still regards the house at Rietgat as her permanent home, and has not removed her possessions from the house.

The legal requirements for an eviction order

[16] 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;

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6 Section 8(2) is quoted in n 9 below.

7 Para 31 of the answering affidavit. The alleged improper behaviour was keeping the first respondent and Mr Mpedi waiting too long, and the perceived bias was because the two officials arrived in the company of the first applicant. In her oral evidence, the first respondent alleged that she and Mr Mpedi would not meet with the two officials because the officials left them standing in the rain for too long.

secondly, the first respondent has not vacated the property within the period of notice given to her;

thirdly, the conditions of section 10 have been complied with; and

fourthly, the requisite two months' 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 denied. The notices envisaged in the second and fourth requirements were properly given,[8] and the first respondent has not vacated the property.

[17] If it is found that the first respondent's right of occupation did not arise solely from her employment agreement, the applicants' purported cancellation of the employment agreement in terms of section 8(2) would be invalid,[9] and the first requirement for an eviction order would not have been met. The applicants did not also rely on section 8(1) to support the cancellation of the right of residence.[10]

[18] The applicants rely mainly on section 10(1)(c), alternatively 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 -

(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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8 Although it was not so stated in the sheriff's return of service, the evidence of Mr E Rossouw (attorney for the applicants) satisfied me that a notice in terms of section 9(2)(d)(iii) of ESTA was also served on the provincial office of the Department of Land Affairs.

9 Section 8(2) reads as follows:

"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 resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act."

10 The cancellation notice refers to section 8(2) only.

(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) . . ."

[19] 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

[20] The first and the second applicants, Mr E Rossouw (the applicants' attorney), Mr F Pitsi (an erstwhile worker) and Mr J Segabetla (a current worker) gave oral evidence in support of the applicants' case. The first respondent gave oral evidence, but did not call any other witnesses in support of her case.

[21] The first applicant testified in a clear and concise manner. Small portions of his evidence turned out to be incorrect; for example, he originally testified that the first respondent did not use swear words towards him at the meeting on 8 February 1999, and later changed his testimony and said that the first respondent did in fact swear at him during that meeting. There are not many such inaccuracies. In general, I find his evidence to be reliable. He did his best to assist the Court.

The evidence by the second applicant was very short. She was a good witness, although somewhat aggressive. It was obvious that she did not enjoy being cross-examined.

[22] Mr Pitsi is an unsophisticated person, who stood up rather well to cross-examination. There are some contradictions in his evidence. Originally he testified that he was told by children from the Phatudi and Mpedi families that he has been accused of removing or taking the missing cattle. Later in his evidence he denied that he said anything about children. Before lunch, on the day on which he gave evidence, he testified that during the meeting on 8 February 1999 the first respondent called him a *tsotsi* or a crook. After lunch, when pressed, he added that she also used other, very vulgar swear words. When asked whether he was prompted during the lunch adjournment, he denied it and said he did not originally refer to the vulgar swear words because he was ashamed to bring them up in Court.[11] Although I do not think there was any deliberate intention on the part of Mr Pitsi to mislead the Court, I will treat his evidence with some circumspection.

[23] Mr Segabetla was not a bright witness. He made some bad mistakes in his evidence. For example, he testified that when the first respondent refused to sign for her outstanding wages, she was still working in the shop. I will be reluctant to rely on uncorroborated evidence from Mr Segabetla. I must add, however, that he was in my opinion not purposefully mendacious.

[24] The first respondent was an unimpressive witness. During her examination in chief and also under cross-examination, she introduced new evidence which was not contained in any of her affidavits and was never put to any of the other witnesses. I have the impression that much of this new evidence was not previously disclosed to her legal advisers. In many respects, her evidence was contradictory. She would not concede factual allegations which are obviously true, if she thought that a concession might harm her case. When she found herself in trouble during cross-examination, she showed signs of discomfort, and talked more and more softly. At times she pleaded illiteracy, but had to concede at a later stage that she is well able to read books in her mother language. I suspect that the first respondent realises that portions of her evidence are untrue. I will give some examples hereunder. I will refer to more unsatisfactory aspects of her

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11 He did not explain why he lost his shyness after lunch.

evidence later in this judgment, when I discuss the particular issues which I have to decide in this case.

[25] The following is an example of what can only be an intentionally untrue statement by the first respondent. The first applicant intimated in his oral evidence that the first respondent now lives in Nylstroom, where her two children are at school, and where she is occupied by making clothes for a shop. Over the past two years, so he testified, he hardly ever saw her on the farm. Mr Segabetla also testified that the first respondent and her three children are presently staying in Nylstroom. Mr Mokhari, for the respondents, put it to the first applicant in cross-examination that the first respondent will deny that she ever left the farm or that she is staying somewhere else. In response to an enquiry from me, Mr Mokhari confirmed that her evidence will be that she is still sleeping on the farm every night. Under cross-examination, the first respondent at first persisted that she does sleep at her home on the farm every night. Later she was constrained to admit that she had been staying in Nylstroom since February of this year. She said she had to go to Nylstroom to sleep at her son's place "due to the illness that I got", and that she had "to go and get pills". Earlier in her evidence she gave a different reason, and alleged that she stayed in Nylstroom since 14 February 2002 because one of her grown-up sons had an attack "towards the heart" and was admitted in the Mankweng hospital in Pietersburg during March 2002. He is still in that hospital. She wanted to be near a telephone so that the hospital could communicate with her. There is a telephone available at Nylstroom, but not on the farm.

[26] The first respondent admitted in her answering affidavit that she was told by the first applicant on 19 April 1999 of the forthcoming disciplinary hearing.[12] Under cross-examination, she persisted (despite her previous admission) that she had no encounter with the first applicant on that day, and that she was not informed of the hearing. Notwithstanding her denial, she went to the Warmbaths Advice Center the next day for assistance. According to her, the Warmbaths Advice Center telephoned the first applicant while she was there, and the first applicant then told the Advice Center about the hearing scheduled for the next day. Later she changed that evidence, and said that it was the first applicant who telephoned the Advice Center. The first respondent's

12 Para 22 of the affidavit of 28 June 2001, read with para 7.9 of the first applicant's founding affidavit.

oral evidence that she only got to know about the disciplinary hearing while consulting at the Warmbaths Advice Center is so implausible that it can hardly be true.

[27] The following serves as an example of important new facts introduced by the first respondent during her oral evidence. She alleged that on 25 April 1999, after the disciplinary hearing, the second applicant called her into the house and offered to hand her outstanding wages and her blue card to her, if she signs for them. The first respondent refused to sign, and nothing was handed over. None of this is contained in any of the first respondent's affidavits, nor was it put to the second applicant during cross-examination.

The right of residence

[28] The content of the first respondent's right of residence must be ascertained before it can be decided whether such right of residence was properly terminated. The first respondent, in her oral evidence, testified that she left Winterveld during January 1989 and went to stay with her parents on Werkendam. During May 1989 the applicants offered her a job in their shop. Towards the end of 1990 she approached the first applicant's father (who lived on Werkendam) and asked him for a place to build a house. The first applicant's father told her to select a place near her family's house, which she did. She then informed the first applicant that she had been given a place to build herself a house. He responded by telling her that, because she worked at the shop from Monday to Saturday every week, he would rather give her a place on his farm so that she could be close to the shop. The first respondent accepted the offer. The applicant built a house for her on Rietgat, and she moved into the house during November 2000. She denied her right to occupy that the house had anything to do with her employment in the shop. She testified that she grew up with the first applicant, that she knew him "as a brother", and that he told her in future they were "going to live together, until death do us part".

[29] The evidence given by the first respondent on the circumstances surrounding her employment by the applicants, is unsatisfactory in several respects. She denied that, after the applicants employed her, they sent a driver with a bakkie to fetch her belongings from her and

her husband's house.[13] She insisted that she left her belongings in that house because she did not have enough funds to hire transport. Later she stated that she did not take her belongings because according to African custom when there is a divorce, the two families must get together for a discussion about the goods which the husband must return to the wife, and such a discussion had not yet taken place. She testified that her belongings are still in the house, which seems unlikely.

[30] Under cross-examination, the first respondent originally said that when the first applicant heard that his father had offered her a place to build her house, he told her "rather come to my place, I will build you a house". Subsequently she testified that originally the first applicant merely pointed out a place where she could build a house herself. Only at a later stage, after she started looking for building materials, did the applicants offer to build the house for her. Mr Mokhari put a third version to the first applicant in cross-examination, namely that when the first respondent asked him whether she would get time off to build a house on Werkendam, he offered to build a house for her on Rietgat. This third version is not substantiated by any evidence.

[31] The first respondent testified that, in her perception, the first applicant gave her a place to stay because they grew up together. She stated that she would not have come to live on Rietgat if her permission to do so was conditional upon her employment, because the first applicant's father had already offered her a place to stay on Werkendam. Later she stated that the first applicant never referred to them having grown up together as a reason for giving her a place to stay, and testified that he gave no reason at all. I find it unlikely that he would have given no reasons. It is significant that Mr Mokhari suggested to the first applicant in cross-examination that he actually told the first respondent that she could stay freely on his farm because they grew up together. The first applicant denounced that suggestion to be an absolute lie, and insisted that the first respondent's right to stay on Rietgat was strictly linked to her service contract.

[32] When asked in cross-examination whether she thought it likely that the applicants would have asked her to live on their farm if she did not work for them, the first respondent stated that at the time she already had been given a room next to the shop where she slept during the week.

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13 The first applicant testified that the belongings were fetched from Hammanskraal, whilst the first respondent insistent that she never lived in Hammanskraal, but in Winterveld.

There was no mention of this room in any of her affidavits or in her evidence in chief.[14] When Mr Havenga, for the applicants, put to the first respondent that according to his instructions she never stayed in a room near the shop. She insisted that she did. She testified that she did not tell her legal representatives about living in the room because it never struck her mind as being necessary.

[33] It might be argued that, on the first respondent's evidence, she already had an unconditional right to a place at Werkendam before the first applicant offered to build a house for her on Rietgat. Why would she give her unconditional right up for a temporary right on Rietgat? The first applicant's father, who allegedly gave her the unconditional right, has passed away. The first applicant denounced the allegation that his father gave the first respondent any such right as an absolute lie. Werkendam, at the time, belonged to the first applicant's brother. It is unlikely that the father would have granted permanent rights in respect of his son's land.

[34] The first applicant's evidence is that when he and his wife employed the first respondent, they told her that they would build a house for her on their farm when they would be in a position to do so. Some two years later, they built a house for her on Rietgat. They told her that for as long as she works for them, she could stay in the house. Under cross-examination, the first applicant said he could not remember whether he told her so at the time when they employed her or at a later stage, although he thinks it was when they employed her.

[35] On the probabilities, I accept the applicants' version. The first respondent left the area when she was a young girl of approximately 18 or 19 years of age, and only returned permanently some 30 years later. It is unlikely that the first applicant's father would give her an unconditional right to live on Werkendam for the rest of her life. It is equally unlikely that the applicants would not only give her a place to live on Rietgat, but would also build a house for her, just because she and the first applicant grew up together. It is much more likely that it was done pursuant to her

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14 In para 11.2 of the answering affidavit of 28 June 2001, the first respondent stated:

> "When I started employment with the First Applicant I stayed on First Applicant's farm with my brother in law Johannes Mpedi during the course of the week. First Applicant only transported me to my parents on Saturday evening and picked me up again on the morning of Monday."

employment agreement. In choosing to accept the applicants' version, I was influenced by the fact that the first respondent's evidence was in many respects unsatisfactory. I conclude that the first respondent's right of residence on Rietgat arose solely from her employment agreement.

[36] The first respondent was dismissed pursuant to a disciplinary hearing which took place on 21 April 1999. The first respondent did not attend the hearing. She gave discrepant reasons for that. In her answering affidavit, she tried to explain her absence by stating that her adviser, Mr Pitsi wa Nong, would not represent her because he was not an attorney. In her oral testimony she intimated that she did not attend because at the time when she received notice of the hearing, she had not yet finished consulting with her advisers.

[37] The first respondent took her dismissal to the CCMA and to arbitration. Her arbitration case was dismissed in her absence. Thereafter, she took no further steps under the Labour Relations Act.[15] I must conclude that she was dismissed in accordance with the provisions of the Labour Relations Act.[16] Having found that the first respondent's right of residence arose solely from her employment agreement, it follows that her right of residence was properly terminated in terms of section 8(2) of ESTA. The first requirement for an eviction order against the first respondent has therefor been complied with.

Did the first respondent commit a fundamental breach of the relationship between herself and the first respondent?

[38] To prove a fundamental breach of the relationship between the applicants and the first respondent, the first applicant relied in the first place on the theft charge brought against him, stating:

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15 Act 66 of 1995.

16 According to section 8(3) of ESTA, any dispute over whether an occupier's employment has terminated in accordance with the provisions of the Labour Relations Act, must be dealt with according to the provisions of that Act. It falls outside this Court's jurisdiction.

> "Hierdie klagte was opsigtelik kwaadwillig en sonder meriete, en is dus deur die Staatsaanklaer verwerp, maar dit was nogtans vir my vernederend en het bygedra daartoe dat my verhouding met die Eerste Respondent en Mpedi onherstelbaar skade gely het."[17]

Under cross-examination, the first applicant persisted in his conviction that no calves were lost.

[39] The first respondent denied the allegation that she laid a charge of theft. She averred in her answering affidavit:

> "I deny that I laid a charge of theft against the First Applicant. I admit that I reported my missing calf to the Police station but I at no stage indicated that the First Applicant stole my calf."[18]

The evidence of the first respondent relating to the loss of her calf and the subsequent report to the police, is unsatisfactory, as I will indicate hereunder.

[40] The first respondent's evidence on the loss of her calf, as contained in her answering affidavit, is as follows:

> "In January 1999 I discovered that my calf was missing, and I did approach the said Frans Pitsi and asked him where my calf was as Frans Pitsi took care of all the cattle on the farm. At no stage did I ever accuse Frans Pitsi of stealing my calf. Admittedly, it would appear that Frans Pitsi was offended as he then stayed away from work. He only returned to work when I was unfairly dismissed."[19]

The first respondent's admission that Mr Pitsi was offended when she enquired from him what had happened to her calf supports the evidence given by other witnesses that she tried to hold Mr Pitsi accountable for the loss of the calf. Mr Pitsi denied, in his evidence, that the first respondent lost any calf. Because there was, at that stage, bad blood between her family and the Pitsi family, it is conceivable that the charge was trumped up in order to get Mr Pitsi dismissed. Mr Pitsi said as much during cross-examination. When his dismissal was not achieved, the first respondent and her sister might well have turned their anger towards the first applicant.

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17 Para 10.5 of the founding affidavit.

18 Para 51.1 of the affidavit of 28 June 2002.

19 Para 18.2 of the affidavit of 28 June 2002.

[41] In her oral evidence, the first respondent testified that the first applicant asked her during January 1999 whether she had a calf amongst the young calves. She confirmed that she had. Later that month, on 27 January, the first applicant told her that he was going to load cattle, and that he would ask one of his workers, Kleinbooi, to look out for her calf. On 5 February 1999 (not during January, as stated in her answering affidavit), she went to look for her calf and found it missing. She told her sister (Ms Rebecca Mpedi) the next day that her calf was missing. She did not tell her sister that the applicant had loaded cattle, nor did she discuss with her sister how her calf could have gotten lost, because, according to her, "my sister has got nothing to do with my affairs". She knew, at the time, that the Mpedi's also claimed to have lost a calf. She testified that after the meeting of 8 February 1999, her sister Mrs Mpedi went to the police to complain about the loss of the calves, also on her behalf. She denied that, in discussions between the two of them, any fingers were pointed either at Mr Pitsi or at the first applicant. She also testified during cross-examination that despite her evidence that the first applicant told her he would be loading cattle on 27 January 1999, it was "not her thoughts" that her calf could also have gotten loaded and could have been subsequently sold. If her evidence that she was told about the loading of cattle is true, this would be astounding.

[42] The police docket, handed up as exhibit F, is significant. It indicates that a charge of theft of two calves was indeed laid, described as "*diefstal van vee gedurende Desember* [1998] *uit weikamp*". In her affidavit to the police, the first respondent declared:

> "Gedurende Januarie 1999 het Mnr Swanevelder my gevra of ek osse by die speenkalwers het waarna ek ja gesê het, daar moes 'n vers en 'n ossie gewees het. Mnr Swanevelder het toe vir Kleinbooi gestuur om te gaan kyk waar die beeste is. Ek het begin wonder want Kleinbooi werk gewoonlik nie met die beeste nie. Ek het toe self na my beeste gaan kyk en gevind dat daar 'n os weg is dat kan moontlik 1997 se kalf wees."[20]

[43] According to first respondent's oral evidence she only missed her calf during February 1999. Her evidence that the first applicant told her during January 1999 that he was going to load cattle, is not contained in any of the affidavits which she made in these proceedings, nor was it put to the first applicant in cross-examination. Her oral evidence also conflicts with her answering affidavit, in which she stated that she discovered the loss of the calf during January

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20 Contained in the police docket, exhibit F (para 5 of her affidavit).

1999.[21] Lastly, I find it difficult to believe that the first respondent did not tell her sister of her alleged conversation with the first applicant about loading cattle, particularly where she authorised her sister to report the loss of her calf to police on her behalf, and where the police docket indicates that a charge of theft against the first applicant has indeed been laid.[22] The inference is irresistible that the first respondent intended to lay the professed loss of the calf at the door of the first applicant.

[44] The investigation into the charge of theft was abhorrent to the first applicant. He described it as a large investigation, with the police taking photographs and statements in the presence of many of his workers. He found that humiliating. He testified that after the police had prepared a full docket, they informed the first respondent and the Mpedi's that there were no calves missing, because all calves born from their cows had been accounted for.[23] Mr Pitsi also said that no calves went missing. I do not know why a charge was laid at all.[24] Possibly it was thought to be a way to castigate the first applicant because he would not dismiss Mr Pitsi.

[45] I now turn to the termination of the first respondent's services. In her answering affidavit, the first respondent described the circumstances of the termination as follows:

> "I did not abscond from my work but was dismissed by Second Applicant in the presence of First Applicant. I respectfully submit that after the meeting that was held on the 8 February 1999, First Applicant called Second Applicant to the gathering. Second Applicant was angry and said to me that it seems that I want Frans Pitsi to leave work. She said that Frans Pitsi will never leave work and that I am the one that should leave work. I then left work as I was dismissed by Second Applicant."[25]

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21 Para 18.2 of the affidavit of 28 June 2001, quoted in para [40] above.

22 In her affidavit to the police (contained in exhibit F, page 21 - 22) Mrs Mpedi accused the first applicant of loading and selling two of her young oxen. The date of this loading was stated to be 15 December 1998.

23 Although this conclusion does not appear from the docket in so many words, it is implied.

24 The public prosecutor refused to prosecute.

25 Para 21 of the affidavit of 28 June 2002.

In her oral evidence, the first respondent testified that after the meeting the second applicant asked her: "Salome, is that your thanks? . . . You are alleging that your cattle has been stolen[26] . . . You people are aiming to have Frans [Pitsi] dismissed from work." According to her, the first applicant then said: "Now is the time for you to leave to go. Rather than Frans leaving you had better go." She then left the shop, and did not return. It is noteworthy that she intimated in her answering affidavit that the second applicant dismissed her, whilst according to her evidence in chief it was the first applicant who actually told her to go.[27] Under cross-examination, she reverted to the version that it was the second applicant who dismissed her, and she denied that she ever testified it was the first applicant.

[46] The second applicant's version is that after the meeting on 8 February 1999 she heard the first respondent raving in the shop. She asked her what the matter was. The first respondent replied that if the applicants want Frans Pitsi to work, he must work, she will go. She then collected her things and left.

[47] The first respondent denied that she was agitated or used crude language during or immediately after the meeting of 8 February 1999. Both applicants and Mr Pitsi testified that she was very agitated and that she used swear words. Her agitation could possibly be ascribed to her failure to secure Mr Pitsi's dismissal. It could also explain why she would desert her job. The evidence of the applicants and of Mr Pitsi withstood the test of cross-examination, and I accept it. The first respondent's evidence on why she left her work is contradictory. In her answering affidavit she alleged that the second applicant dismissed her.[28] In her oral evidence she said it was the first respondent who actually told her to leave. She alleged that when she got back to the shop she found the second applicant there, very angry and "pushing the shelves and throwing the books on the counter". I cannot conceive of a reason why the second applicant would behave in such a manner. The first respondent suggested the second applicant was angry because the first

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26 This evidence given by the first respondent herself lends credence to the evidence of other witnesses that the first respondent and her sister did in fact make accusations of theft.

27 Mr Mokhari put to the first applicant during cross-examination that the first respondent will testify that it was his wife who dismissed her. This is at variance with the first respondent's evidence in chief.

28 Para 21 of the affidavit of 28 June 2001, quoted at para [45] above.

applicant must have told her of the enquiry about the missing calf. She said the second applicant's anger surprised her, particularly because she accused nobody of taking her calf. I suspect that the evidence of the second applicant's anger and of her pushing and throwing things around, was concocted in order to give credence to the first respondent's evidence that she did not abscond from work, but was dismissed. It is not contained in any of the affidavits which the first respondent made in the case, and was never put to any of the applicants in cross-examination.

[48] The history of the termination of the first respondent's services as contained in the section 9(3) report is significant. It reads:

> "In 1999, Salome lost another cattle and she had to complain. The farm owner Mr E.A. Swanevelder started to threaten Salome with eviction. Salome decided to ask for help from the Nylstroom livestock rangers. They took her statement and never got back to her. The farm owner thereafter started dishing out notices of evicting and terminating Salome's services. The same year (1999), Salome withdrawn her services due to the pressure she got from the farm owner."[29]

The first respondent confirmed the correctness of this report, subject to certain clarifications and corrections,[30] one of them being: "I left work because I was dismissed by Johanna Swanevelder in the presence of EA Swanevelder on the 8 February 1999".[31] She did not, however, explain why the report stated that she has "withdrawn her services"[32] and what "pressure she got from the farm owner" which caused her to do so. The report is consistent with the applicants' evidence that the first respondent left her work after the meeting of 8 February 1999, but was only dismissed subsequent to the police investigation, which occurred well after 8 February 1999.

[49] On the probabilities, it is much more likely that the first respondent left her job in a huff, rather than that the second respondent dismissed her without any prior warning or disciplinary hearing. The unsatisfactory portions of the first respondent's evidence fortify this finding. Staying

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29 Para 5 of the report.

30 Para 2 of her affidavit of 26 April 2002 made in response to the report.

31 Para 4.3 of the affidavit of 26 April 2002 made in response to the report.

32 The words "withdrawn her services" carry the connotation that she herself decided to terminate her services, and was not forced to do so pursuant to any dismissal.

away from work, which in this case continued for a long period, cannot but constitute a fundamental breach of any employment relationship.

[50] Lastly, the applicants referred to the first respondent's uncouth behaviour, and stated:

> "As gevolg van die uiters onbeskofde wyse waarop die Eerste Respondent, Johannes Mpedi 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 voorgesette onregmatige optrede en openlik uittartende houding van die Eerste Respondent en Johannes Mpedi, 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."[33]

[51] Although the first respondent denies any ill-mannered behaviour towards the applicants, the evidence of her vulgar demeanour is overwhelming. According to first applicant, it first occurred during the meeting of 8 February 1999. It was repeated when he notified her of the disciplinary hearing, again when she came to collect her money on 27 April 1999, and again when officials from the Department of Land Affairs visited the farm to mediate the discord. The first applicant testified that she persisted in such behaviour whenever she ran into him on the farm.[34] The second applicant testified to similar behaviour in the shop after the meeting of 8 February 1999, and also when she came to fetch her money on 27 April 1999. Mr Pitsi testified that the first respondent showed aggression and swore at him and at the first applicant during the meeting of 8 February 1999. Mr Segabetla stated that she was aggressive and used swear words when asked to sign a receipt for her wages after her dismissal on 27 April 1999. The first respondent's denial stands alone against the weight of all this testimony. Mr and Mrs Mpedi, who might have supported the first respondent in this regard, were not called to give evidence.

[52] The uncooperative attitude of the first respondent, which manifested itself in her refusal to relocate to the house built for her on Steenbokfontein, and also her general animosity towards the applicants, indicate that there is little chance of repairing the fractured relationship between

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33 Para 10.6 of the first applicant's founding affidavit.

34 The first applicant, in his oral testimony, said: "*Sy groet 'n mens nie. Sy vloek ons as sy ons sien . . .*"

herself and the applicants. Her present expectation (which she confirmed, during cross-examination) that the applicants must buy land for her, build a house for her on that land, and in addition pay a cash amount to her, can only stand in the way of a reconciliation.

[53] I conclude that the first respondent is guilty of insolent behaviour towards her erstwhile employers, to such a degree that it completely and irretrievably eradicated the employment relationship which existed between them. This behaviour, together with the first respondent's abscondment from her work and the unsubstantiated theft charge, is more than sufficient to fulfil the requirements of section 10(1)(c) of ESTA. I conclude, therefor, that the third requirement for an eviction order against the first respondent has been met.

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

[54] 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.

[55] I do, however, want to make some observations concerning a possible breach of section 6(3).[35] The first applicant relied on the following:

- A continuous gathering of people at the respondent's house. This allegation was not proved.
- The keeping of goats around the first respondent's house. The house lies in a game camp. The goats are said to harm the veld. The damage caused to the veld by a relatively small number of goats cannot be "material damage to property" within the meaning of section 6(3)(b).

35 Section 6(3) is quoted in para [18] above.

- The refusal of the first respondent to move to the workers' accommodation 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 gathering of wood on Rietgat. This complaint was not seriously pursued during the trial. The extent of any such wood gathering, even if it was unlawful, cannot constitute material damage to property.
- Threats made by the first respondent. Mr Pitsi testified that the first respondent told him that the person who took the missing calves, will die. The first applicant referred to the "*intimidasie van ander werknemers*".[36] The first applicant's oral evidence, which was not contradicted by the first respondent, is that the first respondent "*vloek en raas*" with the workers, and tell them that the applicants will not succeed in getting them off the farm. That can hardly constitute intimidation.

Conclusion

[56] In concluding my judgment, I am constrained to say something about the section 9(3) probation officer's report which has been filed in this matter. The report is a blatantly partisan document. A similar one-sided report was filed in the Mpedi case. I criticized that report at some length in the Mpedi judgment.[37] Those criticisms also apply to the report submitted in this case.

[57] 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.[38] There is no evidence of standing crops. Next to the house built for her by the applicants, the first respondent added some structures of her own. It is clear that these structures have no value for the applicants. The Court is entitled to order the applicants to grant the first respondent a fair

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36 See the extract from his founding affidavit contained in para [50] above.

37 LCC 16/01, handed down simultaneously with this judgment, at para [70]-[72]. Both judgments will shortly be available from www.law.wits.ac.za.

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

opportunity to demolish any structures they built and to remove any materials so salvaged.[39] 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 additional structures belong to the first respondent, Mr Havenga indicated that the applicants will have no objection to removal of all such materials.

[58] 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.[40] The first respondent received her outstanding wages on 27 April 1999. There is no evidence that any other amounts are due.

[59] 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."[41]

Although the respondents have been living on the farm for a long period, I can also take into account that they are now staying in Nylstroom. I am of the view that the respondents should be ordered to vacate Rietgat by not later than 31 July 2002.

[60] 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.

[61] For the reasons set out above:

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

40 Section 13(1)(b).

41 Section 12(2).

(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 July 2002;

(c) should the respondents fail to vacate the farm by 31 July 2002, the eviction order may be carried out on or after 2 August 2002; the sheriff is hereby authorised to carry out the order;

(d) the applicants must allow the first respondent to demolish the structures which she erected on the farm and to remove all materials so salvaged by not later than 31 July 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*.