IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 30 March 2000 **CASE NUMBER**: LCC 53/99
before **DODSON J**

Decided on: 2 June 2000

In the case between:

KG MAHLANGU First applicant

M MAHLANGU Second applicant

and

J A VAN EEDEN First respondent

W A VENTER NO Second respondent

JUDGMENT

DODSON J:

[1] This application comes before the Land Claims Court as a review in terms of section 20(1)(c) of the Extension of Security of Tenure Act.[1] I will refer to the Act as "ESTA". I am called upon to review a decision of the second respondent, a magistrate of the Delmas Magistrate's Court, in proceedings where the first respondent, as plaintiff, sued the first and second applicant for eviction.

[2] The first respondent is the owner of the farm Remaining extent of Portion 15 of the farm Modderfontein 236, Registration Division IR, Mpumalanga. I will refer to it as "the farm". The applicants live on the farm. They are married by customary union. Five of their six children still live with them on the farm. The applicants have lived on the farm since 1985. They were given consent to settle on the farm by the first respondent's father-in-law who was the owner of the farm at the time.

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1 Act 62 of 1997.

His father-in-law passed away during 1991. One of his sons, Mr Job James, continued to manage the farm in his capacity as co-executor of the deceased estate. He too consented to the applicants' residence on the farm. During September 1996, the first respondent began negotiations to purchase the farm. These negotiations resulted in the purchase of the farm by the first respondent from the deceased estate in terms of a deed of sale entered into on 20 February 1997. The applicants' consent to reside on the farm was withdrawn and they were told to leave. Precisely when this happened is a matter of dispute. The applicants did not leave. The first respondent then issued summon in the magistrate's court for their eviction.

[3] The particulars of claim in the magistrate's court action for the eviction of the respondents was based on the simple averments required to found a *rei vindicatio*, namely that the first respondent is the owner of the land and that the applicants are in unlawful occupation.[2] There was no reference to ESTA. The applicants gave notice of their intention to defend. The first respondent brought an application for summary judgment. It was not opposed. Judgment was duly granted on 15 January 1998. The applicants then applied for rescission of judgment. Rescission of judgment was granted on 26 February 1998. During April 1998, pleas were filed on behalf of the applicants, as well as a counterclaim by first applicant against first respondent for outstanding remuneration. A plea to the counter-claim was filed. The applicants made no clear reference to any defence based on ESTA in the plea. This was surprising as there was a direct reference to such a defence in the affidavit filed in support of the application for rescission of judgment. The matter was set down for trial on 13 August 1998.

[4] At the hearing on 13 August 1998, the applicants' counsel indicated to the first respondent's attorney that he wished to apply for a postponement in order to amend the applicants' plea so as to incorporate a defence based on ESTA. The lawyers then debated between themselves whether or not ESTA applied. The first respondent's attorney persuaded the applicants' counsel that it did not. Settlement negotiations then commenced and resulted in a written settlement agreement signed by the

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2 *Graham v Ridley* 1931 TPD 476 at 479; *Chetty v Naidoo* 1974 (3) SA 13 (A) at 15A - B; Harms *Amler's Precedents of Pleading* 5th ed (Butterworths, Durban 1998) at 408.

parties. The settlement agreement obliged the applicants to vacate the farm by 31 December 1998. By agreement, it was then made an order of court by the second respondent.

[5] The applicants did not vacate the land by 31 December 1998. The first respondent then brought an application in terms of rule 27(9) of the Magistrates' Courts Rules of Court for entry of judgment against the applicants in terms of the settlement agreement and authority to issue a warrant of eviction against them. The applicants employed the services of different attorneys and opposed the application. In their opposing affidavit they pertinently raised a defence based on ESTA. They also contended that they were completely unaware of the true nature of the settlement agreement when they signed it. They asked that the application be dismissed, alternatively that any eviction order be granted in accordance with the provisions of ESTA. They also asked that any eviction order be suspended pending its automatic review in terms of section 19(3) of ESTA. The magistrate gave judgment in respect of the application on 9 April 1999. In his judgment, he adopted the attitude that when he made the settlement agreement an order of court, it had the same effect as a judgment, that a warrant could be issued on the basis of that order, that he was *functus officio* in relation to the matter, that the rule 27(9) application was unnecessary and that ESTA was in any event not applicable. The application was struck off the roll.[3]

[6] The first respondent then proceeded to secure the issuing of a warrant. This resulted in an urgent application to this Court to stay the warrant pending a review. That application was resolved by way of an agreement to stay the warrant, save that the costs of that application must be decided in these proceedings. In these proceedings, the applicants have applied in terms of section 20(1)(c) of ESTA for the review of the magistrate's decision on 9 April 1999. Notwithstanding that it is a review of the proceedings in the magistrate's court, the parties, in their founding and opposing affidavits in this application, debated afresh the facts pertaining to whether or not the applicants are entitled to enjoy the rights conferred on "occupiers"[4] by ESTA.

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3 What transpired on 9 April 1999 appears from the parties' affidavits in this application. The cassette tapes recording the proceedings were never forthcoming, despite the second respondent's undertaking to have them delivered to the Court.

4 The term is defined in section 1 of ESTA. See para [11] below.

Jurisdiction

[7] The Court's review jurisdiction is dealt with in Chapter V of ESTA. Section 20(1)(c) of ESTA gives this Court jurisdiction -

> "to review an act, omission or decision of any functionary acting or purporting to act in terms of this Act".

Section 19(3) provides that -

> "Any order for eviction by a magistrate's court in terms of this Act . . . shall be subject to automatic review by the Land Claims Court . . ."

[8] In *Skhosana and Others v Roos T/A Roos se Oord and Others*,[5] the facts were in certain respects similar to this one. Default judgment was granted by a magistrate on similar particulars of claim. ESTA was raised as a possible defence for the first time only in the affidavit filed in support of an application for rescission of judgment. The magistrate struck the rescission application from the roll when the applicant did not arrive to move it. Her decision to strike was taken to this Court on review. Gildenhuys J considered at length the extent of this Court's review jurisdiction under both the sections which I have quoted and concluded as follows:

> "Having regard to ESTA as a whole and taking into account its purpose and scope, I have come to the conclusion that the phrase 'in terms of', where used in the sections of ESTA from which this Court derives its jurisdiction, must be interpreted in a manner which will entitle this Court to adjudicate in a case where the provisions of ESTA are at issue. So interpreted, the phrase 'in terms of this Act' will mean 'within the sphere of law established by this Act'. That does not mean that this Court will have jurisdiction to decide every issue which might arise in such cases. The issue must have some relationship with ESTA. Where the boundaries lie, I will not venture to determine. . . . Because this review application is brought on the basis that the second respondent committed an irregularity by striking the rescission application from the roll when it appeared from the application that the applicants wanted to raise a defence under ESTA, and because it was argued that the default judgment should not have been granted by the third respondent in that the applicants were protected against eviction by ESTA, and because this Court has jurisdiction to adjudicate on issues falling within the sphere of law established by ESTA, I hold that this Court has jurisdiction to adjudicate on the review application."[6]

[9] The Court also made it clear in relation to both these provisions that it would have jurisdiction to review and set aside an order of a magistrate's court which was not made in terms of ESTA in

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5 [1999] 2 All SA 652 (LCC).

6 *Skhosana* above n 5 at para [18].

circumstances where it should have been so made.[7] In this matter, the applicants contend that the magistrate struck the matter from the roll when he ought to have allowed them to raise a defence under ESTA or at least to have made his eviction order in terms of ESTA. It raises questions falling under the "sphere of law" established by ESTA. I am accordingly satisfied that I have jurisdiction.

Does ESTA apply?

[10] Even if this Court has jurisdiction to carry out the review, it was common cause that if ESTA was found not to apply to the applicants, the review application must fail. ESTA regulates the evictions of a particular class of rural residents. They are persons who are "occupiers" as contemplated in ESTA. If a person is an occupier, he or she can only be evicted if certain conditions are satisfied. The eviction procedure in respect of an occupier is also strictly circumscribed.[8]

[11] The definition of occupier in ESTA reads -

> "'occupier' means a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding-
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> (a) a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996);
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> (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
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> (c) a person who has an income in excess of the prescribed amount;"[9]

With reference to this definition, the exact time when the applicants' consent to reside on the farm was withdrawn is important. The applicants said it was withdrawn during March 1997, thus suggesting compliance with the definition. The first respondent said it was during September 1996, precluding such compliance. Mr Van der Merwe, who appeared for the first respondent, argued strenuously that the applicants' version should be rejected. He pointed out numerous weak points in their affidavits and

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7 *Skhosana* above n 5 at para [12] - [13].

8 *Lategan v Koopman en Andere* [1998] 3 All SA 603 (LCC); 1998 (3) SA 457 (LCC) at para [5] - [10].

9 GN R1596, Government Gazette 18457, 28 November 1997 prescribes an income of R5 000 per month as the amount.

placed much reliance on their failure to file a replying affidavit. On this basis he argued that they were not "occupiers" as defined, ESTA did not apply and the application must fail.

[12] However, there is another basis on which a person may qualify as an occupier. In terms of section 3(2)(a) of ESTA,

> "(2) If a person who resided on or used land on 4 February 1997 previously did so with consent, and such consent was lawfully withdrawn prior to that date-
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> (a) that person shall be deemed to be an occupier, provided that he or she has resided continuously on that land since consent was withdrawn;".

Even on the first respondent's version, the applicants comply with this deeming provision. But, said the first respondent, section 3(2) does not apply to these proceedings because they were pending on the date of commencement of ESTA on 28 November 1997. Section 16 of ESTA regulates which sections of ESTA apply to pending proceedings. Section 3(2) is not one of them. Section 16 reads -

> "16 **Pending proceedings**
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> The provisions of sections 5, 6, 7, 8, 9, 10, 11, 12, 13 and 15 shall apply to proceedings for eviction pending in any court at the commencement of this Act."

[13] In *Masondo and Others v Woerman*[10] and *Labuschagne v Sibiya and Another*,[11] this Court held that the omission of any express reference to s 3(2) meant that the subsection did indeed not apply to pending proceedings. Mr Kuny, who appeared for the applicants, argued that these decisions were wrongly decided and suggested that two other decisions of this Court[12] were authority for the view that section 3(2) applies to pending proceedings as a matter of necessary implication. Although I incline to the view of Mr Van der Merwe as to the correctness of the *Masondo* and *Labuschagne* decisions, it is not necessary for me to decide this issue on the view I take of the matter. I will assume in favour of the first respondent that the *Masondo* and *Labuschagne* decisions of this Court are correct and that section 3(2) does not apply to proceedings which are pending.

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10 LCC 139/98, 4 August 1999, [1999] JOL 5168 (LCC).

11 LCC 28/98, 4 August 1999, [1999] JOL 5167 (LCC).

12 *Hen-Boisen and Another NNO v Loliwe* 2000 (1) SA 796 (LCC);*Grand Valley Estates v Nkosi* [1999] 3 All SA 435 (LCC).

[14] The next question is whether or not proceedings were in fact pending in this case. Summons was issued out of the Delmas Magistrate's Court on 1 October 1997, before ESTA commenced. The summons was only served on 3 December 1997, after ESTA had commenced. Can proceedings where summons has been issued but not served be considered as pending?

What are pending proceedings?

[15] Mr van der Merwe, on behalf of the first respondent, took as his starting point that a pending case must simply be one that has commenced but not ended. He then referred to those cases which have held that proceedings commence at the time that summons is issued, not served.[13] On this basis, he contended, the proceedings in this case must be considered as having become pending on the issue of summons. This is precisely the approach which was adopted to the concept of pending proceedings in the Free State case of *Van Tonder v Van Tonder*.[14] This authority is however of limited force in the present context. Amongst other things, the application was not opposed and it is not clear that this point was debated in court. The case did not seem to have turned strictly on whether pending meant issue or service of summons, but rather on whether the mere issue of summons showed, on the part of the applicant, an "ernstige voorneme . . . om met [.n] egskeidingsgeding voort te gaan" in order to determine whether it had jurisdiction to consider a related urgent application for an interim interdict.[15]

[16] A proper consideration of the argument advanced by Mr van der Merwe requires an analysis of those cases which have held that proceedings commence with the issue of summons. There are many decided cases to this effect. The ones that seem to be cited the most often are *Nxumalo v Minister*

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13 *Labuschagne v Labuschagne, Labuschagne v Minister van Justisie* 1967 (2) SA 575 (A); *Minister of Justice, Police and Prisons, Ciskei and another v Ntliziwana* 1989 (2) SA 549 (Ck A); *Rooskrans v Minister van Polisie* 1973 (1) SA 273 (T) and *Nxumalo v Minister of Justice and Others* 1961 (3) SA 663 (W) were the cases specifically cited by him.

14 2000 (1) SA 529 (O) at 532H - 533C.

15 Above n 14 at 532I.

of Justice and Others,[16] *Marine and Trade Insurance Co Ltd v Reddinger*,[17] and *Labuschagne v Labuschagne , Labuschagne v Minister van Justisie*.[18] Both *Nxumalo* and *Labuschagne v Labuschagne* concerned section 32 of the Police Act.[19] At that time, the section required that any action against the State or a person in respect of anything done in terms of the Police Act be "commenced" ("ingestel" in the Afrikaans text, which was signed) within six months of the cause of action arising and only after one month's written notice of such proposed action. In *Nxumalo*, summons had been issued but not served before the expiry of the six month period. The Minister of Justice argued that a statute must as far as possible be interpreted as being in accordance with the common law. The common law regarded an action as only commencing with the service of summons for the purpose of the interruption of prescription. Kuper J rejected this argument. He said that if the ordinary meaning of the statute suggested something at variance with the common law, then that ordinary meaning must prevail. The ordinary meaning of commencement he considered, was the issue and not the service of summons. That meaning therefore had to prevail. However, he went on to say the following:

> "I would only add that, if it could be contended that the ordinary meaning of the words 'the commencement of the proceedings' could be either the date of issue of summons or equally the date of service of the summons, the former view would have to prevail; the second does in fact take away the rights of people who have claims for damages against officers in terms of the section, and who are unable to proceed with those actions."[20]

[17] In *Labuschagne v Labuschagne*,[21] the plaintiff had issued summons less than a month before expiry of the required month's notice period but served the summons after the expiry of that period. This time the plaintiff argued that proceedings only commenced with the service of summons, so the month's notice period had been complied with. The Appellate Division rejected this argument. The court reasoned as follows:

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16 Above n 13. This case was cited as authority in the *Van Tonder* case.

17 1966 (2) SA 407 (A).

18 Above n 13.

19 Act 7 of 1958.

20 Above n 13 at 668D - E.

21 Above n 13.

(i) The ordinary meaning of "ingestel" or "commenced" means the issue of summons only (as counsel for the plaintiff had conceded).[22]

(ii) This is also the way in which the commencement of an action is conceived of in the High Court Rules.[23]

(iii) The legislature must have been aware of this in promulgating the section in this way.

(iv) The possible impracticalities which might arise when service of a summons is delayed, thereby defeating the object of the section, was not sufficient reason to read in a meaning different to the ordinary meaning of "commenced".

(v) The court accordingly held that the plaintiff had jumped the gun by issuing summons prematurely and the claim failed.

[18] In the *Reddinger* case,[24] which came before *Labuschagne v Labuschagne*, the court cited *Nxumalo* as authority for its statement that proceedings commence with the issue of summons. In *Reddinger*, the Court was concerned with the statutory time limits in section 11 *bis* (2) of the Motor Vehicle Insurance Act.[25] Apart from the fact that the Court cited *Nxumalo* with approval, the case does not really take matters much further in the issue-versus-service debate because the express words of the statute determined that commencement was effectively from the time of service of summons.

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22 Although the Appellate Division cited *Nxumalo* as authority, it did not concede any possibility of ambiguity as was the case in the extract which I quoted above in *Nxumalo*.

23 The court referred to the definition of "action" in rule 1 and rule 17 pertaining to the process for the issuing of a summons.

24 Above n 17.

25 Act 29 of 1942.

[19] As I have said, there are a large number of cases which have followed *Nxumalo, Reddinger* and *Labuschagne v Labuschagne* where the statement is repeatedly made that proceedings commence with the issue of summons.[26] Thus in *MV Jute Express v Owners of the Cargo Lately Laden on Board the MV Jute Express*,[27] Howie AJA said:

> "In the first place, by the time the [Admiralty Jurisdiction Regulation Act, 1983] was passed, this Court had long since held that all actions commence with the issue of summons: *Marine and Trade Insurance Co Ltd v Reddinger* . . . and *Labuschagne v Labuschagne; Labuschagne v Minister van Justisie*. . .. There was therefore no need for the lawgiver to say anything in s 3(5) about when the action would commence. It was a matter of settled procedural law."[28]

What the court goes on to say is significant in placing these generalised comments about the commencement date of legal proceedings in context:

> "Secondly, the subject of commencement had in any event been dealt with in s 1(2) insofar as the Legislature had thought it necessary to deal with it at all. And the reason for its doing so there is clear. In the normal course, prescription is not interrupted by the issue of summons but by the service of summons (*Kleynhans v Yorkshire Insurance Co Ltd* . . .) and, as already mentioned, an action is not commenced by the service of summon but by the issue of summons. Manifestly the Legislature intended to unify the *moment of commencement in relation to prescription on the one hand and statutory time limitations on the other*."[29] (my emphasis)

The point is that such generalised statements that proceedings commence on the issue of summons, on closer analysis, relate to a particular context. In the *Nxumalo, Reddinger* and *Labuschagne v Labuschagne* cases, as well as most of the provincial division cases where such statements have been made, the context is that of statutory time limits. The statements do not hold true for every situation. As this extract shows, the commencement of proceedings when it comes to prescription is considered to be from the time that summons is served.[30] Once one takes into account the context, one can

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26 See, for example, the other two cases cited by Mr Van der Merwe, namely *Minister of Justice, Police and Prisons, Ciskei and another v Ntliziwana* above n 13 at 552B - C and *Rooskrans v Minister van Polisie* above n 13 at 274G.

27 1992 (3) SA 9 (A).

28 Above n 27 at 16H.

29 Above n 27 at 16I - 17A.

30 Nor is this because of the particular wording of the statutes dealing with prescription. That was the common law position before the statutory regulation of prescription. *Kleynhans v Yorkshire Insurance Co Ltd* 1957 (3) SA 544 (A) at 551C.

understand the following general statement in *Kleynhans v Yorkshire Insurance Co Ltd*[31] which runs completely contrary to the statements such as that made in the first extract from *MV Jute Express* in the context of statutory time limits:

> "Dit wil my daarom voorkom dat CONNER H.R., se beskouing in *Hartley v Umkanganyeki* . . . dat diening van die dagvaarding volgens die gemene reg nodig was, die juiste is, en dat WARD R., tereg in *Union Government v Willemse* . . . opgemerk het:
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> 'A demand cannot be considered to be made until it is communicated to the person who is required to comply with it. *Nor can any summons have any effect as a summons until it is served on the party who is called upon to obey it*.'"[32] (my emphasis)

[20] The point is illustrated by reference to another area of law where the time of commencement of proceedings has a particular significance, namely jurisdiction. A court must have jurisdiction at the time of the commencement of the action.[33] In *Glen v Glen*[34] the court was of the view that an action commenced for this purpose on the mere issue of summons, not at the time of service. The court relied on *Nxumalo v Minister of Justice and Others*[35] in arriving at this conclusion. It also referred to *Reddinger*.[36] The court based its decision substantially on the very wide and general nature of the remarks made in *Nxumalo* to the effect that proceedings commence at the issue of summons. The decision in *Glen* was criticised by Ellison Kahn in the Annual Survey.[37] He points out that the views expressed in that case may be *obiter*. In any event, he goes on to analyse the court's reasoning and points out that its understanding of the old authorities referred to is flawed. He points out that Huber *Heedendaegse Rechtsgeleerdheyt* is plainly of the view that actual service of the summons is a requisite

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31 Above n 30.

32 Above n 30 at 551H.

33 Pistorius *Pollak on Jurisdiction* 2ed (Juta, Cape Town 1993) at 12 and the authorities referred to at n 1 of that work.

34 1971 (3) SA 238 (R).

35 Above n 13.

36 Above n 17.

37 1971 *Annual Survey of SA Law* 454 at 457.

of the institution of proceedings. Kahn concludes that at common law, an action commences upon service of the summons for purposes of determining jurisdiction.[38]

[21] The same question came up for decision in *Mills v Starwell Finance (Pty) Ltd.*[39] The court was concerned with the jurisdictional provisions contained in section 28 of the Magistrates' Courts Act.[40] Thirion J proceeded from the basis that statute law must be interpreted as far as possible in conformity with the common law.[41] He conducted a far more thorough analysis of the old authorities than had been done in the *Glen* case.[42] It is quite clear from that analysis that at common law the commencement of proceedings was considered to be the moment of service of the summons, and not only for purposes of establishing jurisdiction, but for other purposes too.[43] Thirion J also referred with approval to the views expressed by Kahn.[44] He distinguished the *Nxumalo* and *Reddinger* cases, *inter alia*, on the basis that they dealt with specific statutory provisions. He accordingly concludes that for purposes of deciding jurisdiction, proceedings commence with the service and not the issue of summons. His reasoning is to be preferred over that in the *Glen* case. Moreover the conclusion reached by Thirion J is supported in *Pollak on Jurisdiction*.[45]

[22] What emerges from the above analysis is that there is no uniform position in our legal system as to when proceedings are considered to commence. It all depends on the context. Although *Labuschagne v Labuschagne* was based on the (uncontested) assertion that the ordinary meaning of commencement is the issue of summons, the decisions in that case and other cases dealing with statutory

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38 Above n 37 at 459 - 460.

39 1981 (3) SA 84 (N).

40 Act 32 of 1944.

41 Above n 39 at 87C. As authority for the point that a statute must be interpreted in conformity with the common law, see the cases referred to by Thirion J at this point in the judgment. See also, for example, *In re Kranspoort Community* 2000 (2) SA 124 (LCC) at 161H and the authorities listed at n105.

42 Above n 39 at 87D - 89C.

43 Above n 39 at 88D.

44 Above n 39 at 90E - F.

45 Above n 33 at 12.

time limits are far better explained on the basis that such time limits restrict the rights of citizens to seek relief in the courts and must therefore be interpreted restrictively. An interpretation of a statutory time limit which only requires the issue of summons for its interruption is consistent with such a restrictive approach.[46]

[23] In the case of *President Insurance Co Ltd v Yu Kwam*,[47] the court also distinguished between those statutes dealing with statutory time limits which employ a word which has a well-established significance at common law, such as the word "prescribe", and those which do not. In that case, the court said -

> "In using the term 'prescribed' (or 'verjaar' in the Afrikaans text) in sec. 11 (2) of the [Motor Vehicle Insurance Act, 1942], the Legislature was employing a word of well established legal significance, indicating a juristic concept of Roman Dutch Law stemming back to Roman Law."[48]

The Appellate Division's decision in *Kleynhans* can also be distinguished from the decision in *Labuschagne v Labuschagne* on this basis.

[24] Against the background of that analysis, I now turn to consider the particular context of this case. What is the nature of the legal provision which we are dealing with? It seems to me that there are two ways of looking at it. The one is to say, on the basis of the *Masondo v Woerman* and *Labuschagne v Sibiya* decisions of this Court,[49] that section 16 impliedly excludes section 3(2) of ESTA from application to pending proceedings and we are therefore interpreting the meaning of the term "proceedings . . . pending in any court" in section 16. The other is to say that because section 16 does not refer to section 3(2), section 16 does not apply. Rather, the applicability of section 3(2) to the case must be determined according to the rules dealing with the impact of statutes having

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46 See, for example, *Minister of Justice, Police and Prisons, Ciskei and another v Ntliziwana* above n 13 at 553D - E and *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at 128F - 129B and the authorities referred to there by Didcott J. See also the extract from *Nxumalo* quoted at para [16].

47 1963 (3) SA 766 (A).

48 Above n 47 at 773E. See also the remarks of Harcourt J in *Marine and Trade Insurance Co Ltd v Workmen's Compensation Commissioner* 1972 (1) SA 535 (N) at 538F - 539A.

49 See para [13].

retrospective effect. There is no doubt that section 3(2) does have retrospective effect,[50] and probably in the strong sense referred to by Olivier JA in *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission, and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others*.[51] That brings into play the presumption described by Kentridge AJ in *S v Mhlungu and Others*[52] as follows:

> "There is . . . another well-established rule of construction namely, that even if a new statute is intended to be retrospective in so far as it affects vested rights and obligations, it is nonetheless presumed not to affect matters which are the subject of pending legal proceedings."[53]

At the end of the day, it does not matter, because it is clearly that presumption which section 16 targets and the concept of pending proceedings must be the same, whichever of these two approaches one adopts.

[25] Having identified what we are talking about, there are various observations which must be made in the light of the above analysis of the cases dealing with the commencement of proceedings. The first observation is that the presumption referred to in the *Mhlungu* case derives directly from Roman-Dutch law. The source is referred to in the case of *Bell v Voorsitter van die Rasklassifikasieraad en Andere*:[54]

> "Volgens *Voet* word . . . aangeleenthede ten opsigte waarvan 'n geding aanhangig gemaak is en nog nie beslis is nie (*quod etiam non intelligendum de praeteritis pendentibus quod res non sit integra*), by ontstentenis van 'n ander bedoeling, nie deur so 'n wetsbepaling met terugwerkende krag, getref nie."[55]

This has several consequences. One is not dealing with a simple statutory provision. One is dealing with a rule derived from common law. That section 16 of ESTA impliedly refers to that rule does not change

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50 *Hen-Boisen v Loliwe* above n 12 at para [10]; *Masondo v Woerman* above n 10 at para [89]; *Labuschagne v Sibiya* above n 11 at para [42].

51 1999 (4) SA 1 (SCA) at 7B - E.

52 1995 (3) SA 867 (CC).

53 Above n 52 at 897J - 898A.

54 1968 (2) SA 678 (A).

55 Above n 54 at 683F - G. The reference in this quotation to Voet is a reference to P. Voet, *De Statutis*, 8.1.3 para. 1. All other references to Voet in the judgment are to J Voet.

that. The principle that a statute must be interpreted as being consistent with the common law (unless there is a contrary intention) thus takes on a greater significance in this context. The concept of pending proceedings is referred to in the presumption and also has a common law pedigree. It is not a new concept. This too distinguishes this case from the *Labuschagne v Labuschagne* line of cases on the basis referred to in paragraph [23] in relation to the *Yu Kwam* case. Moreover, I have little doubt that when the old authorities spoke of pending proceedings, they had in mind proceedings which had commenced by way of service of summons. This is borne out by the analysis of the old authorities in the *Mills* case. Voet specifically defines pending proceedings in the context of the defence of *lis pendens* as follows:

> "*Pending suit defined*.- Moreover a suit is deemed to have begun and thus be pending elsewhere not only if joinder of issue has already taken place, but also if there has been merely a citation or summoning to law, since such a thing brings on anticipation. This is so provided that the statement of claim or at least the cause for claiming has at the same time been notified to the defendant, so that it can be known whether the suit is being again set in motion elsewhere on the same cause and about the same matter, or on the other hand the cause or matter is different."[56]

[26] While Voet's approach is described in *Michaelson v Lowenstein*[57] as authority for proceedings becoming pending from the issue of summons,[58] it is in my view clear from the above extract that service of the summons is also envisaged.[59] This is certainly the interpretation placed on the law by Kentridge AJ in *S v Mhlungu and Others*.[60] In all of the cases referred to in *Michaelson*[61] and in Herbstein and

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56 44.2.7. This approach of Voet has been preferred in our law over the majority of old authorities who considered the stage of *litis contestatio* to be the stage from which a suit was pending for purposes of a plea of *lis pendens. Michaelson v Lowenstein* 1905 TS 324 at 327 - 8.

57 *Michaelson* above n 56 at 328.

58 On the basis of *Michaelson* it is also suggested in Van Winsen et al *Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa* Dendy (ed), 4th ed (Juta, Cape Town 1997) at 475 fn 79 that a suit is pending once summons has been issued.

59 As Schreiner JA says in *Kleynhans* above n 30 at 549E:

> "Sometimes the word 'issue' is used loosely when there is no necessity to distinguish it from service."

60 Above n 52 at 892I - J. Note that although the judgment is a minority one, he is not contradicted in this respect by the majority.

61 *Laubscher v Vigors and Fryer* Buch 1873 20; *Partridge v Blake* 4 CTR 280.

Van Winsen[62] in this regard, summons had not only been issued, but also served in the proceedings which formed the basis of a plea of *lis pendens*. An article in the 1923 South African Law Journal also interprets Voet in this way and says that Van Leeuwen was of the view that -

> ". . . *lis pendens* can be pleaded as soon as a summons to appear before another Court has been *served* upon the defendant . . ." (my emphasis)[63]

[27] For the above reasons, I am of the view that when pending proceedings are referred to at common law, they are proceedings which have commenced by the service and not the mere issue of summons.

[28] The second observation is that, in my view, it cannot be said that there is an ordinary grammatical meaning of pending which points to either issue or service of summons as being the starting point. This seems to be the sentiment behind the following extract from the judgment of Kentridge AJ in *Mhlungu* in relation to the meaning of the term pending in section 241(8) of the Interim Constitution[64]:

> "The term 'pending' in relation to proceedings may have different connotations according to its context. See *Noah v Union National South British Insurance Co Ltd* . . .; *Arab Monetary Fund v Hashim and Others* . . .. As Hoffmann J said in the latter case . . ., in the normal meaning of the term proceedings 'are pending if they have begun but not yet finished'. It is clear enough that a 'pending' proceeding is one not yet decided. . . . What is not so clear is when a legal proceeding may be said to have begun."[65]

It is so that Hoffmann J, in the case referred to,[66] considered the ordinary meaning of pending to mean from the issue of summons. But I would respectfully differ. From the point of view of the ordinary meaning of pending, I have great difficulty in the notion that adversarial proceedings could be pending in a court with one of the adversaries having absolutely no knowledge of the existence of the

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62 *Herbstein* above n 58 at 475 fn 79.

63 Karroo *"Lis Pendens and Lis Finita or Res Judicata"* (1923) 40 *SA Law Journal* at 407. See also the extract from Merula *Manier van Procederen* quoted and explained in *Mills v Starwell Finance (Pty) Ltd* above n 39 at 87E - 88A. Contrast *Van As v Appollus en Andere* 1993 (1) SA 606 (C) at 609H - 610B where a somewhat different conclusion is reached, with which I respectfully differ.

64 Constitution of the Republic of South Africa, No 200 of 1993.

65 Above n 52 at 892B - D.

66 *Arab Monetary Fund v Hashim and Others (No 4)* [1992] 1 All ER 645 (ChD) at 649i.

proceedings because service had not yet been effected. At best, the ordinary meaning is ambiguous as to when pending proceedings commence.

[29] On this basis, an interpretation of the concept of pending proceedings which seeks to align it with the common law is required.[67] Reliance on the common law cannot be excluded on the basis that it was in *Nxumalo*,[68] namely that the concept had a clear ordinary meaning which revealed the intention of the legislature to exclude the common law. There is, moreover, authority for interpreting the concept of pending proceedings in conformity with the common law. In *S v Saib*,[69] the court was also concerned with section 241(8) of the Interim Constitution.[70] The relevant part of the subsection read:

> "All proceedings which immediately before the commencement of this Constitution were pending before any court of law . . . shall be dealt with as if this Constitution had not been passed . . ."

Thirion J pointed out that the provision encompassed both civil and criminal proceedings.[71] *Saib* concerned criminal proceedings and it was not necessary for the court to enquire into the question of the point at which civil proceedings commence or become pending. Nonetheless, what is important for present purposes is that Thirion J considered the common law relating to the issue of when civil proceedings commence as being relevant to the interpretation of the statutory (in this case constitutional) reference to the concept of pending proceedings. This emerges from the following passage:

> "One still has to ascertain and give effect to the intention of the Legislature. It must be presumed that the Legislature when it used the expression 'proceedings which were pending' in s 241(8), did so with knowledge of when civil proceedings are regarded at common law as having commenced, and with knowledge of when criminal proceedings are regarded by s 76(1) as having commenced. If Parliament intended the term 'proceedings' to have a more limited meaning in s 241(8) it would, in the light of the meaning which it ordinarily bears, have made its intention clear and it would have defined the more limited meaning."[72]

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67 Above n 41.

68 See para [16] above.

69 1994 (4) SA 554 (D).

70 Above n 69 at 556G.

71 Above n 69 at 558G - H.

72 Above n 69 at 559I - 560A. It is important to note that the reasoning of Thirion J is not in any way upset by the authoritative ruling of the majority (or the minority judgment) of the Constitutional Court in *S v*

Although Thirion J does not, as I have said, commit himself in *Saib* to a view on the issue-versus-service debate, he refers as authority for the common law position in civil proceedings to the same authorities as were referred to in the *Mills* judgment where he held that, at common law, proceedings commence with the service of summons.

[30] Thirion's comments in *Saib* can equally be applied to the employment of the concept of pending proceedings in section 16 of ESTA. Given my preference for the view of Thirion J in the *Mills* case as to the common law position regarding when proceedings commence, that is a sound reason to impute to the concept of pending proceedings in section 16 the requirement that there must have been both issue and service of summons for the section to apply. As Thirion says, if something different from the common law was contemplated, specific provision could have been made.

[31] The third observation is that we are not concerned here with a statutory time limit which impinges upon a citizen's rights to approach the courts. There are therefore no compelling reasons of equity to prefer the issue of summons as being the point in time when proceedings become pending.

[32] The fourth observation which must be made is that certain anomalies arise if proceedings are taken to be pending from the issue of summons in the context of ESTA. Let us assume, for example, that the proceedings in this case had run in the magistrate's court and had not been settled. Assume that a twofold defence had been raised by the applicants. The first defence was a challenge to the jurisdiction of the court on the basis that the clear value to the applicants of their alleged right of occupation was in excess of the prescribed amount as contemplated in section 29(1)(b) of the Magistrates' Court Act. The second defence was that the applicants were protected from eviction by ESTA on the basis that they were occupiers in terms of section 3(2). Assume in relation to the first defence that the evidence showed that at the time of issue of summons, the value of the right of occupation was materially different from the value at the time of service of the summons. In deciding

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Mhlungu on the meaning to be attributed to section 241(8). Indeed, the view ultimately adopted by the majority of the Constitutional Court is foreshadowed in the *Saib* judgment at 560H.

on the first defence, on the basis of *Mills*,[73] the magistrate would have had to consider the factual circumstances prevailing at the time of service of the summons. When it came to the second defence, the magistrate would have had to establish whether or not section 3(2) applied. This would be dependent on whether or not the proceedings were pending on 28 November 1997.[74] On first respondent's argument, this must be evaluated with reference to the date of issue, not service, of summons. This is anomalous because it contemplates an evaluation of the same case at two different points in time. Put another way, at the date of issue of summons, the case will be considered not to have begun for purposes of deciding the defence based on jurisdiction, but to have begun for purposes of the defence based on ESTA. It is also anomalous that a defence relating to the merits should be determined in relation to a chronological point earlier than a defence relating to jurisdiction. As Voet points out, the matter of jurisdiction is something which should be resolved before any other issues.[75] This anomaly is avoided if pending is interpreted to mean that a case only becomes pending after service of the summons.

[33] There is another anomaly which arises if issue of summons is the point at which proceedings become pending. This anomaly was alluded to in the *Mills* case.[76] It is well established practice in the high courts to bring eviction proceedings by way of both action and application. Adoption of the issue of summons as the time for determining when proceedings become pending provides no solution for application proceedings, because an application is not formally issued by the registrar or clerk of the court in the way that a summons is. Often service of an application precedes the filing of the application with the registrar or the clerk. In these circumstances, the adoption of service as the defining moment seems to me to provide a far more coherent and consistent approach to the problem.

[34] The fifth observation is that in *Nxumalo*, the court relied in part on English law authority in arriving at its conclusions. It considered it to be settled law in England that proceedings commenced

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73 *Mills* also dealt with a jurisdictional provision in the Magistrates' Court Act, namely section 28(1)(a).

74 See para [12].

75 5.1.64.

76 Above n 39 at 86C - 87A.

upon the issue of summons.[77] Closer scrutiny would have revealed that even at that time the statement was not entirely correct.[78] The current status of English law in relation to the concept of pending proceedings, as I read it, is that in most instances proceedings will only be considered pending once there has been service of summons. Thus in the case of *Dresser U.K. Ltd and Others v Falcongate Freight Management Ltd and Others*,[79] the court was concerned with article 22 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Article 21 provides, in effect, that where separate actions in respect of the same cause of action are brought in the courts of two or more of the countries who are parties to the Convention, the court which was "first seised" will have jurisdiction and the other courts must decline it. Article 22 then gives courts other than the court "first seised" a discretion to stay related proceedings which it would be convenient to hear together with the main action. The meaning of "first seised" has to be determined by reference to the judgment of the Court of Justice of the European Communities in *Zelger v Salanitri*.[80] There it was held that a court is "seised" when, in terms of the national law of the country in question, the matter becomes "definitively pending". In the *Dresser* case, the question arose whether a matter was "definitively pending" on issue or service of summons. Bingham LJ reviewed the English cases in point at length and concluded that a matter was not "definitively pending" upon the mere issue of summons. He emphasised the following in arriving at his conclusion:

> "...upon mere issue of proceedings . . . (1) the court's involvement has been confined to a ministerial act by a relatively junior administrative officer [referring to the issue of summons by an administrative official of the court]; (2) the plaintiff has an unfettered choice whether to pursue the action and serve the proceedings or not, being in breach of no rule or obligation if he chooses to let the writ expire unserved; (3) the plaintiff's claim may be framed in terms of the utmost generality; (4) the defendant is usually unaware of the issue of proceedings and, if unaware, is unable to call on the plaintiff to serve the writ or discontinue the action and unable to rely on the commencement of the action as a lis alibi pendens if proceedings are begun elsewhere; (5) the defendant is not obliged to respond to the plaintiff's claim in any way, and not entitled to do so save by calling on the plaintiff to serve or discontinue; (6) the court cannot exercise any powers which, on appropriate facts, it could not have exercised before issue; (7) the defendant has not become subject to the jurisdiction of the court." [81]

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77 Above n 13 at 668A - C.

78 *Arab Monetary Fund* above n 66 at 649c - g.

79 [1992] 1 QB 502 (CA).

80 129/83 [1984] ECR 2397.

81 Above n 79 at 523A - C.

[35] It is significant that in the concurring judgment of Gibson LJ, the point is specifically made that decisions to the effect that proceedings commence upon the issue of summons in the context of statutory time limits on the commencement of actions do not mean that proceedings commence or become pending from that time in different contexts.[82] Also significant is that the Court of Appeal in the *Arab Monetary Fund* case[83] was of the "strong impression" that the same conclusion would have been reached in the *Dresser* case, even if the adverb "definitively" had been omitted from the formulation which it was required to consider.[84] This is also apparent from the fact that in article 22, unlike article 21, the word "pending" is actually used and is not qualified with the word "definitively".[85]

[36] In the case of *Neste Chemicals SA and Others v DK Line SA and Another (the Sargasso)*,[86] the Court of Appeal was even more emphatic than in *Dresser* that a matter was only definitively pending upon service. It rejected the possible exceptions to the rule identified in *Dresser*. The exceptions which had been suggested were instances where an Anton Piller order or a Mareva injunction had been sought before the service of summons. In *Neste*, the court held that these constituted "provisional measures" and that the court would only be seised of those proceedings for those purposes. It would only be seised of the "merits of the dispute" upon service.[87]

[37] The distinction between provisional measures and the merits of the dispute is, in my respectful view, an important one. Applying the distinction to the present application, it is clear that we are here dealing with the meaning of pending proceedings for purposes of deciding the merits of the dispute,

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82 Above n 79 at 524G.

83 [1992] 4 All ER 860 (CA). This was an appeal against the decision of Hoffman J referred to in n 66.

84 Above n 83 at 863f.

85 The relevant part of article 22 reads:

> "Where related actions are brought in the courts of different contracting states, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings."

86 [1994] 3 All ER 180 (CA).

87 That the approach in *Dresser* and *Neste* is now entrenched in English law is apparent from the recent decision of *Molins Plc v G.D. SpA* [2000] E.W.J. No. 1471(Quicklaw) at para 35.

particularly whether or not the applicants qualify as occupiers in terms of ESTA. The interpretation of pending proceedings determines what substantive laws apply to the adjudication of the merits. This too points to service of the summons as being the point at which the proceedings become pending in this context.

[38] Reverting to the English law, notwithstanding the *Dresser* and *Neste* cases, there are certain contexts in which proceedings will be considered to become pending from the issue of summons. Thus, the Court of Appeal was able to uphold Hoffmann J's finding that, in the particular circumstances of the *Arab Monetary Fund* case,[88] proceedings became pending upon the mere issue of summons. In that case, the court was concerned with a rule of court which allowed an order consolidating two or more matters if they were "pending" in the same division. Hoffman J pointed out that in the circumstances of that case, numerous impracticalities could arise if the term were to be interpreted as requiring both issuing and service before a matter could be considered to be pending.

[39] In the *Zelger* case,[89] the court made reference to the law in the various states which were then parties to the convention, as follows:

> "It appears from information on comparative law placed before the Court that in France, Italy, Luxembourg and the Netherlands the action is considered to be pending before the court from the moment at which the document initiating the proceedings is served upon the defendant. In Belgium the court is seised when the action is registered on its general roll, such registration implying in principle prior service of the writ of summons on the defendant.
>
> In the Federal Republic of Germany the action is brought, according to Paragraph 253(1) of the Zivileprozeßordnung, when the document initiating the proceedings has been served on the defendant. Service is effected of its own motion by the court to which the document has been submitted. The procedural stage between the lodging of the document at the registry of the court and service is called 'Anhängigkeit'. *The lodging of the document initiating the proceedings plays a role as regards limitation periods and compliance with procedural time-limits but in no way determines the moment at which the action becomes pending.* It is clear from the aforementioned Paragraph 253, read together with Paragraph 261 (1) of the Zivileprozeßordnung, that an action becomes pending once the document initiating the proceedings has been served on the defendant."[90] (my emphasis)

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88 Above n 66 and n 83.

89 Above n 80.

90 Above n 80 at 2407 - 8.

It thus emerges that in the legal systems of all of these countries, an action is generally only considered to be pending once there has been service of the summons. It is noteworthy that this is the case in German law too, notwithstanding that the mere lodging of the document (without service) is relevant to statutory time limits. That some assistance may be derived from reference to the legal systems referred to is apparent from the judgment of Holmes JA in *Government of the Republic of South Africa v Ngubane*,[91] where he says:

> "In seeking to do justice between man and man it is at the least interesting and sometimes instructive to have some comparative regard to the law of other countries, particularly those whose systems have been touched by the greatness of the Roman law."[92]

[40] For all of these reasons, I am satisfied that in the context of the present case, the proceedings only became pending upon the service of summons. The proceedings in this case were not pending on 28 November 1997, when ESTA commenced. Neither section 16, nor the presumption regarding the non-application of retrospective provisions to pending proceedings applies. Section 3 does apply. The applicants are accordingly deemed to be occupiers in terms of section 3(2). This is so even if I were to accept the possible argument referred to in *Pitout v Mbolane*[93] that a person seeking to qualify as an occupier under section 3(2) must also show that he or she is not covered by the three categories of exclusions referred to in the definition of occupier. It is abundantly clear on the papers that these categories do not apply and no attempt was made to suggest otherwise.

Review of the magistrate's court proceedings

[41] The next point which needs to be considered is that, notwithstanding that the applicants have now been shown to qualify as occupiers, they signed a settlement agreement obliging them to vacate the farm. In *Ferguson v Buthelezi and Another*,[94] this court dealt with a settlement agreement

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91 1972 (2) SA 601 (A).

92 Above n 91 at 609E. The countries he proceeded to refer to were The Netherlands, Germany, Italy, Spain, Austria, Switzerland, France, England, USA and Scotland. Note that in Scotland a case is only considered to be pending when there has been both issue and service of summons. See *Dresser* above n 79 at 515G.

93 LCC 21R/00, 2 May 2000, internet web site: http://www.law.wits.ac.za/lcc/2000/21r_00sum.html at para [9] fn 10.

94 LCC 41R/99, 23 September 1999, [1999] JOL 5408 (LCC).

involving occupiers in terms of ESTA. The Court recognised that a settlement agreement involving the vacation of land by occupiers could be made an order of court, provided certain conditions were met. Firstly, to the extent that the settlement agreement involved the waiver or limitation by an occupier of any of his or her rights under ESTA, section 25 applied. The relevant parts read:

> "25 **Legal status of agreements**
>
> (1) The waiver by an occupier of his or her rights in terms of this Act shall be void, unless it is permitted by this Act or incorporated in an order of a court.
>
> (2) A court shall have regard to, but not be bound by, any agreement in so far as that agreement seeks to limit any of the rights of an occupier in terms of this Act."

[42] The effect of these provisions is that the court is not automatically bound by a settlement agreement, but can give the waivers contained in it legal effect by incorporation in a court order. In deciding whether or not to do so, the court exercises a judicial discretion. Three factors relevant to the exercise of this discretion were identified, namely the justice and equity of the agreement, the public interest in the upholding of settlement agreements and whether the party waiving did so with knowledge of the rights waived.[95]

[43] Secondly, the Court in *Ferguson* recognised that there were certain provisions of ESTA which imposed duties on a court making an eviction order. If the settlement agreement had the effect of an eviction order, these would have to be complied with. The settlement agreement would have to be framed in such a way that making it an order of court would still result in compliance with these compulsory provisions. The sections identified in that case as being incapable of waiver were sections 12(1) and (2), 13(1)(a) and (b) and 19(3).[96]

[44] Because the magistrate in this case was unaware (through no fault of his own) of the applicability of ESTA, the exercise required by *Ferguson* was not undertaken. Had he undertaken this exercise, he would have been bound to conclude that the settlement agreement could not be made an order of court. I say this for the following reasons. Because the first respondent did not comply with section

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95 Above n 94 at para [9] - [16].

96 Above n 94 at para [17] - [23].

9 of ESTA, the settlement agreement in effect incorporated a waiver of the right not to be evicted other than in accordance with that section.[97] A proper application of the three factors referred to in paragraph [42] would have resulted inevitably in the court declining to incorporate the waiver in an order of court by making the settlement agreement an order of court. This is primarily because the applicants made their decision to settle on the basis of a flawed conclusion reached between the legal representatives as to the legal position (regarding the applicability of ESTA). On this basis the applicants could not have been aware of the rights which they were waiving, even if one rejects their contention that they did not understand what they were signing. If the agreement was not made an order of court, section 25(1) of ESTA would have rendered the waiver of the right associated with section 9 void.

[45] Another reason why the magistrate would have been forced not to make the settlement agreement an order of court is that it did not provide for compliance with the sections referred to in paragraph [43].

[46] Before one can conclude on this basis[98] that the proceedings before the magistrate's court stand to be set aside, there are two further arguments which need to be considered. The first is the argument raised by Mr Van der Merwe that the notice of motion only provided for the review of the magistrate's decision on 9 April 1999 to strike the application in terms of rule 27(9) from the roll.[99] This decision,

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97 See para [9] and [12] of *Ferguson*, above n 94.

98 Note that there is a further possible reason why the magistrate's decision to make the settlement agreement an order of court was flawed. Section 26(3) of the Constitution of the Republic of South Africa Act 108 of 1996 provides that:

> "No one may be evicted from their home . . . without an order of court*made after considering all the relevant circumstances*." (my emphasis)

It is open to question whether simply making a settlement agreement (effectively providing for an eviction) an order of court constitutes compliance with the portion which I have emphasised. However, it is not necessary for me to decide this issue in this case. See in this regard *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) at 596A - F; *MEC for Business Promotion, Tourism & Property Management, Western Cape Province v Matthyse and Others* [2000] 1 All SA 377 (C) at 385c and 387e-f; *Pitout* above n 93 at para [20].

99 See para [5] above.

said Mr Van der Merwe, could not be faulted. The notice of motion did not bring under review the actions of the second respondent when he made the settlement agreement an order of court.

[47] I agree that the second respondent's decision on 9 April 1999 could not be faulted.[100] However, in *Skhosana*,[101] this Court said the following about the Court's automatic review jurisdiction under section 19(3) of ESTA:

> "Where, in an action for eviction under common law, the defendant raises a defence based on ESTA and the magistrate finds that ESTA is not applicable and grants the eviction order, must the magistrate send the order to the Land Claims Court for automatic review? On a narrow interpretation of 'in terms of this Act' it will not be necessary, because the eviction order was made under common law. However, the legislature in providing for the automatic review of ESTA cases clearly intended that *the Land Claims Court must scrutinise the records of those cases to ensure that the provisions of ESTA were correctly applied*. It would be absurd if, on the one hand, an eviction order made under the provisions of ESTA has to be reviewed by this Court while, on the other hand, an eviction order under common law consequent upon a decision that ESTA does not apply, is not subject to such review."[102] (my emphasis)

[48] In the magistrate's court proceedings, the applicants raised a defence based on ESTA, albeit belatedly. That rendered the entire proceedings before the magistrate's court subject to automatic review in terms of section 19(3),[103] even if they are not covered by the applicants' notice of motion in the review in terms of section 20(1)(c). Moreover, the effect of the compulsory formulation of section 19(3) is that I have not only the jurisdiction, but also the duty to review the entire proceedings, including the proceedings on 13 August 1998.

[49] The second argument is one which I raised with Mr Kuny. Can this Court have regard to the affidavits of both parties in these review proceedings setting out the facts relating to the applicants'

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100 See Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* 9th ed, Vol 2 (Juta, Cape Town 1997) at 27-6 where the following appears:

> "The procedures prescribed in subrules (9) and (10) . . . do not apply where the settlement has been made an order of court. If a party fails to comply with the conditions of a settlement which has been made an order of court, the other party, being already armed with a judgment, may proceed directly to process in execution."

101 Above n 5.

102 Above n 5 at para [12].

103 In *Pitout* above n 93 this Court also exercised jurisdiction under section 19(3) where no plea was filed, but it was clear on the papers that ESTA applied.

status as occupiers in terms of ESTA, when the second respondent, at the time of making the settlement an order on 13 August 1998, had no such information before him? In the cases of *City Council of Springs v Occupants of the Farm Kwa-Thema 210*[104] and *De Kock v Juggels and Another*,[105] this Court held that new evidence could, in certain circumstances, be admitted at the automatic review stage. The first respondent had no objection to the deliberation of the matter on the basis of the new evidence which appeared in the affidavits in the review. On the contrary, Mr Van der Merwe defended the Court's right to have regard to this material, which formed an important part of the case which the first respondent sought to make out. Neither party can be said to be prejudiced by the admission of this evidence. Each had a full opportunity to deal with the averments of the other.

[50] Once one has regard to that evidence, it becomes apparent that the true legal situation is that the applicants are occupiers. A court dealing with the eviction of an occupier, including a settlement agreement which provides for an occupier's vacation of land, is required to apply ESTA. Although it was not his fault, the second respondent failed to do that. It would be contrary to the principle of legality[106] for this Court in review proceedings to ignore that failure to comply with the law.

[51] Even if I am wrong in the basis which I have set out above for considering the new evidence, I am entitled to do so in terms of section 32(3)(b) of the Restitution of Land Rights Act.[107] That section allows the Land Claims Court to conduct any part of its proceedings on an inquisitorial basis. It is applicable to this Court's proceedings under ESTA by reason of section 28O of the Restitution of Land Rights Act. It is a feature of certain inquisitorial systems of civil procedure that they are not limited strictly to the formulation of the case by the parties and the evidence presented by them (as is the case generally in adversarial systems).[108] One manifestation of this is that the courts in such systems may go

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104 [1998] 4 All SA 155 (LCC); 2000 (1) SA 476 (LCC) at para [18] - [19].

105 1999 (4) SA 43 (LCC) at para [17].

106 Wade and Forsyth *Administrative Law* 7th ed (Clarendon Press, Oxford 1994) at 24.

107 Act 22 of 1994.

108 Van Loggerenberg *Hofbeheer en Partybeheer in die Burgerlike Litigasieproses: 'n Regshervormingsondersoek* (unpublished LLD thesis, University of Port Elizabeth 1987) at 47.

behind a settlement reached between the parties and refuse to recognise it. Cappelletti in *"Public Interest Parties and the Active Role of the Judge in Civil Litigation"*[109] quotes the Code of Civil Procedure of one such country which provides:

> "The court will not accept the withdrawal of his action by the plaintiff, or a concession of the action by the defendant, and will not approve a friendly settlement by the parties, if such steps violate the law or infringe upon the rights or legally protected interests of any person."

In this regard it is relevant that the lawyers who conducted the settlement negotiations which gave rise to the settlement in this case paid no attention whatsoever to the possibility that the applicants might qualify as "occupiers" in terms of section 3 of ESTA. They focussed exclusively on whether or not the applicants qualified as "occupiers" in terms of the definition. The result was that the fact that ESTA was applicable to the case was ignored. This in turn resulted in the magistrate's circumvention of the law in making the settlement agreement an order of court. On this basis too, I am entitled therefore to consider the new evidence and to go behind the settlement in reviewing the magistrate's decision on 13 August 1998.

[52] The magistrate's decision on 13 August 1998 to make the settlement agreement an order of Court accordingly stands to be set aside. There is no need for me to consider the applicants' alternative contentions relating to the invalidity of the settlement agreement because they were not properly informed as to its contents.

Costs

[53] The applicants sought a costs order against the first respondent in respect of both these proceedings and the earlier urgent application to this Court. This Court is disinclined to make costs orders in matters falling under ESTA.[110] It is significant that the first respondent did not seek a costs

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109 Cappelletti and Jolowicz (Ocean Publications, Inc, New York 1975) at 76 in fn 198; Van Loggerenberg above n 108 at 47.

110 See *City Council of Springs v Occupants of the farm Kwa-Themba 210* above n 104 at para [24]; *Serole and Another v Pienaar* [1999] 1 All SA 562 (LCC); 2000 (1) SA 328 (LCC) at para [19] and *Skhosana* note 5 above at para [30].

order against the applicants in the event of his having been successful. No party has been guilty of any conduct which would justify this Court in departing from its usual approach to costs in such matters.

[54] I accordingly make the following order:

The second respondent's order on 13 August 1998 making the settlement agreement between the applicants and the first respondent an order of court is set aside in its entirety.

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JUDGE A DODSON

For the applicants:
Adv S Kuny instructed by *Wits Law Clinic, Johannesburg*

For the respondents:
Adv MP van der Merwe instructed by *WA Theron Attorney, Delmas*