



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 121/24

In the matter between:

MAGALONE MEREKI

First Applicant

TOPIES MEREKI

Second Applicant

DIKHOTSO MEREKI

Third Applicant

and

MOLADORA TRUST

First Respondent

**DEPARTMENT OF AGRICULTURE, RURAL
DEVELOPMENT AND LAND REFORM**

Second Respondent

Neutral citation: *Mereki and Others v Moladora Trust and Another* [2025]
ZACC 16

Coram: Madlanga ADCJ, Dambuza AJ, Goosen AJ, Kollapen J,
Majiedt J, Opperman AJ, Rogers J, Theron J and Tshiqi J

Judgment: Rogers J (unanimous)

Heard on: 27 March 2025

Decided on: 1 August 2025

Summary: Extension of Security of Tenure Act 62 of 1997 (ESTA) — consent to graze cattle — such consent a right to use land for purposes of ESTA — termination of right subject to section 8 of ESTA

Interpretation of ESTA — reference to residence in some instances to be read as including use of land, including use for grazing

Tacit consent – proof – presumption in section 3(4) of ESTA

ORDER

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the Land Claims Court):

1. Leave to appeal is granted.
2. The appeal succeeds.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following order:
 - “(a) The appeal is dismissed.
 - (b) The appellant must pay the costs of the first, second and third respondents, including the costs of two counsel.”
4. The applicants must pay the first respondent’s costs of opposing the applicants’ application for leave to file a replying affidavit, including the costs of two counsel.
5. The applicants must bear their own costs in respect of their condonation application.
6. Save as set out in paragraphs 4 and 5 above, the first respondent must pay the applicants’ costs in this Court, including the costs of two counsel.

JUDGMENT

ROGERS J (Madlanga ADCJ, Dambuza AJ, Goosen AJ, Kollapen J, Majiedt J, Opperman AJ, Theron J and Tshiqi J concurring):

Introduction

[1] The applicants, Messrs Magalone, Topies and Dikhotso Mereki, are siblings who reside on a farm in the North West Province. The first respondent, the Moladora Trust (Trust), owns the farm. The key questions are whether the Mereki siblings were entitled to keep cattle on the farm and, if so, whether the termination of that right had to comply with the Extension of Security of Tenure Act¹ (ESTA). The Land Claims Court (LCC) and Supreme Court of Appeal (SCA) gave opposite answers: the LCC answered both questions yes, the SCA answered the first question no and so did not reach the second.

[2] These questions arose in the context of an application by the Trust in the LCC to have the Merekis' cattle removed from the farm. The Merekis did not file opposing papers or appear to oppose the application. The facts were thus those contained in the Trust's founding affidavit in the LCC.

Factual background

[3] The Trust became the owner of the farm in May 2004. The Merekis' mother passed away "before 2017". (The Trust's deponent, Mr Marius Nel, was not more specific.) She had consent to keep five head of cattle on the farm. The Mereki siblings continued to keep cattle on the farm. They did not seek or get express consent.

[4] After the late Mrs Mereki died, Mr Nel "made some efforts to engage" the Merekis on the fact that he had not given them consent to keep livestock on the farm. The Merekis allegedly abused him and told him that they would not remove their cattle. In January 2018 the Trust's attorneys caused the Sheriff to serve letters² on the Merekis to remove the cattle. The letters stated that the Merekis lived on the farm solely by

¹ 62 of 1997.

² The letters bear the date 31 October 2017.

virtue of the employment of their late parents. Their parents had had permission to keep five head of cattle, but this was personal to them as employees. The Mereki siblings now had nine head of cattle. The letters demanded the removal of all the cattle within 30 days.

[5] In September 2020, some 20 months later, the Trust's attorneys caused the Sheriff to serve further letters on the Merekis for the removal of the cattle. According to the Sheriff's returns of service, the Merekis' aggressive behaviour made it impossible to effect personal service. He thus left the notices with another person who was an occupant at the Merekis' homestead.

[6] The letters stated that a recent fire had had an adverse effect on available grazing. The Merekis were allowing the cattle to roam "across the width and breadth of the farm". They had not complied with the earlier removal letters. Despite the fact that there might be a dispute about whether they had permission to keep livestock on the farm, they were now being given one month's notice, "in terms of the common law", of the termination of their right to keep livestock.

[7] The letters of September 2020 seem to have been prompted, at least in part, by allegations made by officials of the Department of Agriculture, Rural Development and Land Reform (Department) that the Trust had arbitrarily interfered with the grazing of the Merekis' cattle. The Trust's attorneys addressed those accusations in a letter to the Department in August 2020.

Litigation history

Land Claims Court

[8] Still the cattle were not removed. In May 2022, after the lapse of another 20 months, the Trust launched proceedings in the LCC for orders that the Merekis forthwith remove their animals (the notice of motion referred not only to cattle but goats, horses and sheep) and that, if they failed to do so within 30 days, the Sheriff be

authorised to do so with the help of the South African Police Service and the Pound Master for the district. The Trust also asked for interdictory relief, and sought costs against the Merekis if they opposed.

[9] The application was served on the Merekis, as was a subsequent notice of set down for the hearing of the application by default. The matter served before the LCC (Cowen J) on 25 July 2022. The case stood down for two days to allow counsel to address certain matters raised by the Judge. On 26 July 2022 the Judge issued directions requiring the Trust to make submissions on whether its founding papers contained sufficient allegations to justify the relief claimed. The hearing resumed on 27 July 2022. Upon completion of oral argument, judgment was reserved. The Trust was granted leave to file supplementary written submissions, which it did on 3 August 2022. Counsel for the Trust asked that if the LCC concluded that the Merekis' grazing consent (if established) could only be terminated in accordance with section 8, the Trust be granted leave to supplement its papers.

[10] In a judgment delivered on 11 November 2022,³ the LCC dismissed the application with no order as to costs. The Judge said that a generous construction of ESTA was to be preferred over a purely textual or legalistic one. The Act was legislation giving effect to section 25(6)⁴ of the Constitution. The history of colonial dispossession had to be borne in mind when interpreting and applying ESTA.

[11] The Judge referred to the decisions of the SCA in *Adendorffs*⁵ and *Loskop*.⁶ These judgments held, so the Judge considered, that an ESTA occupier's right to graze cattle did not derive from ESTA but is a personal right dependent on consent from the owner.⁷ The Judge regarded herself as bound by these pronouncements. She held,

³ *Moladora Trust v Mereki* [2022] ZALCC 32; 2023 (3) SA 209 (LCC).

⁴ Quoted at para [47] below.

⁵ *Adendorffs Boerderye v Shabalala* [2017] ZASCA 37.

⁶ *Loskop Landgoed Boerdery (Pty) Ltd v Moeleso* [2022] ZASCA 53.

⁷ ESTA generally uses the word "owner" in tandem with the expression "person in charge", both defined terms. For the sake of brevity, I shall refer in this judgment only to "owner".

however, that once grazing consent was given, the right formed part of the tenure protected by ESTA. Although section 8 speaks of the termination of a “right of residence”, section 3(1) provides that an occupier’s consent to reside on “or use land” shall only be terminated in accordance with section 8.⁸ The definition of “evict” in section 1 also speaks of a right to reside on “or use” land. Where, therefore, an occupier has consent to graze cattle, the termination of that consent, the Judge concluded, is governed by section 8.

[12] As to whether the Merekis had consent to keep cattle on the farm, the Judge assumed in the Trust’s favour that the Mereki siblings were not occupiers in their own right at the time of their mother’s death and derived their right of residence from their parents’ status as employees. The Judge also assumed in the Trust’s favour that the consent which Mrs Mereki had to graze cattle was specific to her. The Judge found, however, that tacit consent in favour of the Mereki siblings could be inferred from the lengthy period which passed before the first removal notices were given in January 2018 and from the further lengthy period which passed before the second removal notices were given in May 2020. A finding of tacit consent could also be based, the Judge held, on the presumption created by section 3(4),⁹ namely that “a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved”.

[13] The LCC thus concluded that the Trust was not entitled to rely on the common law to terminate the Merekis’ right to graze cattle. Since the Trust did not claim to have terminated the Merekis’ consent in accordance with section 8, the application had to be dismissed. The LCC declined the Trust’s request, in the event of this finding being made, for leave to supplement its papers, since there had been no attempt at all to comply with sections 8 and 9. Given the importance of the issues, the LCC granted the Trust leave to appeal to the SCA.

⁸ These and other relevant provisions of ESTA are quoted later in this judgment.

⁹ Quoted in para [76] below.

Supreme Court of Appeal

[14] In the SCA the Merekis were represented by counsel. The South African Human Rights Commission and the Association for Rural Advancement were granted leave to make written and oral submissions as *amici curiae* (friends of the court). The SCA upheld the appeal with no order as to costs.¹⁰ It substituted the LCC's order with one granting the relief the Trust had sought at first instance.

[15] The SCA (per Weiner JA, with Ponnan and Matojane JJA concurring) emphasised that the Trust's allegations in the LCC had been uncontested. The Merekis' acceptance that they had not been given any express consent to graze cattle and that their mother's grazing rights had not automatically devolved upon them ought to have been the end of the matter. In the SCA's view, the LCC ought not of its own accord to have considered whether there was tacit consent. The Merekis had advanced no such case. On the face of the Trust's removal notices, there was a denial of any consent. The LCC's finding of a tacit consent therefore lacked a proper factual foundation, so held the SCA. The SCA made no reference to the amici's submissions.

In this Court

[16] The Merekis have now applied to this Court for leave to appeal. In their founding affidavit they allege that the LCC correctly held that the Trust had granted them tacit consent to keep livestock and that the termination of this consent had to comply with section 8 of ESTA. The grounds of appeal are summarised as being that the SCA:

- (a) had failed to appreciate that the LCC as a specialist court exercised wide remedial powers under ESTA and the Constitution;
- (b) erred in not holding that the Merekis, as ESTA occupiers who had been granted the right to graze cattle, were still protected by ESTA when the Trust sought to remove that right; and

¹⁰ *Moladora Trust v Mereki* [2024] ZASCA 37; 2024 (5) SA 51 (SCA).

- (c) erred in not holding that tacit consent to graze livestock had been given to the Merekis after their mother's death.

[17] On the first of these questions, the Merekis contend that the LCC exercised a discretion. The test on appeal was whether it had made any “demonstrable blunders” on the facts or the law. The SCA, so they allege, failed to apply the proper standard for appellate review of the exercise by the LCC of its remedial discretion.

[18] On the second and third questions, the Merekis contend that, in order to give proper effect to ESTA as a whole, the words which I underline should be read into section 3(1): “Consent to an occupier to reside on or use land, including the right to graze cattle, shall only be terminated in accordance with the provisions of section 8.” The Merekis acknowledge that the LCC and SCA did not deal with this reading-in, but said that it was in the interests of justice for this Court to consider it.

[19] The Merekis seek condonation, their application having been filed two days late. There is an acceptable explanation. The Trust has not opposed condonation. Nothing more need be said about this. Condonation is granted.

[20] In its opposing affidavit the Trust contends that the factual inferences drawn by the LCC were without merit. In the absence of evidence from the Merekis, there was no basis for a finding of a tacit consent. The SCA had simply interpreted the undisputed facts. The factual conclusions, the Trust says, are not a constitutional matter nor is there an arguable point of law of general public importance, there being no evidence of occupiers similarly placed to the Merekis. The proposed reading-in is impermissible, the Trust argues, in the absence of an application to declare any part of ESTA unconstitutional.

[21] The Trust also complains that the proceedings in the LCC had been unfair. The LCC is said to have made findings on issues that were not raised with the Trust's counsel and which make serious inroads into the Trust's property rights guaranteed by section

25(1) of the Constitution.¹¹ The Trust contends that the Merekis' application in this Court should fail for this reason alone.

[22] The Merekis have applied for leave to file a replying affidavit which the Trust opposed. An applicant for leave to appeal in this Court is not entitled as of right to file a replying affidavit. The replying affidavit merely repeats and elaborates upon arguments contained in the founding affidavit. There are no special circumstances warranting leave to file a replying affidavit. Leave to file a replying affidavit is thus refused.

[23] The counsel who act for the Merekis in this Court are not the same counsel who appeared for them in the SCA. In their written and oral argument in this Court, the Merekis' counsel advance, as their clients' primary case, that persons who have consent in terms of ESTA to reside on a farm automatically have certain ancillary rights, such as cultivation and grazing. Counsel argue that it is unnecessary to debate how extensive these ancillary rights are, either in general or in this particular case, because the Merekis had an automatic right to keep at least some cattle. Since the Trust did not comply with section 8 at all, it was not entitled to any relief in the LCC. In the alternative, the Merekis' counsel support the LCC's line of reasoning on tacit consent.

Jurisdiction

[24] This case concerns the interpretation of ESTA, which is national legislation contemplated in section 25(6)¹² of the Constitution. The case thus engages this Court's constitutional jurisdiction. There are also arguable points of law of general public importance that the Court should consider, thus engaging the Court's general jurisdiction. These include whether consent to graze cattle, granted to an ESTA occupier who has a right to reside, is a right protected by ESTA and whether the

¹¹ Section 25(1) provides: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

¹² Quoted at para [47] below.

presumption in section 3(4) of ESTA¹³ assists an occupier to establish consent to graze cattle. This Court does not require evidence in order to know that there are other ESTA occupiers who keep cattle on the farms where they reside. Common sense dictates that from time to time their right to do so will be disputed by the farm owners.

[25] It is in the interests of justice to grant leave to appeal. The questions are of great importance to ESTA occupiers and those who own farms. As shall presently appear, the Merekis enjoy reasonable prospects of success.

Legal background: a quartet of judgments

[26] Before considering the issues in this matter, it is convenient to get clarity on the true import of the four main cases cited in argument before us, namely *Margre*,¹⁴ *Adendorffs*,¹⁵ *Loskop*¹⁶ and *Sibanyoni*.¹⁷ The Trust relied on the first three while the Merekis supported the fourth.

Margre

[27] In *Margre* the owner brought proceedings in the High Court to enforce a written agreement with an ESTA occupier in terms of which the occupier was permitted to keep 80 units of livestock on the farm. The owner sought to have the occupier's livestock reduced to that number. The occupier contended that in terms of ESTA he had an automatic right to keep livestock on the farm as an incident of his residence. He denied that the written agreement was binding on him, claiming that it was not voluntarily concluded. For this reason, so the occupier's argument went, the owner's attempt to reduce his livestock was an ESTA "eviction" over which the High Court lacked jurisdiction.

¹³ Quoted at para [76] below.

¹⁴ *Margre Property Holdings CC v Jewula* [2002] ZAECHC 22; [2005] 2 All SA 119 (E).

¹⁵ Above n 5.

¹⁶ Above n 6.

¹⁷ *Sibanyoni v Holtzhausen*, unreported judgment of the Land Claims Court, Case No 143/2015 (9 May 2019).

[28] The High Court (Pickering J) held that ESTA did not entitle a residential occupier as of right to keep livestock. Such right was dependent on consent from the owner. It was in this context that Pickering J stated that the occupier's right to keep livestock did not derive from ESTA.¹⁸ In essence, this was a rejection of the Mereki's primary argument in the present case.

[29] The rest of the judgment in *Margre* was devoted to the question whether the written agreement was binding on the occupier. The High Court held that it was. The occupier did not contend that if the written agreement was binding the High Court could not enforce it. If the agreement was binding, the owner was not trying to terminate or vary the occupier's rights under the agreement.

[30] *Margre* thus did not address the alternative argument in this matter, namely, whether a consent to graze cattle is a land use which is protected by, and can only be terminated in accordance with, ESTA.

Adendorffs

[31] In *Adendorffs* there was a grazing agreement between the owner and occupier in terms of which the occupier was permitted to keep a certain number of cattle and horses in an allocated area on the farm. That area became overgrazed. The owner brought proceedings to have the occupier's livestock removed until the land was rehabilitated. This was in order to comply with the Conservation of Agricultural Resources Act¹⁹ (CARA). The owner was not seeking to terminate the grazing agreement. The SCA agreed with *Margre* that the occupier's right to keep livestock did not derive from ESTA but from a separate grazing agreement.²⁰

¹⁸ *Margre* above n 14 at 123-4.

¹⁹ 43 of 1983.

²⁰ *Adendorffs* above n 5 at para 28.

[32] The SCA noted a concession by the occupier that he did not reside on the property and that his rights flowed from a grazing agreement with the owner's predecessor. The SCA said that it followed that the occupier's grazing right did not derive from ESTA; it was a personal right to use the land for purposes of grazing.²¹ It was suggested in oral argument in this Court that these were not the true facts and that the occupier did indeed reside on the farm. However, we must understand the legal propositions in *Adendorffs* in the context of the facts as the SCA rightly or wrongly thought them to be.

[33] It is not clear whether the SCA in *Adendorffs* understood *Margre* as I have explained it. Since the SCA in *Adendorffs* decided that case on the basis that there was a grazing agreement, *Adendorffs* has nothing to do with the Merekis' primary argument. *Adendorffs* is also not relevant to the Merekis' alternative argument, because the owner was not seeking to terminate the grazing agreement. *Adendorffs* was concerned only with the enforcement of CARA and with the fact that the LCC had made orders which had not been sought or debated. The SCA's endorsement of *Margre* must thus be regarded as an obiter dictum (a non-binding pronouncement made in passing).

Loskop

[34] In *Loskop*²² the owner removed the occupier's livestock from two overgrazed camps to another camp in order to comply with CARA. The SCA quoted the passage from *Adendorffs* in which *Margre* was quoted with approval.²³ The SCA said that it was trite that an owner who needed to rehabilitate farmland was entitled, within the law, to remove cattle on the basis that once the land is rehabilitated the cattle can be returned.²⁴

²¹ Id at paras 27-8.

²² *Loskop* above n 6.

²³ Id at para 14.

²⁴ Id at para 11.

[35] The Court in *Loskop* quoted²⁵ a passage from another SCA judgment, *Normandien Farms*,²⁶ dealing with the meaning of “eviction” in the context of the Land Reform (Labour Tenants) Act.²⁷ The SCA in *Normandien* said that an “eviction” connoted a deprivation of the right of occupation or use of land as a result of the purported termination or repudiation of that right by the owner or person in control. In *Normandien* the SCA contrasted an eviction in this sense with a temporary removal of livestock in order to comply with CARA:

“Normandien did not contend that the occupants’ right, as between themselves and Normandien, to graze their livestock on the farm as an incident of their occupation was at an end. Normandien asserted that the continued presence of the livestock on the farm contravened CARA.”²⁸

[36] In the event, the SCA in *Loskop* considered that the LCC and the parties had mischaracterised the issues for determination. The occupiers had brought spoliation proceedings, the owner having taken the law into his own hands by removing the occupier’s cattle from the two overgrazed camps. The SCA held that the occupiers were entitled to spoliation relief and modified the LCC’s order accordingly.

[37] Once again, it is unclear whether the SCA in *Loskop* understood *Margre* as I have explained it. In any event, *Loskop* did not concern either the primary or alternative arguments that feature in the present matter. The SCA’s endorsement of *Margre* was not germane to the actual basis on which the Court decided *Loskop*. The endorsement must thus, once again, be treated as an obiter dictum.

²⁵ Id at para 17.

²⁶ *Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd; Mathibane v Normandien Farms (Pty) Ltd* [2017] ZASCA 163; [2018] 1 All SA 390 (SCA); 2019 (1) SA 154 (SCA) at paras 59-60.

²⁷ 3 of 1996.

²⁸ *Normandien* above n 26 at para 60.

Sibanyoni

[38] In *Sibanyoni* the owner had caused the occupier's cattle to be impounded and sold in terms of the former Transvaal's Pound Ordinance.²⁹ The LCC (Ngcukaitobi AJ) found that the occupier had at least tacit consent to keep and graze cattle. The actual basis of the decision, however, was that if the owner considered the cattle to be unlawfully on his land, he had to comply with section 7 of ESTA.³⁰ The Pound Ordinance did not trump ESTA. It was common cause that the owner had not given notice to the occupier in terms of section 7. The LCC thus declared that the owner had not complied with section 7 and ruled that the occupier was entitled to just and equitable compensation for the loss of his cattle.

[39] *Sibanyoni* contains statements about the historical background to section 25(6) of the Constitution and the approach to the interpretation of ESTA, including the importance of cattle in the lives of black farm dwellers. In the course of considering these matters, the LCC said the following:

- “54. During argument, there was a debate as to whether or not the applicant has any statutory rights to keep cattle at the farm. I think the answer to this is to be found in at least three provisions of ESTA.
55. First, as mentioned above, section 5 includes the rights of occupiers to dignity. In relation to farm dwellers, dignity cannot be restricted to personal dignity. It must include the entitlement to a dignified standard of living despite the meagre and sometimes critical resources at their disposal. Farm occupiers are entitled, as a matter of dignity, to have their assets, such as cattle, protected by law against forcible taking as happened here. The statutory rights in section 5 of ESTA must be construed consistently with the right contained in section 25(1) of the Constitution not to be arbitrarily deprived of property. Cattle are property. Under the Constitution farm occupiers may not be arbitrarily [deprived]³¹ of their cattle.

²⁹ 13 of 1972.

³⁰ On section 7, see para [61] below.

³¹ The reported version of the judgment says “disposed”, which must be a typographical error.

56. Secondly, section 6 of ESTA provides for the rights and duties of occupiers. Section 6(1) states that ‘an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly’. ESTA prohibits conduct by either the owner or the occupier, which has the effect of frustrating the exercise of the rights in question. The rights of an occupier to keep cattle at a farm may, in certain circumstances, constitute a ‘service’ agreed upon with the farm owner. Unless this is withdrawn in a lawfully recognised manner, a farm occupier is entitled to keep cattle on a farm. Moreover, the section speaks of the right to ‘use the land’. Where an occupier keeps cattle as part of an agreement with the owner, the right to use the land includes the right to graze one’s cattle.
57. Thirdly, the provisions of section 7(1) presuppose the existence of animals on farms, which may belong to or [be]³² under the control of an occupier. It refers to ‘trespassing animals usually or [actually]³³ in the care of an occupier’. This wording, in my view shows that it is within the contemplation of the legislature that farm occupiers will keep animals, including cattle, on farms. Otherwise there would be no purpose in regulating the rights of owners trespassing contexts.”

[40] Of the three considerations mentioned by the LCC in the above-quoted passage, the second and the third presuppose that the owner has agreed to the occupier keeping and grazing cattle, while the first is concerned not so much with the right to keep and graze cattle but with the right to be protected against forcible dispossession. Given the actual basis of the judgment, these pronouncements, though they may warrant careful consideration when considering the primary and alternative arguments in the present case, were not directly relevant to the basis on which *Sibanyoni* was actually decided. The LCC found as a fact that the occupier had consent to keep and graze cattle. If the owner believed otherwise, he was obliged – so the LCC found – to have complied with section 7 of ESTA, since on the owner’s view the animals were “trespassing animals”.

³² This word is absent in the reported judgment.

³³ This word has mistakenly been omitted in the reported judgment.

Concluding comment on the four cases

[41] *Margre* is thus an authority against the Merekis' primary argument in the present case, but it has nothing to say about the alternative argument. Since the endorsement of *Margre* in *Adendorffs* and *Loskop* was obiter, the LCC was not precluded in the present matter from considering what is now the Merekis' primary argument. *Margre* was not binding on the LCC. *Sibanyoni* contains obiter statements which could be invoked to support both the primary and alternative arguments, but those statements were not pertinently addressed to the legal propositions at the heart of the two arguments. None of these judgments stood in the way of the conclusion reached by the LCC in the present matter, based on the Merekis' alternative argument.

[42] The distinction between a personal right and a right protected by ESTA, for which *Adendorffs* and *Loskop* have come to be cited as authority, is a false dichotomy. To take the case of residence, it has its source in consent from the owner, and in that sense it is a personal right of occupation. The consent may be express or tacit, but in the absence of consent there is no right of occupation for purposes of ESTA. However, once there is a consent to reside, ESTA protects the right of residence. Section 8 regulates its termination. An unlawful termination constitutes an eviction for which ESTA grants remedies.

[43] Of course, once there is a right of residence for purposes of ESTA, sourced in consent, ESTA not only protects the right of residence but confers certain ancillary rights. Section 6(2) lists a number of these rights.³⁴

³⁴ These rights are, apart from security of tenure: to receive bona fide (good faith) visitors at reasonable times and for reasonable periods; to receive personal or other communications; to family life in accordance with the family's culture; to bury a deceased member of the family in the circumstances contemplated in section 6(2)(dA); not to be denied or deprived of access to water; and not to be denied or deprived of access to educational or health services. Subsections 6(4) and (5) expand on an occupier's burial rights.

The Merekis' primary argument

[44] The Merekis' primary argument in this Court is new. It was not considered by the LCC, because the LCC regarded itself as bound by the SCA's approval of *Margre* in *Adendorffs* and *Loskop*. The primary argument was not advanced by the Merekis or the *amici curiae* in the SCA. It was not even made in the Merekis' application for leave to appeal in this Court. It first emerged in written argument.

[45] The argument is an important one with far-reaching implications. It is not in the interests of justice for this Court to address it without the benefit of a judgment on the subject from the LCC, the specialist forum established to deal, among others, with the interpretation of ESTA.³⁵ This Court could also benefit from a judgment on this argument by the SCA, though that would of course depend on leave to appeal to that Court being granted. We thus leave the primary argument open. Nothing in this judgment should be read as expressing any opinion on the right answer to the primary argument.

The Merekis' alternative argument

[46] The alternative argument, based on the LCC's line of reasoning, raises two issues: (a) whether an ESTA occupier's consent to graze cattle is protected by ESTA and can only be terminated in accordance with ESTA's provisions; and (b) if so, whether the Merekis had consent to graze cattle. If these questions are answered in the Merekis' favour, the appeal must succeed because it is common cause that the Trust did not comply with section 8 of ESTA when terminating the grazing consent.

Does ESTA protect grazing consent?

[47] Section 25(6) of the Constitution reads:

³⁵ The LCC's jurisdiction and ancillary powers are set out in section 20(1) of ESTA. Among other things, the LCC has the power to decide any constitutional matter in relation to ESTA and to grant interlocutory orders, declaratory orders and interdicts. In terms of section 20(2), and subject to sections 17(2) and 19(1), the LCC's powers in section 20(1) are to the exclusion of other courts apart from this Court and the SCA. Section 20(3) provides that if, in proceedings in the High Court, that Court is required to interpret ESTA, it must stop the proceedings if no oral evidence has been led and refer the matter to the LCC.

“A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”

[48] The background to this provision is that before the advent of democracy in this country, black people were routinely forced off land on which they resided and on which they often cultivated crops and grazed livestock. Their occupation of land was not the subject of legal rights recognised by the colonial and apartheid governments of the day. Their tenure was thus insecure, as section 25(6) recognises.³⁶

[49] In terms of section 39(1) of the Constitution, a court, when interpreting the Bill of Rights, must, among other things, “promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. And in terms of section 39(2), a court, when interpreting legislation, “must promote the spirit, purport and objects of the Bill of Rights”.

[50] The expression “tenure of land” in section 25(6) of the Bill of Rights is apt to embrace the occupation of land not only for purposes of residence but also for associated purposes such as cultivation and grazing. In the context of our country’s history, there is every reason to hold that the framers of the Constitution intended a broad and generous concept of tenure. ESTA should thus be interpreted, to the extent that its language reasonably permits, in a way that promotes this broad and generous concept of tenure.

[51] ESTA is an Act of Parliament as contemplated in section 25(6). Its very name proclaims that it is concerned with “tenure” – the “Extension of Security of Tenure Act”. Its preamble records that many South Africans “do not have secure tenure” and

³⁶ This history was recounted by this Court in *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at paras 14-22. See also *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at paras 38-42 and *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at paras 58-63.

are therefore vulnerable to unfair eviction. The preamble further records that it is desirable that the law should promote “the achievement of long-term security of tenure for occupiers of land”; “extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners”; and “regulate the eviction of vulnerable occupiers from land in a fair manner, while recognising the right of land owners to apply to court for an eviction order in appropriate circumstances”.

[52] Since “tenure” in section 25(6) includes associated uses of land for cultivation and grazing, ESTA must, to the extent reasonably possible, be interpreted in a way which protects such associated uses. There are various provisions of ESTA which are consistent with a broad and generous concept of tenure, which I emphasise with italics in what follows.

[53] The first recordal in ESTA’s preamble states that many South Africans do not have secure tenure “of their homes *and the land which they use*”.

[54] The term “evict” is central to the protections afforded by ESTA. It is defined in section 1 as meaning “to deprive a person against his or her will of residence on land *or the use of land* or access to water which is linked to a right of residence in terms of this Act, and ‘eviction’ has a corresponding meaning”.

[55] Another important definition in section 1 is “terminate”, since one of the key protections given to ESTA occupiers is the regulation by section 8 of the termination of an occupier’s rights. “Terminate” is defined as including “to withdraw consent to a person to occupy *or use* land”.

[56] Section 3 is a critical provision, since it deals with consent. Its heading is “Consent to reside on land”, but subsection (1) provides that “[c]onsent to an occupier

to reside on *or use* land shall only be terminated in accordance with the provisions of section 8”. The same distinction features in subsection (2).³⁷

[57] Section 6 is another key provision. It sets out the rights and duties of occupiers. Subsection (1) states:

“Subject to the provisions of this Act, an occupier shall have the right to reside on *and use the land* on which he or she resided *and which he or she used* on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly.”

Subsection (2)(a) identifies “security of tenure” as one of an occupier’s rights. In context, this security of tenure must be understood as protecting the right to reside on and the right to use land. The right to reside (and, with it, any rights which ESTA automatically confers on a person with the right to reside) and the right to use are rights sourced in the consent envisaged by subsections 3(1) and 3(2).

[58] Section 14 deals with a court’s powers when an occupier has been evicted contrary to the provisions of ESTA. In terms of subsection (3)(a), a court may make an order “for the restoration of residence on *and use of land* by the person concerned, on such terms as it deems just”. In terms of subsection (3)(b), the court may make an order “for the repair, reconstruction or replacement of any building, structure, installation or thing that was peacefully occupied or used by the person immediately prior to his or her eviction, in so far as it was damaged, demolished or destroyed during or after such eviction”. The language of subsection (3)(b) is plainly not confined to a residential dwelling; its language could include buildings, structures, installations and things used for other purposes, for example a shed, kraal or tools used in connection with crops or livestock.

³⁷ Section 3(2) begins: “If a person who resided on or used land on February 1997 previously did so with consent . . .”.

[59] Section 29(2) provides that the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act³⁸ shall not apply to an occupier “in respect of land which he or she is entitled to occupy *or use*” in terms of ESTA.

[60] ESTA envisages that an occupier may have consent to cultivate crops. In terms of section 13(1)(a), a court making an eviction order may order the owner to pay compensation for, among other things, “any standing crops planted by the occupier, to the extent that it is just and equitable with due regard to all relevant factors”. Among the relevant circumstances are whether the crops were planted with the owner’s consent. In terms of section 13(1)(c) the court may order the owner to grant the occupier a fair opportunity to “tend standing crops to which he or she is entitled until they are ready for harvesting, and then to harvest and remove them”. In the case of a wrongful eviction, section 14(3)(d) empowers a court to order the payment of compensation contemplated in section 13.

[61] Section 7 by necessary implication envisages that an occupier may have consent to keep livestock. In terms of subsection (1), an owner may, on 72 hours’ notice, have a “trespassing animal usually or actually in the care of an occupier impounded and removed to a pound”. The expression “trespassing animal” is not defined. Its ordinary meaning is an animal which is present on the land without the owner’s consent.³⁹

³⁸ 19 of 1998.

³⁹ See *S v Van der Westhuizen* 1976 (4) SA 306 (C) at 310E-G. “Trespass” requires an element of unlawfulness (see *Hefer v Van Greuning* 1979 (4) SA 952 (A)) and unlawfulness is negated by consent. This understanding of “trespassing animal” is reflected in the prescribed notice which an owner must give to an occupier in respect of a trespassing animal (Form C to the Extension of Security of Tenure Act: Regulations, GN R1632, GG 19587, 18 December 1998). The following appears at the foot of the notice:

“The Extension of Security of Tenure Act gives you the right to live on the land where you were staying on 4 February 1997 or at any time thereafter, provided you had the permission of the owner or person in charge. It also gives you the right to carry on using any other land which the owner or person in charge gave you permission to use on or after that date.

The Act says that if an animal which belongs to you or which you are looking after is found on land belonging to somebody else, *without permission*, it may be taken to the pound. Before this happens, the owner or person in charge of the land must give you at least 72 hours’ notice. During this time you may go and collect the animal from where it is being kept.” (Emphasis added.)

[62] That the Act is concerned with the right which an occupier may have to cultivate land or keep livestock is apparent from the definition of “occupier”. This word is defined as meaning—

“a person residing on land which belongs to another person, and who on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding—

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

The words I have italicised have the effect that an “occupier” includes a person who “works the land” and does not employ others who are not members of that person’s family. Having regard to the introductory part of the definition, the lawmaker had in mind a person who has consent to work the land in the manner contemplated.

[63] In the context of evictions under ESTA, the availability of “suitable alternative accommodation” has to be considered by a court.⁴⁰ That expression is defined as meaning—

“alternative accommodation which is safe and overall not less favourable than the occupiers’ previous situation, having regard to the residential accommodation *and land for agricultural use* available to them prior to eviction, and suitable having regard to—

- (a) the reasonable needs and requirements of all the occupiers in the household in question for residential accommodation, land for agricultural use, and services.”

⁴⁰ See sections 9(3)(a), 10(2), 10(3)(a) and 11(3)(c).

Here again the lawmaker envisages that an occupier might have the right to use land for agricultural purposes.

[64] If there is a difficulty, it arises because the lawmaker has not been consistent in adding “use of land” when it refers to “reside on land”. And when the lawmaker uses both expressions, sometimes they are separated by “or”, at other times by “and”. In the present case, we need not concern ourselves with the second of these difficulties, since the Merekis had consent to reside on the land (this was conceded in the Trust’s founding affidavit in the LCC). We thus do not have to decide whether ESTA protects a consent to use land in circumstances where the recipient of the consent does not also have consent to reside on the land.

[65] As to the first difficulty, an analysis of ESTA as a whole does not reveal any coherent scheme that would explain why “use of land” is sometimes included and sometimes omitted. For example, an occupier is defined as meaning a person “residing on land” and having the consent to do so, but the definition then goes on to include a person who works the land himself or herself and employs only members of his or her family. The definition of “person in charge” refers to a person who at the relevant time had the legal authority “to give consent to a person to reside on the land in question”, yet section 3(1) plainly envisages a consent “to reside on *or use* land”. Although the heading to section 3 refers only to residence, subsections (1) and (2) refer to residence on or use of land; yet subsections (3) and (4) refer to residence alone.

[66] The most inexplicable omission is in section 8. The section is headed “Termination of right of residence” and refers throughout only to an occupier’s right of residence. The absence of a reference to termination of the right to use land is inexplicable, because—

- (a) an occupier’s occupation rights are sourced in consent, and in terms of subsections 3(1) and 3(2) consent may include consent not only to reside on but also to use land;

- (b) an “occupier” as defined includes a person who is himself or herself working the land with consent and employing only his or her family members;
- (c) “terminate”, the very thing with which section 8 is concerned, is defined in section 1 as including the withdrawal of consent to use land;
- (d) the termination of consent in terms of section 8 is a precursor to eviction if the occupier does not vacate the land, and “eviction” includes depriving a person against his or her will of residence on or use of land; and
- (e) in the eviction process, the availability of “suitable alternative accommodation” has to be considered, and this includes the land available to the occupier for agricultural use.

[67] One is driven to conclude that the “right of residence” in section 8 cannot have been intended by the lawmaker to be confined to residence in the strict sense but to include such rights of use as ESTA elsewhere envisages, including the right to use land for cultivation or livestock. An alternative but practically equivalent route to this conclusion is to say that section 8 is subject to an implied term rendering the section applicable also to the termination of an occupier’s right to use land. Words cannot be read into a statute by implication unless the implication is “a necessary one in the sense that without it effect cannot be given to the statute as it stands” or is “necessary in order to realise the ostensible legislative intention or to make the [statute] workable”.⁴¹ This test, admittedly stringent, is satisfied in the present case. Unless the section is understood as I have indicated, ESTA would be internally inconsistent and the ostensible legislative intent would not be achieved. The inconsistency must be resolved in favour of an interpretation that enlarges rather than diminishes the security of tenure afforded to occupiers. That interpretation also accords with section 39(2) of the Constitution, as it promotes the spirit, purport and objects of the Bill of Rights. As previously stated, we are concerned here with “tenure of land” contemplated in section 25(6) of the Bill of Rights.

⁴¹ *United Manganese of Kalahari (Pty) Ltd v Commissioner of the South African Revenue Service* [2025] ZACC 2; 2025 (5) BCLR 530 (CC) at para 71 and fn 92.

[68] It can be assumed for present purposes that a right to use land for grazing purposes may be terminated in terms of section 8 even though the occupier's right to reside on the land is not simultaneously terminated. On this basis, and even though the Trust did not terminate the Merekis' admitted right to reside on the farm, the termination of the Merekis' right to graze cattle on the farm, if such a right existed, had to comply with section 8.

[69] This conclusion strikes an appropriate balance between the rights of owners and ESTA occupiers. If the owner gave an ESTA occupier consent to graze cattle, there is nothing unjust or disproportionate in requiring the termination of this consent, like the termination of consent to reside, to comply with section 8 and in treating an unlawful termination of the consent as an eviction.

[70] The conclusion I have reached in this part of the judgment does not involve a reading-in as a constitutional remedy contemplated in section 172(1)(b). That constitutional power is not engaged in this case, because there has been no attack on the constitutionality of any of ESTA's provisions. My conclusion is based on the proper interpretation of ESTA. An expansive definition of an expression or the implication of a necessary term is part of the legitimate process of interpretation.

Did the Merekis have consent to graze cattle?

[71] There was no express consent, but was there tacit consent? I disagree with the SCA's view that it was not open to the LCC to consider tacit consent. The LCC was entitled to assess whether, on the evidence presented by the Trust, there was tacit consent, just as the LCC would have been entitled to assess whether, on such evidence, there had been express consent.

[72] In his founding affidavit for the Trust, Mr Nel alleged that the Merekis "never obtained" consent to keep livestock on the farm. He said that since the passing of the Merekis' mother, he had "made some efforts to engage" the Merekis about the fact that

he had “never granted them consent” to keep livestock on the farm. As to when Mrs Mereki died, he said merely that she passed away “before 2017”. When the threadbare nature of these allegations was put to the Trust’s counsel during oral argument in this Court, their scantness was frankly acknowledged.

[73] It is difficult to avoid the conclusion that the absence of detail as to when Mrs Mereki died, and as to when the engagements took place and what they comprised, was attributable to a concern that fuller disclosure would have been prejudicial to the Trust’s assertion of an absence of consent. Mrs Mereki might have died some years before 2017. Mr Nel would know, because the Trust bought the farm in November 2003 and took transfer the next year.

[74] According to Mr Nel, the Mereki’s late parents had consent to graze five cattle. However, by the time the cattle grazing became contentious, there were nine. Mr Nel has not said that the parents’ grazing of cattle became problematic during their lifetimes. All indications are that this consent had existed for many years, since Mr Nel makes reference to the previous owner of the farm in that context.⁴² The Mereki siblings lived with their parents on the farm and in all probability were involved in tending the livestock. There is no reason to suppose that, from the point of view of the acceptability of having cattle on the farm, anything changed when Mrs Mereki passed away.

[75] The only evidence of a change “on the ground” is Mr Nel’s statement that in August 2020 a stage was reached “where the continued presence of the [Merekis] livestock posed a threat to [the Trust’s] continued farming operations”. This is what preceded the service of the second set of removal notices, which were dated 23 September 2020. The notices stated that a recent fire on the farm had had an adverse effect on the available grazing.

⁴² In para 13.3 of his affidavit, Mr Nel said:

“By virtue of the fact that I have bought the farm from a previous owner and to afford the [Merekis] a reasonable opportunity to make alternative arrangements for their livestock, I caused formal notices to be served on the [Merekis] in January 2018.”

[76] It is against the backdrop of these facts, or lack of facts, that the question of the presumption in section 3(4) of ESTA comes to the fore. It is there provided that, for purposes of civil proceedings in terms of ESTA, “a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved”. In terms of section 3(5), this presumption becomes irrebuttable upon three years of such residence.

[77] For reasons explained in the first part of this judgment, these presumptions should be regarded as applying also to the use of land, including the use of land for grazing cattle. A person may have consent to reside on and consent to use land. The termination of such consent to use land, like the termination of consent to reside, can only lawfully take place in compliance with ESTA. In those circumstances, there is no rational basis for supposing that the lawmaker intended to provide a presumption only in relation to residence and not also use of land. The open and continuous use of land, for example in grazing cattle, is as apt a basis for a presumption as open and continuous residence on land.

[78] Since Mrs Mereki died “before 2017”, and since the first removal notices were served on the Merekis in January 2018, the presumption in section 3(4) is triggered. Depending on how long before 2017 Mrs Mereki died, the irrebuttable presumption in section 3(5) might even have been applicable. However, for present purposes we can confine ourselves to section 3(4).

[79] Tacit consent must be presumed unless the Trust put up evidence to prove that there was no tacit consent. The mere say-so of the owner cannot suffice. In the very nature of things, evidence to rebut tacit consent must consist of overt acts. In my view, the LCC was entitled to find that such evidence was lacking. The supposed engagement by Mr Nel with the Merekis was so devoid of detail that no weight could be attached to it. And in the absence of evidence as to when Mrs Mereki died and when Mr Nel’s

engagements with the Merekis took place, we cannot know that the acts comprising the engagement occurred before a period of one year had passed.

[80] There is no evidence that at the time of Mrs Mereki's death there were any prevailing circumstances which would have moved the Trust to object to the continued keeping of the Merekis' cattle on the farm. We know that the Trust did not object to the Mereki siblings continuing to reside on the farm, even though the Trust never gave express consent. As previously mentioned, the Trust accepted in its founding affidavit in the LCC that the Merekis were ESTA occupiers.

[81] It follows that, on the evidence before the LCC, that Court was entitled to conclude that the Trust did not establish an absence of consent and thus did not establish that the provisions of ESTA were inapplicable. And this conclusion precluded the LCC from granting the relief sought by the Trust.

The Land Claims Court's jurisdiction

[82] During oral argument in this Court the following conundrum was raised with counsel from the bench. The Trust's application was made on the basis that the Merekis did not have consent to keep cattle and that, even if they had consent, their rights flowing from such consent were a common law matter unrelated to ESTA. It was common cause that if, contrary to this argument, there was consent and such consent was protected by ESTA, the Trust had not complied with ESTA in terminating the consent. Why then did the LCC have jurisdiction?⁴³ If the Trust was right, why was the case not one for the High Court? And if the Trust was wrong, so that the matter fell within the jurisdiction of the LCC, it was common cause that the Trust had to fail because of non-compliance with section 8 of ESTA.

[83] This conundrum was not considered by the LCC or the SCA and was not the subject of written argument. *Margre* might be regarded as supporting the view that the

⁴³ On the LCC's jurisdiction, see n 35 above.

High Court rather than the LCC would have jurisdiction to adjudicate the claim formulated in the Trust's founding affidavit. In *Tsotetsi*⁴⁴ the LCC took a wider view of its jurisdiction.

[84] Particularly in the absence of full argument, it is undesirable for this Court to resolve the issue as a court of first instance. It is also unnecessary to do so. Treating the matter as an appeal properly emanating from the LCC, we have concluded that the LCC was right to dismiss the Trust's application on the merits. If instead the LCC should have declined jurisdiction, the practical result would have been the same: the dismissal of the application or perhaps the striking of the application from the roll.

Procedural unfairness?

[85] The Trust complains that the LCC reached conclusions on matters that were not put to its counsel. Even if that were so, it would not justify a refusal by this Court to engage with the case on its merits. The matter has been argued in the SCA and again in this Court. If the Trust considers that its legal submissions might have persuaded the LCC to a different point of view, its counsel have had the opportunity to advance their submissions in the SCA and in this Court.

[86] In any event, there was in my view no procedural unfairness. The Trust's legal team knew that, despite the absence of opposition, the LCC was unsure that the Trust had made out a case for the relief claimed. The matter stood down on the first day to allow counsel to address difficulties raised by the Judge. On the following day the LCC issued directions requiring the Trust to make submissions—

“on whether there are sufficient allegations in the founding affidavit to grant relief in circumstances where (1) the SCA has accepted that in some circumstances, the removal

⁴⁴ *Tsotetsi v Raubenheimer N.O.* [2021] ZALCC 2; 2021 (5) SA 293 (LCC).

of cattle may amount to an eviction⁴⁵ and (2) there was no engagement with the respondents prior to the purported termination of any right to keep cattle during 2020.”

[87] Following the further oral hearing, the LCC afforded the Trust an opportunity to file written argument. We do not know exactly what the written argument covered. Nonetheless, the LCC’s queries raised questions as to whether the Merekis had the right to graze cattle and whether the termination of that right amounted to an eviction for purposes of ESTA. It may be that the LCC’s thinking on these matters had not yet crystallised. That did not mean that the LCC could not adopt the reasoning it ultimately did.

Conclusion and order

[88] It follows that the appeal must succeed. The Merekis are entitled to costs in the SCA and in this Court. The importance of the issues warranted the employment of two counsel.

[89] The following order is made:

1. Leave to appeal is granted.
2. The appeal succeeds.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following order:
 - “(a) The appeal is dismissed.
 - (b) The appellant must pay the costs of the first, second and third respondents, including the costs of two counsel.”
4. The applicants must pay the first respondent’s costs of opposing the applicants’ application for leave to file a replying affidavit, including the costs of two counsel.
5. The applicants must bear their own costs in respect of their condonation application.

⁴⁵ The LCC here referenced *Normandien* above n 26 at paras 59-60 and *Loskop* above n 6 at paras 14-17, as well as two LCC judgments.

6. Save as set out in paragraphs 4 and 5 above, the first respondent must pay the applicants' costs in this Court, including the costs of two counsel.

For the Applicants:

T Ngcukaitobi SC and N Qwabe
instructed by Legal Aid South Africa

For the First Respondent:

M Roberts SC and E Roberts instructed
by Moolman and Pienaar Incorporated