CONSTITUTIONAL COURT OF SOUTH AFRICA

Magalone Mereki and Others v Moladora Trust and Another

CCT 121/24

Date of hearing: 27 March 2025
Date of judgment: 1 August 2025

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 1 August 2025 at 10h00, the Constitutional Court handed down a unanimous judgment an application for leave to appeal against the judgment and order of the Supreme Court of Appeal (SCA) which upheld an appeal against the judgment and order of the Land Claims Court (LCC). The application concerns whether the right to graze cattle is afforded protection under the Extension of Security of Tenure Act 62 of 1997 (ESTA).

The matter emanates from an application brought before the LCC where the first respondent, Moladora Trust (Trust), sought an order directing the applicants to remove their cattle from the Trust's farm within 30 days, failing which the sheriff would be directed to remove the cattle to the pound master. The applicants are Mr Magalone Mereki, Mr Topies Mereki and Mr Dikhotso Mereki, who are occupiers in terms of ESTA and reside on a farm owned by the Trust. The second respondent is the Department of Agriculture, Rural Development and Land Reform. Only the Trust opposes the application.

The Trust bought the farm in in 2003. The applicants' mother (Mrs Meriam Mereki) previously occupied the farm and used it to graze cattle, but she passed away before 2017. According to the Trust, Mrs Mereki had derived consent to graze five head of cattle by nature of her employment at the farm. The right was personal to Mrs Mereki and was not transferrable to her children upon her death. However, after the passing of Mrs Mereki, the applicants continued to live on the farm and used the land to graze their nine heads of cattle. The applicants had never sought or obtained express consent to keep cattle on the farm.

In January 2018, the Trust issued notices instructing the applicants to remove their cattle, but these were ignored. Further notices were issued in September 2020, after which the Trust initiated legal proceedings in the LCC in May 2022. Following no response to the application by the applicants, the matter was set down on the unopposed roll. Despite the matter being unopposed, the LCC issued directions to the Trust to make submissions on whether the Court should grant the relief sought where (a) several SCA judgments held that the removal of cattle may amount to an eviction, and (b) there was no proper engagement with the respondents prior to the termination of their right to keep cattle in 2020.

The LCC acknowledged that, based on previous SCA rulings, grazing rights are personal rights that arise from the landowner's consent rather than from ESTA itself. However, the LCC found that once consent is granted, it becomes part of an occupier's tenure rights under ESTA and is subject to its protections. The LCC ruled that terminating grazing rights without engagement could amount to an eviction under ESTA, requiring compliance with section 9 of the Act. The LCC also found that tacit consent for grazing may have existed, as the applicants continued using the land without objection for more than a year after their mother's passing. Consequently, the LCC held that the Trust's termination of their grazing rights was unlawful without due process and protections under ESTA.

On appeal, the SCA found that the LCC had erred in considering tacit consent, as this was not a claim advanced by the applicants in their defence. The SCA held that the applicants never obtained explicit consent to graze livestock and that Mrs Mereki's right to do so did not automatically transfer to them upon her death. The court further ruled that the Trust had made repeated efforts to communicate the lack of permission, undermining any claim of tacit consent. The SCA set aside the LCC's decision and directed the applicants to remove their livestock from the Trust's farm.

Before this Court, the applicants advanced two arguments. The primary argument, raised for the first time at this stage, and not before the LCC or SCA, was that ESTA occupiers who had consent to reside on a farm acquired an automatic right to keep and graze cattle as an incident of their occupation. The secondary argument was that, once consent had been established, the grazing of cattle constituted a right that attracted the protection of ESTA.

The Trust, on the other hand, maintained that the case did not raise constitutional issues but rather presented a factual dispute as to whether grazing rights had ever been granted to the applicants. It argued that ESTA did not extend to grazing rights and that the applicants had failed to demonstrate a breach of any constitutional entitlement. In addition, the Trust contended that the applicants had not enjoyed tacit consent to graze cattle, pointing to several interactions between the parties which confirmed that no permission had been granted. Relying on authority from the SCA, the Trust submitted that grazing rights fell outside the scope of ESTA and that extending its protections to include such rights would unjustifiably deprive landowners of their property.

In a judgment authored by Rogers J, this Court held that its jurisdiction is engaged as this matter concerns the interpretation of ESTA which is remedial legislation contemplated by section 25(6) of the Constitution and raises several arguable points of general public importance, especially

relating to whether consent to graze cattle is a right protected by ESTA. The Court held that it is in the interest of justice to grant leave to appeal.

The Court considered four leading judgments mentioned in argument to support the averments made by the Merekis and the Trust: *Margre Property Holdings* (a High Court judgment), *Adendorffs* and *Loskop* (two judgments of the SCA) and lastly, *Sibanyoni* (a judgment of the LCC). In its assessment of the judgments, the Court held that *Margre* is against the primary argument by the Merekis but does not touch on their secondary argument. *Margre* was endorsed in *Adendorffs* and *Loskop,* but this Court held that the LCC was not bound by these judgments as there were obiter and this alone did not preclude the LCC from considering the first argument by the Merekis. Whilst the analysis of the Court in *Sibanyoni* can be convinced to be in support of the two arguments put forward by the Merekis but the statements in the judgment do not touch the legal propositions of the two arguments. The Court concluded that these authorities did not stand in the way of LCC's conclusion in support of the Merekis' second argument.

The Court found that it would not have been in the interests of justice to consider the Merekis' primary argument, as a court of first instance, without the benefit of a judgment from the LCC on the issue. The argument had far-reaching implications for the rights of both owners and ESTA occupiers, and the LCC, as a specialist forum, was best placed to determine it at first instance.

In considering the Merekis' secondary argument, the Court first had to address whether, assuming there had been consent to keep cattle, such consent constituted a right protected under ESTA. If that were so, the question arose whether section 8 applied; and if it did, whether the Trust had been required to comply with it. If the Trust had failed to do so, it would not have been entitled to the relief it sought.

The Court considered the historical background of dispossession and noted that section 25(6) of the Constitution had been enacted with the intention of securing tenure and guaranteeing rights associated with the use of land for cultivation and grazing. It found that section 39(1) of the Constitution required that tenure under ESTA be given a broad and generous interpretation, rather than a narrow one. This approach was reflected in the preamble to ESTA, which acknowledged that many South Africans lacked secure tenure not only of their homes but also of "the land which they use".

In interpreting ESTA, the Court highlighted several provisions that referred not only to residence but also to the use of land. Particularly instructive were the definitions of "evict" and "terminate", along with other provisions envisaging that an occupier might have consent to cultivate crops or graze animals. The Court held that the legislature had not been consistent in its inclusion of "use of land" when referring to the right to "reside on land". It found that ESTA, taken as a whole, did not provide clarity on this inconsistency. In respect of section 8 specifically, the Court concluded that "right of residence" could not have been intended by the legislature to be confined to residence in the strict sense, but must include the rights of use that ESTA envisaged elsewhere, such as cultivation and grazing. Unless section 8 were understood in this way, the Act would be internally inconsistent, and the apparent legislative purpose would not be fulfilled. The inconsistency, the Court held, had to be resolved in favour of an interpretation that broadened rather than diminished the security of tenure afforded to occupiers.

The Court held that the farm owners experienced no injustice when required to comply with section 8 in instances where they sought to terminate consent to graze cattle granted to persons residing on the farm with consent. Accordingly, the Court held that no reading-in was required under section 172(1)(b) of the Constitution to reach this conclusion.

On the question of whether the Merekis had consent to keep cattle, the Court found that there had been no express consent. It then turned to the issue of whether there had been tacit consent. In making this determination, the Court considered a range of factors. It found that the lack of evidence triggered the presumption in section 3(4). As with section 8, the presumptions in sections 3(4) and 3(5) ought to be understood as extending not only to residence in the strict sense, but also to associated uses such as grazing and cultivation. On the facts of this case, tacit consent in terms of section 3(4) had to be presumed, unless the Trust adduced evidence to rebut it. The mere say-so of the owner did not suffice.

The Court concluded that the LCC had been entitled to find that the Trust had failed to prove the absence of consent and was therefore entitled to grant the removal order. It further held that there had been no procedural unfairness in the manner in which the LCC had arrived at its conclusion. The Merekis' appeal in this Court was thus upheld with costs. The order of the SCA was set aside and replaced with one dismissing the Trust's appeal in that Court against the LCC's order.