

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Case No: 18/97

In the matter between:

JABULANI ROBERT NGCOBO

First Applicant

FIKILE NGCOBO

Second Applicant

and

BWJ VAN RENSBURG

First Respondent

SHERIFF FOR THE MAGISTRATE'S COURT, BABANANGO

Second Respondent

DEPARTMENT OF LAND AFFAIRS

Third Respondent

JUDGMENT

Dodson J:

Introductory

[1] This is an application for an interdict preventing the Deputy Sheriff for the magisterial district of Babanango from executing a warrant of ejectment. The warrant of ejectment was issued pursuant to summary judgment having been granted in the Babanango Magistrate's Court against the applicants for eviction from the first respondent's farm. The application is based on s 5 of the Land Reform (Labour Tenants) Act ("the Act").¹ Section 5 says that

"a labour tenant or his or her associate may only be evicted in terms of an order of the [Land Claims] Court issued under this Act."

To succeed, the applicants will have to show that they are labour tenants as defined in the Act and thus entitled to the protection afforded by s 5. The first respondent has not objected to the procedure which the applicants have chosen to follow² and I will assume that it is competent for

¹ Act 3 of 1996.

² This application is somewhat unusual in that it is a separate substantive application to this Court which seeks to prevent the execution of a judgment of the Magistrate's Court. The allegation that the applicants are labour tenants was never raised as a defence in the Magistrate's Court proceedings. The first respondent did raise the point in limine in his papers that the failure by applicants to pay the first respondent's costs in the magistrate's court action precluded them from proceeding with this application, but this point was abandoned.

them to have approached the Court in this manner. Rather, the first respondent has opposed the application on the basis that the applicants are not labour tenants as defined in the Act. The application was not opposed by the second and third respondents.

[2] The question raised in this matter is how we should interpret the definition of “labour tenant” in the Act. That definition reads:³

“‘labour tenant’ means a person—

- (a) who is residing or has the right to reside on a farm;
- (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; *and*
- (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm,

including a person who has been appointed a successor to a labour tenant in accordance with the provisions of s 3(4) and (5), but excluding a farm worker”. (my emphasis)

[3] At the end of the day, the dispute is about the meaning to be attributed to one word. That is the word “and” where it appears between the second and third paragraphs of the above definition. Mr Rall, for the applicants, contended that the word “and” here has both a conjunctive and a disjunctive connotation. Thus a person who satisfied paragraphs (a) and (b) only would qualify as a labour tenant and so would a person who met the requirements of paragraphs (a) and (c) only. For the sake of convenience, I will refer to this as the “disjunctive interpretation”. For his authority, Mr Rall relied on two decisions of the Natal High Court, *H B Klopper and Others v B E Mkhize and Others*⁴ and *Tselentis Mining (Pty) Ltd and Another v J Mdlalose and Others*.⁵

[4] Mr Van der Merwe for the first respondent contended that the word “and” must be read in its normal conjunctive sense so that compliance with all three paragraphs, (a), (b) and (c), is necessary to qualify as a labour tenant. I will refer to this as the “conjunctive interpretation”. Mr van der Merwe relied on two decisions of this Court, *Mahlangu v de Jager*⁶ and *Zulu and Others v Van Rensburg and Others*.⁷ Mr Rall asked us to find that these decisions were wrongly decided and to adopt the approach of the Natal High Court. *Mahlangu v De Jager* was a decision of two judges and *Zulu v Van Rensburg* a decision of a single judge. In both cases the judges sat

³ The definition appears in paragraph (xi) of s 1.

⁴ NPD 2169/96, 3 March 1997.

⁵ [1997] 3 All SA 657 (N).

⁶ 1996 (3) SA 235 (LCC).

⁷ 1996 (4) SA 1236 (LCC).

with an assessor who did not have authority to decide on questions of law.⁸ Both the Natal High Court decisions were decisions of a single judge. This Court is not bound by the decisions of a High Court.⁹ I will also assume that, in as much as the bench in this matter is constituted by three judges, it is not bound by its earlier decisions on the point raised. In other words they will be treated in the same way as a decision of a single judge of a High Court in a case before a full bench of the same High Court.¹⁰

Factual Background

[5] The material facts of this application are as follows. The applicants are both children of the late Mgobeni Robert Ngcobo. The first applicant is the second-oldest child and also the second-oldest son. The second applicant is the youngest child. The applicants, their father and grandfather were all born on the first respondent's farm. Their father worked for the first respondent and the first respondent's father on the farm and in return for his labour was entitled to certain rights to graze livestock and grow crops on the farm. He worked until 1978, when he retired. The first respondent allowed him to continue living in the kraal which he had established on the farm until he died in October 1994, by which time he was nearly 100 years old. The second applicant lived with her father on the farm and cared for him until his death. She has continued to reside on the farm since his death. According to the first respondent her residence on his farm since her father's death has been unlawful. This is disputed. She has never provided labour to the first respondent or any of his forebears.

[6] The first applicant left the first respondent's farm as a young man, at first for education and training and later to seek his fortune. He has not lived on the first respondent's farm since then. He has established a kraal on a nearby state-owned farm where he lives with his family. He claims to have been appointed as his father's heir on his death at a meeting of his brothers and sisters because the oldest son is based in Durban. Since then he has been using the first respondent's farm for grazing and cropping purposes without the first respondent's consent. He has never worked for the first respondent. He claims to owe a duty of support to the second applicant as she has never married.

Compliance with the Definition

[7] It is immediately clear from the summary of the facts that neither of the applicants complies with paragraph (b) of the definition. Both comply with paragraph (c) of the definition because of the terms of the contracts which existed between their father, on the one hand, and the first respondent and his predecessors in title, on the other. This much was common cause.

⁸ Section 28(5) of the Restitution of Land Rights Act 22 of 1994. After the amendments brought about by the Land Restitution and Reform Laws Amendment Act 78 of 1996, assessors are no longer required to sit in matters arising under the Land Reform (Labour Tenants) Act.

⁹ See the unreported decision of this Court in *Nchabeleng v Phasha* LCC 24/96, 24 June 1997 at para 16.

¹⁰ Kahn "The Rules of Precedent Applied in South African Courts" 1967 *SA Law Journal* 43 at 310-5.

[8] As far as paragraph (a) is concerned, the first applicant does not reside on the farm concerned. An initial, halfhearted attempt in the papers to suggest that he derived a right to reside from his position as his father's heir, was abandoned by Mr Rall at the commencement of argument. On this basis it was conceded that the first applicant had no case, even on the approach of the Natal High Court in the *Tselentis* case¹¹. Mr Rall did not seek to place any reliance on the statement of Galgut J in the *Klopper* case that compliance with paragraph (c) alone might be sufficient to qualify in terms of the definition.¹²

[9] It was argued on behalf of the second applicant that she complies with paragraph (a) because she still resides on the farm, even if her residence were to be found to be unlawful (which was not conceded). Mr van der Merwe however contended that the residence contemplated by paragraph (a) must be lawful. Because her continued occupation of the farm was unlawful, so he argued, she did not comply. For the purposes of deciding this matter I am however prepared to assume (without deciding the point) that the lawfulness or otherwise of the second applicant's residence is of no consequence and that she accordingly complies with paragraph (a) of the definition. The question which must then be asked is whether the second applicant's compliance with paragraphs (a) and (c) of the definition is sufficient to qualify her as a labour tenant.

How must the definition of labour tenant be interpreted? The argument for second applicant

[10] The first part of the argument on behalf of the second applicant went like this. It is recognised that the word "and" can have a conjunctive or a disjunctive meaning.¹³ To resolve which should be preferred in this case, one must have regard to the context in which the word appears in the statute read as a whole and the object which the statute seeks to achieve. The main object of the legislation (as confirmed by its long title) is to provide labour tenants and their associates¹⁴ with security of tenure. The need for this protection arises from past racial discrimination against labour tenants. In the circumstances, the widest possible meaning should be given to the concept of a labour tenant to ensure that as many as possible of the victims of this form of racial discrimination are protected. This is achieved if "and" is read according to the disjunctive interpretation, as it was in the *Tselentis* case.¹⁵

¹¹ *Tselentis Mining v Mdlalose* supra n 5.

¹² *Klopper v Mkhize* supra n 4 at 6.

¹³ The statement of the law in this regard in the *Zulu* case supra n 7 at 1253H-1254B was accepted by the applicants as correct.

¹⁴ An associate is defined in the Act as follows:

“‘associate’ means a family member of a labour tenant, and any other person who has been nominated in terms of section 3(4) as the successor of such labour tenant, or who has been nominated in terms of section 4(1) to provide labour in his or her stead;”

¹⁵ *Tselentis Mining v Mdlalose* supra n 5.

[11] There can be no quarrel with the suggestion that the definition must be read in its context and with due regard to the objects of the Act. However, there are flaws in Mr Rall's argument. The interpretation of the definition for which he contends does not require a simple disjunctive reading of the word "and" between paragraphs (b) and (c). A simple disjunctive reading would give "and" the meaning "or". This the courts will quite readily do if the proper application of the rules of statutory interpretation justify it. Hence the following extract from the judgment of Dowling J in *R v La Joyce (Pty) Ltd and Another*:¹⁶

"The authorities . . . show that the Courts are not so slow to read 'and' for 'or' or 'or' for 'and' in cases where such a course appears better to give effect to the obvious intention of the Legislature and the scheme of the Act."

[12] But this is not what we are asked by Mr Rall to find. Rather, the meaning which he seeks to attribute to the word "and" requires a significant modification of the definition, so that a labour tenant would in fact be a person -

- (a) who is residing or has the right to reside on a farm; and either
- (b) [**who**] has or has had the right to use cropping or grazing land on the farm referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; [**and**] or
- (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm,

including a person who has been appointed a successor to a labour tenant in accordance with the provisions of s 3(4) and (5), but excluding a farm worker.

Thus one must read in the words "and either" at the end of paragraph (a), delete the word "who" in paragraph (b) and read "or" for "and" at the end of paragraph (b).

[13] Our law recognises that in order to give effect to the true meaning of a statute, a court may adopt an interpretation which in effect modifies the statute's terms although the cases are not consistent as to the precise circumstances when this is appropriate.¹⁷ However logic dictates that the circumstances when this will be appropriate will be more exceptional than those which merely warrant the adoption of a secondary or less usual meaning of a word (such as "or" for "and"). Devenish describes the circumstances as follows:

"Modification of language very often requires a judicious weighing up of competing factors, in the light

¹⁶ 1957 (2) SA 113 (T) at 116.

¹⁷ See generally GE Devenish *Interpretation of Statutes* 1ed (Juta Cape Town 1992) at 93-99 and the authorities cited by him. See also LM du Plessis *The Interpretation of Statutes* 1ed (Butterworths Durban 1986) at 151-2.

of the principles and ethos of our common law. Thus, rendering the law effective is not the only or paramount consideration, . . . Lord Denning aptly summed up the position, with characteristically astute judicial insight, when he observed that '[w]henver there is a choice, choose the meaning which accords with reason and justice'.

Some of the considerations that a court should weigh up in the process of modification are set out by Maxwell, who has stated that

'[t]he judicial interpreter may deal with careless, and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text when satisfied on solid grounds from context or history of the enactment, *or from injustice, inconvenience or absurdity of the consequences* to which it would lead, that the language thus treated does not really express the intention and that the amendment probably does'.

Therefore, consequences of 'injustice, inconvenience and absurdity', according to Maxwell, should be considered in the process of modification, provided the intention of the legislature justifies it."¹⁸

[14] I am not satisfied that any sufficiently compelling reasons of the kind contemplated in this extract have been suggested for the modification sought in this case. The conjunctive interpretation cannot be described as giving rise to any absurdity. It requires no modification of the definition, nor even the adoption of any secondary or unusual meaning for any of the words in the definition. Mr Rall did point to two injustices which he said arose if the word "and" is read conjunctively so as to require compliance with all three paragraphs of the definition. These he said were so startlingly unfair that the legislature could never have intended them to come about. The first was referred to by Meskin J in his judgment in the *Tselentis* case:

"A person (A) who qualifies as a labour tenant as at 2 June 1995 in terms of paragraphs (a) and (b) of the definition of 'labour tenant' has a son, (B). A person (C) who qualifies as a labour tenant as at 2 June 1995 in terms of paragraphs (a) and (b) of the definition of 'labour tenant' has a son (D). As at 2 June 1995 each of B and D resided or had a right to reside on the relevant farm, but neither B nor D had the rights envisaged by paragraph (b) of the definition. A is alive as at 22 March 1996, the date of commencement of the Act. A can ensure that B has the benefits of the occupation and use of the relevant part of the farm and the concomitant rights by appointing B as his successor (section 3(3)(b)) or, if A dies without appointing a successor, A's family can appoint B as A's successor (section 3(4)). C has died before 22 March 1996. There is no way in which (absent paragraph (c) of the definition of 'labour tenant') D can acquire the relevant benefits notwithstanding that C, his father, enjoyed such benefits. This is manifestly unfair to D, who is prejudiced, as against B, by the mere accident that C has died before 22 March 1996, whereas A is alive as at such date. The legislature can hardly have intended such prejudice to exist."¹⁹

[15] With great respect to the learned judge, I am not at all sure that D is without a remedy, particularly as it seems that his example contemplates the death of C after 2 June 1995 but before 22 March 1996 (the date of commencement of the Act). If regard is had to ss 3(4) and (5) of the Act, they appear to be open to the interpretation that C's surviving family could (like A's) appoint D as successor notwithstanding that the death preceded the commencement of the Act on 22 March 1996. They provide as follows:

¹⁸ Devenish *ibid* at 95.

¹⁹ *Tselentis Mining v Mdlalose* supra n 5 at 664D-G.

“(4) If a labour tenant dies, becomes mentally ill or is unable to manage his or her affairs due to another disability or leaves the farm voluntarily without appointing a successor, his or her family may appoint a person as his or her successor and shall, within 90 days after being called upon in writing to do so by the owner, inform the owner of the person so appointed.

(5) A person who is not a family member of a labour tenant, may only be appointed as the successor to such labour tenant if he or she is acceptable to the owner, who may not unreasonably refuse such appointment.”

[16] No express time limit is placed on this right of appointment,²⁰ which would seem to allow the appointment to follow the commencement of the Act. To the extent that this might be seen as conferring rights retrospectively, this would be in accordance with the scheme of retrospectivity to 2 June 1995 which s 3(1) expressly introduces into the Act. Section 3(1) reads:

“3 **Right to occupy and use land**

(1) Notwithstanding the provisions of any other law, but subject to the provisions of subsection (2), a person *who was a labour tenant on 2 June 1995* shall have the right with his or her family members-

associate (a) to occupy and use that part of the farm in question which he or she or his or her was using and occupying on that date;

which (b) to occupy and use that part of the farm in question the right to occupation and use of is restored to him or her in terms of this Act or any other law.” (My emphasis)

[17] Even if I am wrong in saying that D may have a remedy, it seems to me that the introduction of legislation which confers new rights will always result in unfortunate cases where qualifying criteria are not met by certain persons because of events which preceded the coming into force of the legislation. Such cases cannot in my view afford a basis for the adoption of an interpretation which amounts to a modification of the legislation. Moreover the anomaly contemplated by *Meskin J* (if it is one) is outweighed by the anomalies which arise on the disjunctive interpretation. I will return to these below.

[18] The second injustice of the conjunctive interpretation of which Mr Rall complained is this. A conjunctive reading of the definition imposes what may loosely be termed a second generational requirement in all cases. This is because there will always have to be compliance with paragraph (c) of the definition. That requires that the person seeking status as a labour tenant must show that his or her parent or grandparent lived on a farm and provided labour in return for cropping or grazing rights. The result is that a person who resides on a farm and has for his or her entire working life over several decades been employed in terms of a contract with a farm owner whereby labour was provided in return predominantly for grazing, cropping and residential rights (thus complying with paragraphs (a) and (b) of the definition and avoiding the exclusionary clause regarding farm workers²¹) but who did not comply with the second generational requirement in

²⁰ The only time limit is that for notifying the land owner of the identity of the incumbent.

²¹ A farm worker is defined in s 1(ix) of the Land Reform (Labour Tenants) Act as

“... a person who is employed on a farm in terms of a contract of employment which provides that-

paragraph (c) would have no rights whatsoever under the Act. This could be contrasted with a person who qualifies under paragraphs (a), (b) and (c) of the definition but whose compliance with paragraph (b) is based on but a few days' provision of labour.

[19] This is indeed a harsh result, but in my view it is not a sufficient reason to warrant the adoption of the disjunctive interpretation. The conjunctive interpretation retains an inherent logic. As was pointed out in the *Zulu* case,²² on a conjunctive interpretation, the Act seeks to protect a particular class of rural tenant. That class consists of persons who have, over more than one generation, subsisted through arrangements with landowners whereby they provided labour in return for cropping, grazing and residential rights. To extend the protection afforded by the Act to long standing first generation labour tenants (and here I do not use the term as defined in the statute) would in my view require an amendment to the Act and cannot be accommodated by the adoption of the disjunctive interpretation. That this is so is clear from the far more serious anomalies which would arise from the latter approach.

[20] What are the anomalies which arise on the disjunctive interpretation? Take the example of a person who, on 2 June 1995, was and continues to be, a farm worker who provides her services personally and is paid predominantly by way of a cash salary but in part by way of rights to live on the farm and graze a few cows or keep a vegetable patch. Such a person is clearly not intended to qualify (no matter what her ancestry may be) because farm workers are expressly excluded from the definition of a labour tenant.²³ However the farm worker has children who are allowed to live with her and have done so since at least 2 June 1995. Those children would then qualify as labour tenants in their own right because they comply with paragraphs (a) and (c). Those children would then have the significant rights afforded labour tenants under the Act, including the right to have family members living with them. Family members would by definition include their farm worker parent.²⁴ That parent would then be able to derive most of the benefits which she was excluded from by reason of her farm worker status because she is a family member of her children. If she were dismissed, eviction from the farm could be avoided by ensuring as guardian of the children that they exercised their right under s 16 to acquire the portion of the farm where they lived. This is an absurd situation which could never have been intended.

[21] The situation is all the more absurd if one considers that the farm referred to in paragraph

(a) in return for the labour which he or she provides to the owner or lessee of the farm, he or she shall be paid predominantly in cash or in some other form of remuneration, and not predominantly in the right to occupy and use the land; and

(b) he or she shall be obliged to perform his or her services personally.”

²² Supra n 7 at 1254D.

²³ See the definition of farm worker at n 21 supra.

²⁴ A “family member” is defined as:

“a labour tenant's grandparent, parent, spouse (including a partner in a customary union, whether or not the union is registered), or dependant;”.

(c) of the definition need not be the same as the farm referred to in paragraph (a)²⁵. Thus in the example referred to above, the children would, on the disjunctive interpretation, still have the rights of a labour tenant in relation to the farm where they resided even if their parent is or was employed as a farm worker on similar terms by a different farmer on a different farm. There are other anomalies which are conceivable on the disjunctive interpretation, but in my view those already mentioned are sufficient to illustrate the point.

Further point arising from the Tselentis case

[22] There is a further basis for the disjunctive interpretation which is suggested in the *Tselentis* judgment:

“Reading section 3(1)(a) of the Act together with definition of ‘associate’ and ‘family member’, actual physical use and occupation as at 2 June 1995 can only mean use and occupation as at such date by the alleged labour tenant *or* his family member, i.e. his grandparent, parent, spouse or dependant or his nominee in terms of section 3(4) or section 4(1) of the Act. The word “or” in section 3(1) after the words ‘he or she’ is a crucial pointer, it seems to me, to the intention of the Legislature and once one appreciates this, the difficulty in construction of the definition of ‘labour tenant’ is solved.

In what follows it is necessary to refer only to ‘family member’ in the definition of ‘associate’ and to ‘grandparent’ and ‘parent’ in the definition of ‘family member’. If one oneself was not residing on, i.e. physically using and occupying, a farm as 2 June 1995, although one had the right to do so, but one’s grandparent or parent was physically using and occupying such farm as at such date, then one was a labour tenant as at such date if, in terms of paragraph (b) of the definition of ‘labour tenant’, one had the rights to use cropping and grazing on such farm (or another farm of the owner) and in consideration of such rights provided labour to the owner or lessee. *Clearly, it is quite irrelevant, in this context, whether one’s grandparent or parent had such rights.* Obviously, if one was not oneself physically using or occupying such farm, ordinarily one could not oneself have provided any labour to the owner or lessee. In my opinion, reading paragraph (b) of the definition of ‘labour tenant’ with section 3(1)(a) and the definitions of ‘associate’ and ‘family member’, the clear intention is that it suffices to enable one to qualify as a labour tenant, for purposes of the Act, if one’s grandparent or parent was providing such labour while being the person having actual physical use and occupation of the farm provided one oneself also owned the right to reside on such farm, and the rights to use cropping or grazing thereon. It will be observed, thus, that the intention is that one is to qualify as a labour tenant in terms of paragraph (a) and (b) of the definition of ‘labour tenant’ if the actual physical use and occupation of the farm was through one’s grandparent or parent (as the case might be), although the right to reside on the farm and the rights to use cropping and grazing thereon were vested, not in such grandparent or parent (as the case might be), but in one oneself.

Paragraph (c) of the definition of ‘labour tenant’ caters for a quite different situation from that catered for by paragraphs (a) and (b) thereof. Paragraph (c) caters for the situation where the rights to use cropping or grazing on a farm were vested, not in one oneself, but in one’s grandparent or parent. The intention of the Legislature is not, as *Mr Kennedy* would have it, to make it a *sine qua non* of qualification [as] a labour tenant that as at 2 June 1995 one’s parent or grandparent had these rights in addition to *the fact that one oneself had such rights as at such date*; the intention was to create an *additional means* by which a person who as at 2 June 1995 resided or had the right to reside on the farm but who did not have in his own right the rights to use cropping or grazing on such farm can nevertheless qualify as a labour

²⁵

Zulu v Van Rensburg supra n 7 at 1257B-1258A.

tenant if his parent or grandparent in the latter's own right had such rights.”²⁶

[23] With great respect, I have difficulty in following the reasoning of the learned judge in this portion of the judgment. Mr Rall was invited to assist the Court in this regard but declined to do so on the basis that he was unable to understand it. He disavowed any reliance on the point in support of his client's case. To me, the learned judge's point seems to be this: s 3(1)(a) qualifies the definition of a labour tenant or is a pointer to what the legislature had in mind with that definition; the labour tenant definition must be read consistently with this section; s 3(1)(a) neither mentions nor implies a second generational requirement; in fact it implies the opposite; therefore the labour tenant definition must be read as not requiring compliance with paragraph (c) of the definition in all cases; paragraph (c) caters for a different situation.

[24] If my understanding of his point is correct, I respectfully disagree. In my view, s 3(1)(a) does not qualify or guide the interpretation of the definition of a labour tenant. It merely describes and circumscribes the rights conferred by that subsection. The prerequisites for enjoyment of the rights conferred by s 3(1) are that the person relying on the section either herself complied with the definition of labour tenant on 2 June 1995 or was a family member of such labour tenant. *Only once that is shown by reference to the definition of labour tenant*, do rights of occupation and use follow in terms of s 3(1). Those rights, as described in s 3(1)(a), are-

- * rights of use and occupation of the portion of the farm used and occupied by the labour tenant, in so far as the labour tenant is concerned, and
- * rights of use and occupation of the portion of the farm used and occupied by the family members of the labour tenant, in so far as they are concerned.

The reference to “or his or her associate” is necessary to provide for the fact that the section confers rights not only on labour tenants, but also persons who were their family members. It mirrors the introductory portion of s 3(1) which refers to both these categories. No greater significance than this can in my view be attached to the use of the word “or” in paragraph (a) of s 3(1). It is not intended to qualify or guide the definition of a labour tenant. In passing, I note that the use of the term “associate” in paragraph (a) after “family member” is used in the introductory portion of s 3(1), is somewhat strange. However it does not undermine my analysis because the definition of associate includes a family member.²⁷

[25] That s 3(1)(a) does not qualify the definition of labour tenant is confirmed by the (with respect) most unusual example which Meskin J postulates as illustrating how compliance with his interpretation would be achieved.²⁸ It would include as a labour tenant a person who had the right

²⁶ *Tselentis Mining v Mdlalose* supra n 5 at 663e-664c. The definition of labour tenant is quoted in paragraph 2 above. Section 3(1)(a) is quoted in paragraph 16 above. The definition of “associate” is quoted in n 14 and the definition of “family member” is quoted in n 24 above.

²⁷ The definition of “associate” is quoted in n 14 and the definition of “family member” is quoted in n 24 supra.

²⁸ *Tselentis Mining v Mdlalose* supra n 5 at 663h-664a.

to reside on a farm but did not herself do so, had the obligation to provide labour, but did not herself provide it and had cropping and grazing rights but did not herself use these rights, provided all these things were done on her behalf by a parent or grandparent who did not qualify under paragraph (c) of the definition. This cannot possibly have been intended as an acceptable interpretation of the Act.

[26] I am accordingly of the view that the conjunctive interpretation of the definition is the correct one. Apart from the earlier decisions of this Court, I am supported in this view by the decision of Du Plessis J in the Transvaal High Court case of *Van Niekerk v Nqonwange*²⁹ where he held as follows:

“It was held in *Zulu and Others v Van Rensburg and Others* . . . that for a person to fall within the definition of a labour tenant, he or she must comply with all the requirements of paragraphs (a), (b) and (c) of the definition quoted above. I agree that the paragraphs must be read conjunctively.

I am aware of the judgment in *Klopper and Others v Mkhize and Others* . . . where it was held that the three requirements need not cumulatively be present. I respectfully disagree. The learned judge in the *Klopper* case (*supra*), held that paragraph (c) must be read on its own, or conjunctively with (a) or with (b). In my respectful view the use of the word ‘and’ at the end of paragraph (b), makes it clear that paragraph (c) cannot be read on its own.”³⁰

[27] Mr Van der Merwe referred in argument to two documents which he suggested supported his view that the conjunctive interpretation should prevail. The first was a media release dated 1 June 1995 by the Minister of Land Affairs which accompanied the publication of the Land Reform (Labour Tenants) Bill 1995 and the second was the Bill itself (to which was annexed an explanatory memorandum in accordance with Parliamentary practice). Both the media release and the explanatory memorandum Bill referred under the heading “Limited Scope” to the requirement in the definition of a labour tenant that the person be a second generation labour tenant. The definition in the Bill itself was at that time worded differently, but, it was contended, also pointed to a conjunctive interpretation. The weight of authority is very much against allowing such documents to be called in aid in the interpretation of a statute.³¹ This authority has received considerable academic criticism.³² There are also a few authorities which seem to suggest a softening of attitudes by South African courts to certain of the documents which precede the passing of an Act.³³ For the purpose of deciding this matter it has not been necessary for me to

²⁹ *O T Van Niekerk v P Nqonwange* TPD 24921/96, 19 August 1997, as yet unreported.

³⁰ Ibid at 4.

³¹ See, for example, *Mathiba and Others v Moschke* 1920 AD 354 at 362. See also Devenish *supra* n 17 at 123; Du Plessis *supra* n 17 at 134 and Kellaway *Principles of Legal Interpretation* (Butterworths, Durban 1995) at 304.

³² See Devenish *supra* n 17 at 124-126.

³³ In *S v Makwanyane* 1995 (6) BCLR 665 (CC) the Constitutional Court decided, after having regard to the position in foreign law, that it was acceptable to have regard to the drafting history of the Constitution as an aid to *its* interpretation:

rely on the documents referred to by the first respondent. It is therefore unnecessary for me to decide on their admissibility.

[28] The application must accordingly be dismissed. This raises the question of costs.

Costs

[29] This Court set out at some length its approach to costs in matters falling under the Act in

Hlatswayo and Others v Hein.³⁴ In that matter this Court adopted an approach which is similar to that adopted in the labour courts.³⁵ Mr Van der Merwe argued, in effect, that we should find that that decision was wrongly decided. He based his argument primarily on various differences between this Court and the labour courts as well as the legislation which regulates the two. I am not persuaded that this Court's earlier decision was wrong. The reasons why the approach of the labour courts can usefully be employed in cases under the Act were set out in that case and it is not necessary for me to repeat them. I will therefore decide the issue of costs in this matter on the basis of the principles laid down in that case.

[30] In my view this is also a matter where fairness requires that the general rule (that costs follow the result) not be followed. The issues raised were novel in the sense that conflicting approaches to the definition of labour tenant in the Act by different Courts of similar status needed to be considered and resolved, at least as far as this Court was concerned. Whilst this Court's decisions do not in my view bind the High Courts in matters such as this one, this judgment may contribute towards the resolution of this question in those courts. The parties were bona fide in approaching this Court. It is so that the application in the case of first applicant was misguided, as was apparent from the concessions which his legal representative was forced to make on his behalf at the commencement of the hearing of the matter. I have therefore given careful consideration to whether a costs order should be made against the first applicant. Had he insisted that the matter be argued, I would in all likelihood have made a costs order against him. However Mr Rall very properly conceded his case at the outset. Much of what was dealt with in relation to the first applicant in the affidavits was applicable to the second applicant and there is in my view no basis for a costs order against her. In its judgment in the *Hlatswayo* case,³⁶ this Court placed substantial reliance on the judgment of Goldstone JA in *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd*³⁷. It is clear from that judgment that he contemplated that there may well be circumstances where costs would not be ordered against a litigant who was bona fide

“Such background material can provide a context for the interpretation of the Constitution and, where it serves this purpose, I can see no reason why such evidence should be excluded. The precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it.”

³⁴ *Hlatswayo and Others v Hein* LCC 31/96, 23 September 1997, as yet unreported, at 7-12.

³⁵ Ibid.

³⁶ Ibid.

³⁷ 1992 (1) SA 700 (A) at 739E .

but misguided in bringing an application. In the circumstances I have decided not to penalise the first applicant with a costs order.

[31] The application is accordingly dismissed. No order is made as to costs.

Date: 17 October 1997

Judge A Dodson

We agree:

Judge YS Meer

Judge J Moloto