

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG**

CASE NUMBER: 2/97

In the matter between:

ENNIS MLIFI

Plaintiff

and

OTHARD JOHANN KLINGENBERG

Defendant

JUDGMENT

MEER J:

Introduction

[1] This is an action for the reinstatement of the plaintiff as a labour tenant in terms of section 12 of the Land Reform Labour Tenants Act No 3 of 1996 (hereinafter referred to as “the Act”), to the farm, Groothoek, Wakkerstroom district in the Mpumalanga Province, owned by the defendant. The plaintiff seeks an order in the following terms:

- “1.1 declaring that he and his associates be regarded as labour tenants for the purposes of the Land Reform Labour Tenants Act 3 of 1996;
- 1.2 reinstating him and his associates to the farm, Groothoek ;
- 1.3 directing the defendant to compensate him in the amount of R67 822,00;
- 1.4 further and/or alternative relief;
- 1.5 costs of suit.”

[2] The plaintiff lived on the farm Groothoek from 1982 or thereabouts until 1996 when he was evicted by the defendant. Before living on Groothoek he lived for most of his life on the farm Chance, owned by the defendant’s father. He came to live on Groothoek after defendant’s father evicted him from Chance. In 1982 Groothoek was not owned by defendant, but by one, Hendrik Buhrman and the plaintiff came to work for him when he settled on the farm. In terms of his employment contract he was given the right to reside on the farm and use cropping and grazing land thereon. The defendant purchased the farm Groothoek from Hendrik Buhrman in 1991 and the plaintiff was taken into his employ. He continued residing on the farm and using

cropping and grazing land. The plaintiff's employment with the defendant continued until 18 September 1992 when he stopped working because of a dispute over the number of cattle plaintiff could graze and the employment of plaintiff's son by the defendant.

[3] Thereafter during 1995 the defendant issued a summons against the plaintiff for his eviction and obtained an order by way of default judgment in the Wakkerstroom Magistrate's Court for the eviction of the plaintiff and his family. In pursuance thereof the Sheriff evicted the plaintiff and his family from the farm in February 1996 and removed their personal possessions to Paul Pietersburg. During the eviction the plaintiff's homestead was demolished and he claims the sum of R67822,00 in compensation, as the replacement value of the structures comprising his homestead. The plaintiff and his family are currently residing at Kwa Ngema, also in the Wakkerstroom Magisterial District.

[4] The plaintiff claims, and led evidence to the effect that he was employed by the defendant as a labour tenant. The defendant led no evidence, but pleaded that the plaintiff was not a labour tenant, and that there had never been a contract of labour tenancy between him and the plaintiff. Instead, he pleaded, the plaintiff was employed exclusively as a farmworker, between 19 August 1991 and 18 September 1992. Defendant pleaded also that none of plaintiff's family were associates of labour tenants, nor had any of them ever worked for him; accordingly he was not liable to pay the plaintiff or his associates compensation for damages incurred during the eviction. On the contrary, as owner of the farm, he acquired ownership of plaintiff's structures built thereon and hence plaintiff and his associates had no claim for compensation relating thereto.

[5] The Order which the Plaintiff seeks is governed by Section 12 of the Act which provides:

"12 Reinstatement

(1) A person who -

(a) in terms of section 3 would have had a right to occupy and use land if the provisions of this Act had been in force on 2 June 1995; and

(b) between 2 June 1995 and the commencement of this Act vacated a farm or was for any reason or by any process evicted,

may institute proceedings in the Court for an order of reinstatement of such rights.

(2) The Court may, subject to such conditions as the Court may impose, make an order -

(a) that a person referred to in subsection (1) be regarded as a labour tenant or his or her associate for the purposes of this Act;

(b) for the reinstatement of a labour tenant or his or her associate on such terms as it deems just;

- (c) for the payment of compensation, having regard to the provisions of section 10; and
- (d) for costs.

(3) Where the person referred to in subsection (1) was evicted in terms of an order of a court -

- (a) the proceedings shall be instituted within one year of the commencement of this Act;
- (b) the Court shall in addition to other factors which it deems just and equitable, take into account -

- (i) whether the order of eviction would have been granted if the proceedings had been instituted after the commencement of this Act; and

- (ii) whether the person ordered to be evicted was effectively represented in those proceedings, either by himself or herself or by another person.”

Section 3(1) of the Act deals with the right of a labour tenant to use and occupy land:

“3 Right to occupy and use land

(1) Notwithstanding the provisions of any other law, but subject to the provisions of subsection 2¹, a person who was a labour tenant on 2 June 1995 shall have the right with his or her family members -

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

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

¹ “(2) The right of a labour tenant to occupy and to use a part of a farm as contemplated in subsection (1) together with his or her family members may only be terminated in accordance with the provisions of this Act, and shall terminate -

- (a) subject to the provisions of subsections (3) to (7), by the waiver of his or her rights;
- (b) subject to the provisions of subsections (4) and (5), on his or her death;
- (c) subject to the provisions of section 10, on his or her eviction; and
- (d) on acquisition by the labour tenant of ownership or other rights to land or compensation in terms of Chapter III.”

[6] The prerequisites for reinstatement as a labour tenant as set out at sections 12(1)(a) and (b) of the Act are: status as a labour tenant on 2 June 1995, and eviction between 2 June 1995 and 22 March 1996, the date the Act commenced. The plaintiff must moreover show that he commenced these proceedings within a year of 22 March 1996. This he has done, just in time, the notice of action bearing the date, 17 March 1997.

[7] In accordance with Section 12(3)(b), when considering the Plaintiff's application the court must, in addition to any other factors which it deems just and equitable, take into account whether the eviction order by the Wakkerstroom Magistrates' Court would have been granted if the case for plaintiff's eviction had been instituted after the commencement of this Act, bearing in mind the provisions pertaining to evictions. The court must also to consider whether the Plaintiff was effectively represented at the proceedings which resulted in the order for his eviction.

[8] Of these, the biggest challenge which the Plaintiff faced in these proceedings was that of proving that he was a labour tenant on the farm Groothoek on 2 June 1995.

[9] In order to qualify as a labour tenant the Plaintiff must satisfy all the requirements set out in the definition of labour tenant at section 1(xi) of the Act.² Section 1(xi) states:

“(xi) - “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 section 3(4) and (5), but excluding a farmworker;”

[10] At a pretrial conference on 2 February 1998 the parties agreed that the plaintiff bore the onus of proving he was a labour tenant as defined in section 1 of the Act on the farm Groothoek as of 2 June 1995. The parties further agreed that the defendant bore the onus of proving that plaintiff was a farmworker.³

² *Mahlangu v De Jager* 1996 (3) SA 235 LCC at 241 E-F; *Zulu & others v Van Rensburg & others* 1996 (4) SA 1236 LCC at 1253-1254; *Ngcobo & another v BWJ Van Rensburg & others* LCC 18/97, 10 October 1997, as yet unreported.

³ In accordance with sections 2(5) and 2(6) of the Act.

[11] At the trial four witnesses testified for the plaintiff, namely: his wife, his uncle, Elphius Buthelezi, a fellow labourer on the farm, and the plaintiff himself. Of these, the testimony of the plaintiff and his uncle Elphius Buthelezi was of crucial relevance to the plaintiff's case as appears from the consideration of the evidence and argument.

Application For Absolution From The Instance

[12] At the close of plaintiff's case, Mr Dreyer for the defendant applied for absolution from the instance, his view being that no prima facie case had been made. The application was refused. The defendant thereafter chose not to lead evidence. Instead he closed his case and argued for the dismissal of the action with costs.

[13] Mr Dreyer explained that the defendant was of the view that the plaintiff had not discharged the onus of proving that he was a labour tenant. This being the case, the onus had not shifted to the defendant to prove that plaintiff was a farmworker. Hence the decision not to lead evidence.

[14] The stance adopted by the defendant is clearly a challenge to the court's dismissal of the application for absolution, implicit in which is a finding that plaintiff had established a prima facie case. The well-established test for absolution from the instance is whether or not the plaintiff has made out a prima facie case.⁴ The Act ascribes to the plaintiff the onus of proving that he falls within paragraphs (a), (b) and (c) of the definition of labour tenant. If this is prima facie proved a presumption that he is not a farmworker arises, and the onus shifts to the defendant to rebut the presumption by proving the contrary, that plaintiff is in fact a farmworker.⁵ Given that the parties had agreed at a pretrial conference that the onus operates in precisely this fashion, the defendant's contention that the onus had not shifted to him, despite the court's ruling, amounted to a challenge thereof.

[15] The test I am now required to apply, in deciding plaintiff's case, the plaintiff only having led evidence and both parties having closed their cases and submitted arguments, is different to the prima facie test I applied at the absolution stage. I must now enquire whether the plaintiff has shown on a balance of probabilities that he was a labour tenant on 2 June 1995. The metaphor "balance of probabilities" conveys that the party bearing the onus has to put sufficient evidence into his pan of the balance to make the probabilities arising from that evidence outweigh the other.⁶ As the defendant put no evidence into his pan there is no weighing up of probabilities arising from his evidence. In the circumstances unless the plaintiff's evidence is found to be without credibility, his evidence stands. In conducting the enquiry I must examine whether the plaintiff has shown on a balance of probabilities that he satisfied all three requirements of the

⁴ Hoffmann and Zeffertt *The South African Law of Evidence* 4ed (Butterworths, Durban 1988) at 508; *Gascoyne v Paul & Hunter* 1917 TPD 170; *Supreme Service Station (1969) (Pty) Ltd v Fox & Goodridge (Pty) Ltd* 1971 (4) SA 90 (RAD).

⁵ See ss 1(xi) and 2(5) of the Act.

⁶ Hoffmann and Zeffertt *supra* note 4 at 526.

definition of labour tenant as set out at section 1(xi) of the Act on 2 June 1995. I shall examine compliance with each paragraph of the definition in turn.

Has plaintiff complied with para (a) of the definition?

[16] Paragraph (a) of the definition states:

“(xi) ‘labour tenant’ means a person -

(a) who is residing or has the right to reside on a farm;

(b) . . .

(c) . . .”

[17] It was common cause that the plaintiff was residing on the farm Groothoek on 2 June 1995, and that he resided there until February 1996 when he was evicted. Plaintiff has therefore shown compliance with paragraph (a) of the definition.

Has plaintiff complied with paragraph (b) of the definition?

[18] Compliance with paragraph (b) of the definition poses greater difficulties.

[19] It was common cause that whilst the plaintiff was residing on the farm on 2 June 1995, he stopped providing labour to the defendant on 18 September 1992. Therefore on 2 June 1995, the critical date (prescribed at section 12(1) read with section 3 of the Act), upon which he was required to have the status of labour tenant, he was not providing labour to the defendant.

[20] Paragraph “(b)” of the definition states:

“(xi) ‘labour tenant’ means a person -

(a) . . .

(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 for such right provides or has provided labour to the owner or lessee; and

(c) . . .”

[21] Mr Dreyer argued that the actual provision of labour on 2 June 1995, by the plaintiff himself or his nominee on his behalf, was a precondition for compliance with paragraph (b) of the definition. In the absence of proof thereof the plaintiff could not succeed in his claim of being a labour tenant. The fact that the plaintiff was not providing labour to the defendant on 2 June 1995 disqualified him from the definition of labour tenant and from being reinstated as one.

[22] Ms Kathree for the plaintiff contended that the plaintiff was not required to show that he was actually providing labour to the defendant on 2 June 1995. He was merely required to show that on 2 June 1995 he was a labour tenant as defined at section 1(xi) of the Act, which was not necessarily the same as actually providing labour on that date. She stated that the use of the past tense, “has provided,” in paragraph (b) of the definition of labour tenant, meant that if on 2 June 1995 the plaintiff had provided labour in the past, he satisfied the requirement of paragraph (b) of the definition.

[23] Mr Dreyer disagreed. The past tense in paragraph (b), he argued, referred to the situation where a labour tenant who had provided labour prior to 2 June 1995, was no longer doing so personally on that date, but was instead providing labour through a nominee. The words, “has provided” in paragraph (b) did not cater for the situation as in the present case where no-one, neither the plaintiff nor his nominee, was working on 2 June 1995. Mr Dreyer argued further that if the definition of labour tenant did not make provision for the past tense, reinstatement of labour tenants who had been evicted between 2 June 1995 and the commencement of the Act, in terms of section 12(1)(b) of the Act, could not occur.

[24] I do not agree with Mr Dreyer’s explanation. I am of the view that a labour tenant who provides labour through a nominee is providing labour in the present rather than the past. A nominee⁷ provides labour in a labour tenant’s stead. Section 4(1) of the Act states:

“4 Provision of Labour

(1) A labour tenant may nominate another person, acceptable to the owner or the lessee of the farm in question, to provide labour in his or her stead.”

⁷ The term “nominee” appears to be an import from English company law. Buckley states that: “The expression is a commercial rather than legal one.” Buckley *The Companies Act* (Vol 1) 14ed (Butterworths, London 1981) at 92.

Within the purview of company law the term refers, inter alia, to the situation where a nominee shareholder takes instructions from a beneficial shareholder. In *Sammel and Others v President Brand Gold Mining Company* 1969 (3) SA 629 (A) a nominee was defined as:

“In the ordinary use of language, a person who holds shares as a nominee is a person who holds them in name only but who really, actually and in fact holds them for someone else, without himself having any real, actual or beneficial interest in them. Thus where shares are registered in the name of A but are, in reality and in fact held by A for B, A is said to be B’s ‘nominee’ . . . In determining the meaning of the term ‘nominee’ as used in the section the court must look both at the underlying rationale of the section and at the mischief which the amendment was designed to meet” (at 642 and 633G-H).

[25] The section acknowledges the practice of family/associate contributed labour by delegation within labour tenancy schemes. This ensures that the labour tenant is providing labour.

[26] A labour tenant who provides labour through a nominee therefore provides labour himself or herself albeit not personally. On this formulation a labour tenant who chooses to provide labour through a nominee from the inception of the labour tenancy, and never personally labours, would still be providing labour. If on 2 June 1995 a nominee is providing labour in a labour tenant's stead, it is the labour tenant who is providing labour. The use of the past tense in paragraph (b) cannot therefore apply to the labour tenant/nominee situation as submitted by Mr Dreyer. I also do not agree with Mr Dreyer's submission that if paragraph (b) of the definition of labour tenant did not make provision for the past tense, reinstatement under section 12(1)(b) could not occur. The past tense in paragraph (b) has nothing to do with reinstatement. It relates only to the status of labour tenancy.

[27] Clearly at issue to this enquiry is the impact of the past tense in paragraph (b) on the date 2 June 1995. 2 June 1995 is the date which the legislature, in its wisdom, chose at which the Court must test whether a person is a labour tenant.⁸ One therefore assesses a person as of 2 June 1995 and applies paragraphs (a), (b) and (c) of the definition of labour tenant to his or her position as of that date. If on 2 June 1995 he or she is no longer providing labour, the enquiry does not end there. One enquires further whether on 2 June 1995 he or she had provided labour in the past.⁹ If so, he or she satisfies the requirements of paragraph (b) of the definition.

[28] There would be unfair results if the actual provision of labour as of 2 June 1995, was required for compliance with paragraph (b). There are an infinite number of reasons why a person might no longer be providing labour on that date. What of the labour tenant with 20 years service who stopped providing labour in May 1995. It could not have been the intention of the legislature to require the actual provision of labour on 2 June 1995, especially in the light of unfair consequences to long standing labour tenants who were evicted before that date.

[29] The use of the words "has provided" at paragraph (b) suggest to me that if on 2 June 1995 a person no longer provides labour but had provided labour in the past, he or she fulfills requirement (b) of the definition. I am therefore able to agree with Ms Kathree that the plaintiff complies with the requirements of paragraph (b) of the definition even though he was not working on 2 June 1995. Therefore an evicted labour tenant, like the plaintiff, who was not actually providing labour on 2 June 1995, but who had provided labour prior thereto, satisfies the requirements of paragraph (b).

⁸ See also *Pieter Du Preez Janse Van Rensburg v Simon Makoba and three others* NPD 3611/96, as yet unreported, at 9.

⁹ See s 3(1) of the Act which provides:

“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 . . .” (My emphasis)

[30] In *Zulu and others v Van Rensburg and others*,¹⁰ it was held to be apparent from the use of the past tense in paragraph (b) of the definition of labour tenant, that the Act creates a statutory form of labour tenancy in respect of persons whose labour tenancy contracts were terminated before the Act came into force. It is clear from an analysis of the judgment that this statutory form of labour tenancy applies also to those whose contracts were terminated before 2 June 1995.

[31] Mr Dreyer relied also on the unreported judgment of Le Roux J in *W Klingenberg v E Buthelezi*¹¹ for authority that the actual provision of labour on 2 June 1995 is necessary. In that case the learned Judge stated that:

“Maar die hoofpunt is dat hy afgedank was gedurende Januarie 1995. Die wet het ‘n afsnypunt en soos dit in Mahlangu se saak duidelik gestel word, moet hy bewys dat hy in hierdie diensverhouding of die huurarbeid verhouding gestaan het op 2 Junie .”

[32] Whilst *Mahlangu v De Jager*¹² certainly stated that there must be proof of labour tenancy on 2 June 1995 it did not go so far as to specify that compliance therewith required the actual provision of labour on that date, insofar as this is suggested in the above extract. It in fact made no pronouncement on that matter, it not being required to consider the issue.

[33] Thus in applying the definition of labour tenant to the plaintiff on 2 June 1995, the following can be said of him: On that date he had had the right to use cropping or grazing land on the farm and he had provided labour in the past. He accordingly satisfies the requirements of paragraph (b) of the definition of labour tenant.

Has plaintiff shown compliance with paragraph (c) of the definition?

[34] According to the plaintiff, his family had a history of labour tenancy. Prior to his birth his maternal grandparents resided on the farms Voorslag and Amsterdam where according to the testimony of both the plaintiff and his uncle Elphius Buthelezi, his maternal grandfather worked as a labour tenant. Thereafter his maternal grandparents moved to the farm Chance owned by Valdimar Klingenberg, the defendant’s father. At that stage the plaintiff’s grandfather was too ill to work as a labour tenant, but according to the evidence of the plaintiff and Buthelezi, plaintiff’s grandmother worked as a labour tenant for defendant’s father on that farm. The plaintiff and his siblings lived on Chance in the household of his uncle Elphius Buthelezi. When the plaintiff came of age, according to his testimony, he himself began working as a labour tenant for defendant’s father and was in his employment until moving to Groothoek.

[35] The plaintiff’s testimony about his grandmother’s labour tenancy for the defendant’s father on the farm Chance appears as follows from the record:

¹⁰ *Zulu v Van Rensburg* supra n 2 at 1265F-I

¹¹ *W Klingenberg v E Buthelezi* TPD 13399/98, as yet unreported, at 3.

¹² *Mahlangu v De Jager* supra n 2.

“Well, my grandmother was tilling the land at the farmer’s portion as well as at home . . . She just used to work for the farmer for no remuneration, after they had finished tilling the land they would get a bag of salt as remuneration.

. . . She also had the land to grow her crops in the very same farm.”

Adv Kathree: “Who provided her with the land to graze the cattle on and the land to plant the crops on?”

Mr Mlifi: “Mr Klingenberg’s father.”

[36] The plaintiff’s uncle, Elphius Buthelezi, also testified that the plaintiff’s grandmother had worked on the farm Chance.

[37] In the absence of evidence to the contrary by the defendant, the evidence of the plaintiff and Elphius Buthelezi pertaining to the labour tenancy of plaintiff’s grandparents stands. I therefore find that the plaintiff’s maternal grandfather worked on a farm as a labour tenant and that his maternal grandmother was a labour tenant on the farm Chance. Does this necessarily mean that the plaintiff has complied with paragraph (c) of the definition? According to Mr Dreyer, it does not.

[38] Mr Dreyer argued that compliance with paragraph (c) requires more than just proof that the plaintiff’s grandparents had been labour tenants on a farm. He contended that paragraph (c) of the definition requires the plaintiff to show that his parents or grandparents had resided and worked on a farm owned by the same owner or his successors or predecessors in title, as the owner of the farm on which the plaintiff resided on 2 June 1995, namely the defendant or his successors or predecessors in title. As he had not shown that his grandparents had been labour tenants on a farm owned by defendant or his successors or predecessors in title, he had not complied with paragraph (c) and was therefore not a labour tenant.

[39] In support of this view Mr Dreyer cited the unreported judgment of Hurt J in *Salimba v Ngcobo*¹³, which he contrasted with the judgment of Dodson J in *Zulu v Van Rensburg*¹⁴. *Salimba v Ngcobo* ruled that the words, “a farm” in paragraph (c) of the definition refer to a farm owned or occupied by the same owner as the owner of the farm referred to in paragraph (a) of the definition or his successor or predecessor in title. This view suggests that a person referred to in (a) would have to have a farmowner (or his successors/predecessors in title) in common with his or her parent or grandparent referred to in paragraph (c) of the definition. I do not agree as appears from the following consideration of these two cases.

¹³ NPD 340/96, 4 November 1997, as yet unreported.

¹⁴ *Zulu v Van Rensburg* supra n 2.

[40] In *Salimba v Ngcobo*¹⁵ the learned judge stated as follows:

“On the other hand, I do not think that the intention of the legislator was to give the word ‘a farm’ in paragraph (c) the wide meaning of ‘any farm, wheresoever situated and owned by whomsoever’. Such a wide interpretation would mean that one of the requirements for qualification as a ‘labour tenant’ is, simply, that the claimant must have a grandparent or a parent who was once a labour tenant under the old system. It must be borne in mind that the Act is intended to entrench rights of occupation of property and confer rights of acquisition of property to protect people who had, for practical purposes, been bound to that property or its owner by the bonds of the feudal tenant system over an appreciable period. It is clear that, in enacting the requirement in paragraph (c) of the definition (referred to in the *Ngcobo* case as a ‘second generational requirement’), the legislator was narrowing down the class of people who would qualify for benefits under the Act to those whose history of ‘labour tenancy’ stretched back more than a generation. As I have already indicated, I think that it is fundamental to a proper construction of the definition to bear in mind that the Statute was intended to regulate the dealings as between ‘labour tenant’ and ‘owner’. Requirement (c) refers in general terms to ‘a farm’ but it also refers to ‘the owner’. It is not without significance that the Statute defines ‘owner’ with specific reference to the occurrence of that word in the definition of ‘labour tenant’. The definition of ‘owner’ is as follows -

‘Owner’ means the owner as defined in section 102 of the Deeds Registries Act 1937 (Act 47 of 1937), of a farm, and where it occurs in the definition of ‘labour tenants’, includes his or her successors and predecessors in title’.

It seems to me that the existence of a historical relationship between the labour tenant’s family and ‘the owner’ (who will include all of the present owner’s predecessors in title) was what was contemplated in requirement (c) and that this paragraph should properly be so interpreted. Thus, in those cases where families established themselves on a portion of a farm and that farm was then subdivided and sold with the result that a grandchild was in occupation of a portion of one subdivision and the grandparent in occupation of a portion of another, requirement (c) would be satisfied, because the original owner of the undivided farm would be included within the term ‘owner’ as used in requirement (c). Conversely, this interpretation avoids the anomaly which would result from the wide interpretation of ‘a farm’ without reference to the identity of the owner where, for instance, a person who has satisfied (a) and (b) for a matter of months on the farm of X would be able to claim the benefits of the Act as against X on the ground that, many years ago, his grandparent had been a labour tenant (in the old sense) on a farm belonging to Y.”

¹⁵ Supra n 13 at 19-22.

[41] This is in direct contrast with the views of Dodson J expressed in the case of *Zulu v Van Rensburg*:¹⁶

“Mr Loots contended that the farm referred to in para (c) need not be the same farm as that referred to in para (b). In support of this contention he pointed out that para (b) specifically refers to ‘the farm referred to in para (a)’. This means that the applicants themselves must show that they have cropping or grazing rights on, and provide labour to the owner of the same farm as that on which they reside (subject to the exception that the cropping or grazing rights can be exercised on another farm of *that owner*). However para (c) only refers to ‘a farm’. Had Parliament required that it should be the same farm as that referred to in para (a) they would have said so in the same way that they did in para (b). There is certainly force in this argument, particularly if one considers the context of the statute as a whole and its purpose. One of the objects of the Act is to provide labour tenants with certain protections against eviction. In the past the common law left labour tenants exposed to eviction at the whim of the owner of the land subject only to compliance with the common law requirement of reasonable notice. Such a basis for eviction is now excluded by the Act if a person can show that he or she qualifies as a labour tenant under the legislation. If we are to adopt Mr Robert’s interpretation, a person whose predecessors had over the generations consistently been labour tenants (as that term was understood before the statutory definition was enacted), but had been forced by evictions to move from farm to farm, would be excluded, whilst a person whose father and who himself or herself had been fortunate enough to avoid eviction would qualify. What then in effect becomes a disqualifying criterion is the fact of past evictions, the very problem which the Act sought to deal with. A statute is presumed not to give rise to a harsh or discriminatory result. Such a result is avoided if the interpretation contended for by Mr Loots is adopted. It is clear that the legislature intended to protect a particular class of persons whose way of life had been based, over the generations, on labour tenancy, without confining it to that part of the class who had not been subject to eviction. On this interpretation of the law I am satisfied that *prima facie* first, fourth and fifth applicants comply with para (c).”

[42] I am of the view that the interpretation in the *Zulu* judgment is the correct one. The emphasis on the statute’s intention to regulate the relationship between labour tenants and owners, and the suggestion of a nexus between the same owner or his successors or predecessors in title and two generations of labour tenants, in the *Salimba* judgment is, I believe, misplaced

[43] The purpose of the Statute appears clearly from the preamble:

“To provide for security of tenure of labour tenants and those persons occupying or using land as a result of their association with labour tenants; to provide for the acquisition of land and rights in land by labour tenants; and to provide for matters connected therewith.

¹⁶ *Zulu v Van Rensburg* supra n 2 at 1257C-1258B.

WHEREAS the present institution of labour tenancy in South Africa is the result of racially discriminatory laws and practices which have led to the systematic breach of human rights and denial of access to land;

WHEREAS it is desirable to ensure the adequate protection of labour tenants, who are persons who were disadvantaged by unfair discrimination, in order to promote their full and equal enjoyment of human rights and freedoms;

WHEREAS it is desirable to ensure that labour tenants are not further prejudiced;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-”

[44] The statute was enacted to provide security of tenure for labour tenants on the land they occupy. The regulation of the dealings between owner and labour tenant, whilst important is, I believe, ancillary to this purpose. The nexus therefore is clearly between the labour tenant and the land and not between the farmowner and the labour tenant or generations of labour tenants.

[45] I am fortified moreover in my view that the interpretation in the *Zulu* judgment is the correct one, by the following consideration: In the instant case it would be unfair if plaintiff were disqualified from acquiring labour tenancy status, despite his years on Groothoek and Chance prior thereto, simply because his grandparents happened not to be labour tenants on a farm owned by the defendant or his predecessor in title¹⁷, factors over which the plaintiff had no control. With regard to plaintiff’s grandparents working for defendant himself, this would have been well nigh impossible because the defendant simply did not own a farm when plaintiff’s grandparents were labour tenants. The defendant would have been a child, or perhaps not even born at the time.¹⁸ Later on when defendant became owner of Groothoek it would in all likelihood also not have been possible for persons of the generation of plaintiff’s grandparents to have worked for him, they being either too frail or having passed on by that time. With regard to plaintiff’s grandparents working as labour tenants for defendant’s predecessor in title, this simply did not occur. The defendant became the owner not of Chance where plaintiff’s grandparents had worked but of Groothoek to which they had no link. His predecessor in title in respect of Groothoek was therefore Mr Buhrman on whose farm plaintiff’s grandparents had never worked.

¹⁷ The definition of “owner” in the Act includes predecessors in title. Section 1(xiii) of the Act states:

“owner” means the owner, as defined in section 102 of the Deed Registries Act, 1937 (Act 47 of 1937), of a farm, and where it occurs in the definition of ‘labour tenant’, includes his or her successors and predecessors in title.”

¹⁸ Plaintiff and defendant are of the same generation. His uncle testified to carrying defendant, then a child, when he worked on Chance.

[46] It would be absurd and indeed unfair in the circumstances to stipulate to plaintiff and others like him that they could not acquire labour tenancy status, because they did not have a parent or grandparent labour tenant on a farm owned by a person (or such person's successor or predecessor in title), whose labour tenants their parent or grandparent simply could not have been. The legislature could not have intended so absurd and unfair a result. Were we to adopt this approach large numbers of labourers would be prevented from ever becoming labour tenants.

[47] In view of the above, and on the basis of my ruling that plaintiff's grandparents were labour tenants, I find that the plaintiff satisfies the requirements of paragraph (c) of the definition of labour tenant.

[48] I accordingly find that the plaintiff, having satisfied the requirements of paragraphs (a), (b) and (c) of the definition of labour tenant on 2 June 1995, was a labour tenant on that date. It being common cause that he was evicted between 2 June 1995 and the commencement of the Act, the plaintiff is eligible for reinstatement, all other requirements for reinstatement specified at section 12, being present.

Would the order for plaintiff's eviction have been granted if the eviction proceedings had been instituted after the commencement of the Act?

[49] In considering the plaintiff's application for reinstatement, I must, in addition to any factors which I deem just and equitable, take into account whether the eviction order by the Wakkerstroom Magistrate's Court would have been granted if the eviction proceedings had been instituted after the commencement of this Act.¹⁹

[50] Mr Dreyer argued for the defendant that even if the court were to find that the plaintiff was a labour tenant on 2 June 1995, the eviction order would have been granted if the proceedings had been instituted after the commencement of the Act, regard being had to the provisions of section 7(2) of the Act.

[51] Section 7(2) provides:

“(2) No order for eviction in terms of section 5 shall be made unless it is just and equitable and -

(a) subject to the provisions of section 9(1), the labour tenant has, contrary to the agreement between the parties, refused or failed to provide labour to the owner or lessee and, despite one calendar month's written notice having been given to him or her, still refuses or fails to provide such labour; or

(b) the labour tenant or his or her associate has committed such a material breach of the relationship between the labour tenant or associate and the owner or lessee, that it is not

¹⁹ Section 12(3)(b)(i).

practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship.”

[52] Section 7(2)(a) permits the eviction of a labour tenant who refuses or fails to provide labour despite one calendar months written notice to do so. No such notice was given to the plaintiff. However, given that the Act was not in existence at the time of plaintiff’s eviction, no store can be placed on defendant’s failure to provide notice in terms of this section.

[53] With regard to section 7(2)(b), Mr Dreyer argued that there was an unreasonable withholding of services by the plaintiff from 18 September 1992 which constituted a material breach as contemplated at section 7(2)(b). This would have entitled the defendant to evict the plaintiff in terms of section 7(2)(b) if the proceedings had been instituted after the commencement of the Act.

[54] From plaintiff’s evidence it emerged that the relationship between the plaintiff and defendant had been a troubled one from the outset. Plaintiff’s version of events was as follows:

1. The defendant varied the labour tenancy contract soon after he took over ownership of the farm and plaintiff’s employment, by reducing the number of cattle to ten per labourer and introducing a cash wage of R80 per month ostensibly because of a new law requiring labour tenants to receive payment in cash.
2. There were further reductions in both grazing and cropping land at the behest of the defendant, including a bar on labour tenants keeping goats. When plaintiff did not sell his goats he was issued with a “trekpass” by the defendant, ordering him to leave the farm.
3. The plaintiff approached his chief, Mtetwa, who attempted to mediate and as a result defendant informed the chief that plaintiff should come back to work. On returning to work the defendant informed the plaintiff that his (plaintiff’s) son must come and work for him. Plaintiff refused because the labour tenancy contract between them, on his version, provided that his son would only work on the farm when he retired. When plaintiff persisted in this stance the defendant issued a second trekpass ordering him to leave the farm within a period of three months.
4. The plaintiff sought his chief’s advice once more. Chief Mtetwa advised the plaintiff to go back to the defendant and tender his services which he did, but the defendant stopped him from working.
5. The plaintiff also sought the advice of the Black Sash, which advised him to remain on the farm and undertook to correspond with defendant. Thereafter the defendant gave plaintiff five days written notice to leave the farm. On the expiry of the five days plaintiff obtained the services of a lawyer who also advised him to remain on the farm. The lawyer undertook to stop the eviction, but nothing

further emanated from him. The eviction of the plaintiff and his family followed thereafter.

[55] Defendant's version, as put to plaintiff in cross examination (but not of course substantiated by oral evidence), was that after the disagreement between the parties, and the issuing of the treypass on 18 September 1992, plaintiff unilaterally discontinued his services and was prepared to return to work only on his own terms.

[56] When questioned by the court, plaintiff reiterated that the reason he did not provide services after receiving the treypass on 18 September 1992, was because the defendant stopped him from working. He was willing to work but it was the defendant who would not accept his services. He also said that he would be willing to work once again for the defendant.

[57] There being no evidence on behalf of defendant refuting plaintiff's version, plaintiff's evidence that defendant told him to stop working, must stand.

[58] The standard set out at section 7(2)(b) is a stringent one and if regard is had to what our law considers to be material breaches in contract relationships, then it seems to me that the conduct of the plaintiff in this case falls far short thereof.

[59] In considering what constitutes a material breach of an employment relationship the lessons of the Industrial Court, the Labour Court of Appeals, the Labour Relations Act, the Agricultural Labour Court and the common law are instructive. In expressing the well established principle that dismissal for a first offence is inappropriate unless the misconduct is so serious that it makes a continued employment relationship intolerable, the Industrial Court has held that dismissal is justified where the disciplinary offence has "the effect of seriously damaging or destroying the relationship between employer and employee so that the continuance of that relationship could be regarded as *'intolerable'*"; where the relationship is *'irreparably harmed'*, and where continuance of the relationship would be *"futile"*.²⁰

[60] The Code of Good Practice of the Labour Relations Act²¹, gives instructive examples of what might justify dismissal for a first offence: gross dishonesty; wilful damage to the property of the employer; wilful endangering of the safety of others; physical assault on the employer, a fellow employee, client or customer; and gross insubordination.²²

[61] While the dispute in this case was clearly real, in my view, the relationship between the plaintiff and defendant was not so seriously damaged that it was irreparably harmed. It is this standard, I believe, by which section 7(2)(b) must be judged.

[62] Indeed as the Labour Court of Appeals recently held:

²⁰ Du Toit et al *The Labour Relations Act of 1995* (Butterworths, Durban 1996) at 355.

²¹ No 66 of 1995.

²² Schedule 8 clause 3(4) of the Labour Relations Act 66 of 1995.

“Whether or not there has been a breakdown of the employment relationship must . . . be objectively assessed. It cannot be made dependent upon the subjective and possibly irrational views of the employer. If the test were subjective, it would place employees in an untenably vulnerable position. Dismissal would be competent whenever the employer held the view that the employment relationship had broken down irrespective of whether this conclusion was objectively sustainable.”²³

[63] In *Booyesen v Helderenberg (Edms) Bpk*,²⁴ the court found that the sanction of dismissal of an agricultural worker for a physical assault on family and a community member while intoxicated was too harsh a penalty in view of the fact that the relationship between the respondent and applicant had *not broken down irretrievably*.

[64] That plaintiff’s conduct did not constitute a material breach of the employment relationship is further borne out by reference to the common law. Under South African common law, misconduct which has been held to justify summary dismissal includes dishonesty, drunkenness, gross negligence, insolence, fighting, revealing of trade secrets, persistent idleness, and absenteeism.²⁵

[65] Further, there is no evidence that defendant’s unilateral amendment to the terms of the employment relationship arose in response to any operational requirement of the farm or to any alleged misconduct of plaintiff. There is further no evidence that defendant approached the farm workers to offer a reason for the amendment or seek their acceptance of the change. In the face of this, plaintiff’s evidence that defendant imposed his will on plaintiff, unilaterally and in breach of the employment contract, also stands.

[66] A unilateral amendment of the terms of employment by the employer, as occasioned by defendant, constitutes a repudiation of the contract which entitles the employee to either hold the employer to the existing terms or, if the breach is sufficiently serious, to cancel the agreement and sue for damages.²⁶ Under such circumstances, plaintiff had the choice of either accepting the amendment (by continuing to work under the altered terms of the contract) or keeping the original contract alive. In opting for the latter, he was entitled to refuse to continue working until defendant performed his part of the contract (by complying with the terms of the contract as they existed prior to the dispute). Despite this, he continued to render his services.

[67] Rycroft and Jordaan describe the obligations of an employer who wishes to vary the terms of a contract as follows:

²³ *Concorde Plastics (Pty) Ltd v NUMSA and others* 1998 (2) *BLLR* 107 (LAC) at 129H-I.

²⁴ 1994 (15) *ILJ* 673 (ALC).

²⁵ *Grogan Workplace Law* 1ed (Juta, Cape Town 1996) at 91.

²⁶ Rycroft & Jordaan *A Guide to South African Labour Law* 1ed (Juta, Cape Town 1990) at 42.

An employer who wishes to vary the terms of the contract would be obliged to obtain the employee's consent to the variation in the absence of any power to do so in the contract itself. Failing that, the employer may at common law terminate the contract by proper notice and substitute it with an offer of fresh employment on new terms. Although the employer would be acting lawfully in this instance, its conduct may still constitute an unlawful practice.²⁷

The defendant did not act in this manner in varying plaintiff's contract.

[68] The Industrial Court has held that where the terms of a contract include housing accommodation, the employer may not, relying on his or her own purported termination of the contract, claim an order of ejection from premises the employee is lawfully occupying in terms of his or her employment contract. As the court held in *Coin Security (Cape) (Pty) Ltd v Vukani Guards and Allied Workers Union & Others*:

“The respondents are entitled, in addition to their wages, to free accommodation . . . Thus, if they should refuse to accept an unlawful repudiation of their contracts of employment, they would be entitled to insist on receiving whatever was due to them under their contracts whether they worked or not . . . What was due to them was not only their salary, but also the right to accommodation . . .”²⁸

[69] After carefully considering plaintiff's evidence I find that his services were terminated through no material breach on his part, but that the defendant unilaterally amended the terms of the employment relationship by reducing the number of plaintiff's cattle, insisting that plaintiff's son work on the farm, and thereafter preventing the plaintiff from continuing to work for him.

[70] From plaintiff's evidence it is clear that the eviction was not justified in terms of section 7(2) of the Act. Nor was it “just and equitable”, a third statutory requirement of section 7(2). In the circumstances plaintiff's conduct clearly did not amount to a material breach in terms of section 7(2)(b).

[71] Mr Dreyer also suggested that in discontinuing his services, plaintiff had constructively dismissed himself. Section 186(e) of the The Labour Relations Act²⁹ describes as a form of unfair dismissal the situation where:

“an *employee* terminated a contract of employment with or without notice because the employer made continued employment intolerable for the *employee*.”

²⁷ Ibid.

²⁸ 1989 (10) *ILJ* 239 at 247J.

²⁹ Act 66 of 1995.

Thompson and Benjamin, in their commentary of the Act, cite this as the definition of constructive dismissal.³⁰ I agree with this formulation and find defendant's argument that the plaintiff constructively dismissed himself through failure to perform his services untenable.

[72] Another factor which I am required to consider in terms of section 12(3)(b)(ii) of the Act is whether the plaintiff was effectively represented in the proceedings at the Wakkerstroom Magistrate's Court, which resulted in his eviction. From the evidence it is clear that the order for plaintiff's eviction was granted by default in the said Court. Therefore, plaintiff was neither present, nor represented, let alone effectively, at those proceedings.

Credibility

[73] Mr Dreyer referred to several "material contradictions" between the plaintiff's statement of case and evidence in chief. He submitted that these so deeply impugned the credibility of the witnesses for the plaintiff that the plaintiff could not be said to have proved his case on a balance of probabilities.

[74] Some of the more glaring contradictions pointed to by Mr Dreyer were the following:

1. The plaintiff, in his statement of case, submitted that his children, including Johannes, provided services to the defendant whereas it transpired from the evidence that this was not so.
2. The plaintiff's statement of case indicated that the labour tenancy agreement with Mr Buhrman, the owner of Groothoek prior to the defendant, continued on the same terms with the defendant. The evidence indicated that the defendant varied the terms.
3. The plaintiff's statement of case averred that in 1993, the defendant had ordered him to reduce the numbers of his stock. In his evidence in chief however, the plaintiff stated that this order had been given in 1989, immediately after defendant's purchase of the farm Groothoek.
4. There were three versions from the plaintiff as to when he stopped working for the defendant. According to his statement of case he continued working until 1996; according to his evidence in chief he discontinued his services in September 1992 when he was given the treypass and according to documentation in a Labour Court hearing, he was dismissed in 1993.
5. There were also three accounts of the number of stock that the plaintiff owned on the farm Groothoek: one in his statement of case, one in his evidence and another on the return of service of the sheriff at the time of his eviction.

³⁰

Thompson and Benjamin *South African Labour Law* Vol 1 (Juta, Cape Town 1998) at AA1-15.

6. Plaintiff's statement of case made no mention of the plaintiff working for a Mr Bertus van Zyl who occupied the farm for a period before defendant purchased it. The plaintiff, however, testified thereto in evidence.
7. Plaintiff's statement of case referred to Elphius Buthelezi as the head of the family whilst his evidence pointed to his grandmother being the family head after the death of the grandfather.

[75] With regard to the plaintiff's evidence in substantiation of his compensation claim, Mr Dreyer expressed bafflement at how a single roomed thatch dwelling could have cost the plaintiff approximately R8 000 to build in 1982 while his current residence, built in 1992 and comprising four structures, cost only R1 700. Mr Dreyer was perplexed also at the fact that the plaintiff was unable to remember certain dates but remembered in detail the prices of the materials that went into building his homestead on the farm Groothoek. These assertions, submitted Mr Dreyer, were particularly suspicious.

[76] On the basis of credibility alone, Mr Dreyer argued, the Court could find that the evidence adduced on behalf of the plaintiff was insufficient to discharge his burden of proof on a balance of probabilities.

[77] The degree of proof required by the civil standard is said to involve a comparative rather than a quantitative test.³¹ This has been formulated by Lord Denning as follows:

"It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not."³²

[78] "Credibility of Witnesses" was the topic of the *1984 Olive Schreiner Memorial Lecture* delivered by Judge H C Nicholas.³³ The learned judge dealt succinctly with factors a court takes into account in assessing witness credibility, focussing on veracity, reliability and probability.

[79] On veracity and contradictions such as those which peppered the plaintiff's testimony, the learned Judge said the following:

"A witness is proved to be in error where his statements are contradicted by the proved facts or where he is guilty of self contradiction. Where he has made contradictory statements, since both cannot be correct, in one at least he must have spoken erroneously. Yet error does not in itself establish a lie. It merely shows that in common with the rest of mankind the witness is liable to make mistakes. A lie

³¹ Hoffmann and Zeffert, supra n 4 at 526.

³² Cited in Hoffmann and Zeffert supra n 4 at 526.

³³ Nicholas "Credibility of Witnesses" Olive Schreiner Memorial Lecture, 24 August 1984, published in 102 *SA Law Journal* (1985) 32.

requires proof of conscious falsehood, proof that the witness has deliberately misstated something contrary to his own knowledge or belief.”³⁴

[80] On the point that human beings are liable to make mistakes, Judge Nicholas quotes Dr William Paley, an eighteenth Century philosopher:

“I know not a more rash or unphilosophical conduct of the understanding than to reject the substance of a story by reason of some diversity of the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. This is what the daily experience of the courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression on the minds of the Judges. On the contrary a close and minute agreement induces the suspicion of confederacy and fraud.”³⁵

[81] There is no proof of conscious falsehood on the part of plaintiff or his witnesses. In order for me to reject plaintiff’s evidence, more is required than the pointing to contradictions; there must be proof that these contradictions were the result of deliberate and conscious falsehoods. Defendant furnished no such proof. In the absence of proof of deliberate fabrication I cannot find that the plaintiff’s witnesses were mendacious and reject their evidence on this basis. Their contradictions are of such a nature that they are in all likelihood the result of honest mistake.

[82] Where there is proof of a witness’s mendacity on one or more occasion, this is not a ground for rejecting the witness’s testimony in its entirety. The maxim *falsus in uno falsus in omnibus* (false in one thing, false in all) has been rejected in South African law as unreliable and illogical.³⁶ Wigmore has said of the maxim:

“It is untrue to human nature. It is not correct that a person who tells a single lie is therefore necessarily lying throughout his testimony, nor that there is any strong probability that he is so lying. The probability is to the contrary.”³⁷

Consequently:

“All that can be said is that a witness whose evidence has been shown to be deliberately false on one point is liable to be regarded with suspicion and distrust, and the trier of fact *may* (not *must*) conclude that his evidence on other points cannot safely be relied upon”³⁸

³⁴ Ibid at 32.

³⁵ Ibid at 42.

³⁶ *R v Gumede* 1949 (3) SA 749 (A) at 756; *S v Oosthuizen* 1982 (3) SA 571 (T) at 577A-B.

³⁷ Cited in Nicholas supra n 33 at 33.

³⁸ Nicholas supra n 33 at 35.

And:

Faith in a witness's testimony can be partial or fractional; evidence may be good in parts."³⁹

[83] Therefore, even if I were to assume in defendant's favour that the contradictions in plaintiff's case were the result of deliberate fabrication, this would not entitle me to reject automatically all of plaintiff's evidence as untrue. I might well still find that certain evidence can safely be accepted. Of importance in this regard is the fact that the "material contradictions" referred to by Mr Dreyer in plaintiff's evidence did not relate to the essential elements of his case. Indeed, "material" is something of a misnomer, the contradictions being, more accurately, peripheral to plaintiff's case.

[84] The contradictions in plaintiff's case, are insufficient to impugn fatally the credibility of the witnesses for the plaintiff or to preclude proof of the plaintiff's case on a balance of probabilities. The plaintiff rose to the biggest challenge he faced: proving compliance with the definition of labour tenant, especially the "second generation" requirement, that his grandparents were labour tenants. The plaintiff and his uncle, Mr Buthelezi corroborated each other on this crucial and irrefuted piece of evidence. There were no contradictions in the evidence led by plaintiff to establish compliance with paragraphs (a), (b) and (c) of the definition of labour tenant. As this testimony remains unshaken, great store cannot and ought not to be placed on contradictions in non crucial evidence.

[85] As Judge Nicholas observes:

"The question is not whether a witness is wholly truthful in all that he says, but whether a court is satisfied, beyond a reasonable doubt in a criminal case, or on a balance of probabilities in a civil matter, that the story which the witness tells is true in its essential features."⁴⁰

[86] There was in my view nothing in the demeanour of the witnesses for the plaintiff that gave cause for concern. It is accepted in South African law that demeanour is a fallible guide to credibility and that in the absence of striking indications, great significance should not be attached to it.⁴¹ It is further accepted in our law that the limited value of a finding on demeanour becomes even less where an interpreter was used.⁴² As Judge Nicholas cautioned:

"It is clear that where evidence is given through an interpreter, findings on demeanour are likely to rest on unsafe ground."⁴³

³⁹ Nicholas supra n 33 at 35.

⁴⁰ Nicholas supra n 33 at 36.

⁴¹ Schwikkard, Skeen and van der Merwe *Principles of Evidence* 1 ed (Juta, Cape Town 1997) at 377; Hoffmann and Zeffertt supra n 4 at 610.

⁴² See for example *S v Malepane* 1979 (1) SA 1009 (W) at 1016H-1017A and *R v Dhlumayo* 1948 (2) SA 677 (A).

⁴³ Nicholas supra n 33 at 36.

[87] This is apposite to the present case where plaintiff's witnesses testified through an interpreter in court and possibly also in legal consultations.

[88] I am satisfied on a balance of probabilities that the story which plaintiff tells is true in its essential features. After careful consideration of the evidence and arguments, in keeping with Lord Denning's formulation of the civil standard of proof, I am able to say about the evidence for the plaintiff "I think it more probable than not".

Continuation of labour tenancy contract from Mr Buhrman to defendant

[89] It emerged under cross examination of the plaintiff, that for a period after the farm had been sold by Mr Buhrman, (its owner prior to defendant), and before the defendant had taken occupation, one Bertus van Zyl, who plaintiff identified as the father in law of Buhrman, occupied the farm, and plaintiff took orders from him.

[90] Mr Dreyer argued that the plaintiff was not employed by the defendant as a labour tenant as the labour tenancy contract had not continued from the previous owner, Mr Buhrman, to the defendant. The continuation thereof, he submitted, was interrupted by a novus actus interveniens in the form of Bertus van Zyl's occupation of the farm for a period before the defendant's ownership. Because the plaintiff, in Mr Dreyer's view, had worked for Van Zyl prior to his working for the defendant, the defendant could not have taken over the labour tenancy contract which the plaintiff had originally entered into with Buhrman.

[91] In order to establish that the labour tenancy contract was discontinued by the presence of Van Zyl, more than just an assertion in argument by the defendant that Van Zyl introduced a novus actus interveniens, was required. The defendant was required to show by way of evidence that the labour tenancy contract did not pass onto him. This he could have done by adducing evidence to show that when plaintiff started working for him, he entered into a contract with plaintiff, whereby plaintiff was employed as a farmworker as opposed to a labour tenant. Short of such evidence, I cannot accept the argument that the mere occupation of the farm by Van Zyl, and his authority over plaintiff, meant that plaintiff's labour tenancy did not continue to the defendant.

[92] All the evidence points to the defendant having purchased the farm with the knowledge of plaintiff's employment thereon, and plaintiff's contract with the previous owner passing together with the land to defendant. The fact that the defendant might have varied the labour contract by introducing a cash wage and reducing plaintiff's livestock, factors dwelt upon at some length by Mr Dreyer in argument, does not take the matter much further, and certainly does not provide adequate proof that the labour tenancy contract did not continue during defendant's employment of the plaintiff.

[93] Also, by merely stating in cross examination that he paid the plaintiff R400 per month; by disputing the income the plaintiff derived from his land and livestock, and by simply denying plaintiff's labour tenancy, without proffering alternative evidence, the defendant failed to show that there was a contract of employment in terms of which plaintiff was *paid predominantly in cash* in return for his labour, and not predominantly in the right to use and occupy the land, and

that he was obliged to perform his services personally. In short the defendant failed to prove that plaintiff was a farmworker, as defined in the Act.

[94] The defendant moreover neither suggested in cross examination nor led evidence to show that the plaintiff was not employed as a labour tenant by Buhrman. In the absence of the requisite evidence, I accept that there was a labour tenancy contract between Buhrman and the plaintiff and that this contract persisted and continued into the era when the plaintiff was employed by the defendant.

[95] Ms Kathree argued that the inference to be drawn from the defendant's failure to lead evidence is that there was no contract of employment as a farmworker. Accordingly, per section 2(5) of the Act, the plaintiff must be presumed to be a labour tenant.

[96] In *Supreme Services Station v Fox and Goodridge Pty Ltd*⁴⁴ Beadle CJ stated:

“If the defendant closes his case without giving evidence, in a proper case, an inference may always be drawn against him from his failure to give evidence contradicting that of the plaintiff ... the fact that the defendant has not given evidence at all to refute what appears in the plaintiff's evidence is often a cogent factor to be taken into account.”

[97] The defendant's election not to lead evidence because he believed the onus had not shifted to him was indeed a cogent factor. The onus to prove plaintiff was a farmworker had shifted to defendant, who failed to discharge it. Defendant's submissions by way of pleadings and his version of events as put to the plaintiff under cross examination do not of course amount to evidence. Defendant's election not to adduce evidence in support thereof or in rebuttal of plaintiff's evidence means that the evidence plaintiff has put into his pan of the balance of probabilities is the only evidence before me. I have found such evidence to be credible and it is the evidence which I accept.

[98] Accordingly I am of the view that the evidence adduced by the plaintiff was sufficient to discharge his onus, and the plaintiff has succeeded in proving compliance with paragraphs (a), (b) and (c) of the definition of labour tenant and he accordingly is eligible for reinstatement under section 12.

Quantum

[99] The plaintiff argued that he was entitled to the full replacement value of the eight structures demolished. He led evidence to show that the materials for these structures were provided and purchased solely by himself and to prove their replacement value. Ms Kathree contended that the plaintiff, having built these unsophisticated structures himself, was the best person to give evidence as to their replacement value and that he had done so from his personal knowledge and experience. She said some of the materials used did not have English terms, for

⁴⁴ 1971 (4) SA 90 (RAD) at 93.

example “amakappa” which only a labour tenant would know about. She stated moreover that no expert had been called, as none had been there to see what had been demolished.

[100] Ms Kathree contended that plaintiff had demonstrated that he had suffered damages totalling approximately R63 000⁴⁵ and that in accordance with *Hersman v Shapiro*⁴⁶

“ where the best evidence has been produced ... a court must use it and arrive at a conclusion based on it”

Ms Kathree relied also on the cases of *Enselin v Meyer*;⁴⁷ *SM Goldstein & Co (Pty) Ltd v Gerber*⁴⁸ and *Lazarus v Rand Steam Laundries (1946) (Pty) Ltd*.⁴⁹

[101] Mr Dreyer called for the rejection of the evidence on quantum as being unreliable and stated that quantum wise the plaintiff had failed to prove his claim. The better and best evidence, he said, would have been that of an expert as the determination of replacement value required a degree of actuarial calculation projected back to 1982 values.

[102] The plaintiff’s evidence on quantum was far from satisfactory and the court had great difficulty understanding the basis upon which he arrived at certain values. I do not believe he was the best person to give evidence on the replacement value of the unsophisticated structures which had belonged to him, given his ineptitude at determining values and the precise nature of the calculations involved. Perhaps the best evidence would have been, as Mr Dreyer suggested, that of an expert. Whilst there may well be instances where a non-expert is the best person to testify

⁴⁵ Plaintiff proffered no explanation as to why this was less than the amount of R67822 sought in his statement of claim.

⁴⁶ 1926 TPD 367 at 379 in which the following passage was quoted with approval:

“Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based on it.”

⁴⁷ 1960 (4) SA 520 (T) in which Galgut J stated at 523:

“Nevertheless where there is evidence that damage is caused a court will make some assessment on the material before it even if the damage cannot be computed exactly . . . A plaintiff is, however, expected to lead evidence which will enable an accurate assessment to be made if such evidence is available.”

⁴⁸ 1979 (4) SA 930.

⁴⁹ 1952 (3) SA 49 T.

to the value of structures, the case in point is not one. The following dicta of Gildenhuys J in *Mahlangu v De Jager*⁵⁰ is apposite to the plaintiff's testimony on quantum:

"The respondent does not, however, indicate how she has determined the value of R10 per month per head of cattle or R40 per month for the right of occupation, nor does she allege that she has any expert knowledge in making such determinations. Although suitably qualified persons other than valuers will be permitted to give valuation evidence, unmotivated determinations of what something is worth, especially by a witness who does not disclose any qualifications to make such determinations, are of no evidential value."

[103] Whilst I accept on plaintiff's evidence that he owned eight structures which were demolished I am unable to arrive at a replacement value of these structures on the basis of such evidence. In the circumstances I am of the view that it would be appropriate and fair to accord plaintiff the opportunity to present to the court within a specified period, a price list of materials required to rebuild the demolished structures, whereupon a conference will be convened at which further proceedings pertaining to the determination of compensation will be decided.

[104] I believe I am authorised to deal with the issue of quantum in this manner, somewhat differently from the approach customarily adopted in adversarial proceedings, which at this point might result in the failure of the plaintiff's case for compensation. This is so by virtue of the inquisitorial powers permitted me under section 32(2)(b) of the Restitution of Land Rights Act.⁵¹ The section provides:

"Notwithstanding anything to the contrary in this Act or in the rules [of the Court] . . .

(b) the Court may conduct any part of any proceedings on an informal or inquisitorial basis."

[105] That section is in turn one of the sections of the Restitution of Land Rights Act expressly incorporated into the Land Reform (Labour Tenants) Act to apply to the Court when performing its functions under the latter Act.⁵² I make the following comments on the meaning to be attached to section 32(3)(b) and the concept of proceedings conducted on an "inquisitorial basis" in particular.

[106] The role which a judge plays in the proceedings is the main determinant of whether a procedure can be said to be adversarial or inquisitorial. The traditional conception of the adversarial model is expounded by Lord Denning as follows:

"The judge's part . . . is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him

⁵⁰ *Mahlangu v De Jager* supra n 2 at 243 B-D.

⁵¹ No 22 of 1994.

⁵² See section 30(1) of the Act.

well. Lord Bacon spoke right when he said that: ‘Patience and gravity of hearing is an essential part of justice and an over-speaking judge is no well-tuned cymbal’⁵³

[107] The inquisitorial system rejects the notion of a passive judge. On the contrary the judge is expected actively to undertake a comprehensive investigation into the facts surrounding the dispute. He or she need not rely solely on the evidence adduced by the parties. His or her role is to find the objective or material truth. The dismissal of a case on the basis of inadequate evidence would be seen to be a failure on the part of the judiciary. The judge must manage the case from the outset to ensure that it is run efficiently. He or she interviews the parties separately at an early stage of the proceedings, discusses with them points they need to consider, advises them of their rights and duties, determines what witnesses are to be called (and this may include witnesses the judge wishes to call) and what documentary evidence is required, makes settlement proposals, and decides when the matter is ripe for hearing. At the hearing the judge plays an active role in the presentation of evidence and the questioning of witnesses and determines the order in which they testify.⁵⁴

[108] Increasingly there is now recognition in those countries employing the adversarial system of its shortcomings. For a number of reasons, the inactive role of the court allows legal proceedings to be drawn out interminably. The adversarial system relies heavily on the assumption that the contesting parties will be legally represented, and by lawyers of equal competence. Where this is not so there is a serious risk of the result reflecting the relative social and financial strength of the parties and not the true merits of their respective cases.⁵⁵

[109] It was no doubt in recognition of problems like these that section 32(3)(b) was introduced. In fact many courts in the Anglo American adversarial tradition, including our own High Courts⁵⁶ have already begun to take steps to require a more active role on the part of the judiciary, often in the absence of any statutory compulsion to do so.⁵⁷

[110] The honourable Mr Justice D A Ipp of the Supreme Court of Western Australia has identified the following areas where elements of the inquisitorial system can usefully be engrafted onto an adversarial system:⁵⁸

⁵³ *Jones v National Coal Board* 1957 (2) All ER 155 (CA) at 59D - H.

⁵⁴ See generally Cappelletti and Jolowicz *Public Interest Parties and the Active Role of the Judge in Civil Litigation* (1975) and Van Loggerenberg *Hofbeheer en Partybeheer in die Burgerlike Litigasieproses: 'n Regshervromingsondersoek* (unpublished LLD thesis, University of Port Elizabeth 1987) especially at 43-50

⁵⁵ Cappelletti and Jolowicz *ibid* at 248-249.

⁵⁶ See rule 37A of the Uniform Rules of the Supreme Court.

⁵⁷ See generally Cappelletti and Garth “Increased Judicial Control Over the Unfolding of Proceedings” in (Vol XVI) *International Encyclopedia of Comparative Law* (1984) at 255.

⁵⁸ Ipp “Judicial Intervention in the Trial Process” 69 *Australian Law Journal* (1995) 365 at 368.

1. The overall management of the trial with a view to reducing its length and arriving at a just decision;
2. Directing the exchange of witness statements;
3. Assisting the parties in the determination of issues (at any stage of the proceedings) including proposing points the parties themselves have not considered.
4. Assisting the unrepresented party;
5. Assisting the party represented by an incompetent lawyer;
6. Questioning witnesses more extensively to get to the bottom of a matter (but not unfairly or in a way which prejudices either party);
7. Calling witnesses of its own accord to arrive at the truth of a matter;
8. Intervening in cross-examination where this is justified;
9. Intervening where one of the parties employs delaying tactics.

[111] Section 32(3)(b) would, in my view, justify this Court in using its discretion to intervene in any of the ways contemplated in this list, where this is in the interests of justice and provided it does not compromise its impartiality or affect either of the parties unfairly. Indeed the Court conceives of its role in this way: in its questioning of parties in court, and in its rules which mandate the early allocation of a matter to a judge, who then, primarily through the mechanism of the pre-trial conference, plays an active role in the management of the matter. The present case was conducted in precisely such a manner.

[112] A case such as this, in which plaintiff's loss is established, but inadequate evidence of quantum is placed before the court, in my view lends itself to the employment of the inquisitorial powers under section 32(3)(b). I believe the court's discretion to act inquisitorially in this instance would be well exercised in arriving at an objective value of compensation in the interests of justice. This position falls comfortably within the ambit of area three of Justice Ipp's approach above.

[113] Mr Dreyer argued also that there was no merit in the claim for quantum in the light of the common law principle of *jus tollendi* in terms of which he alleged the owner of the land acquires ownership of any attachments built thereon unless there is a clear contractual relationship or agreement to the contrary. Mr Dreyer's characterisation of *jus tollendi* is not wholly accurate. In the *Law of South Africa* *jus tollendi* is referred to as the possessor's right, albeit not absolute and subject to the court's discretion, to remove improvements from property:

“Where improvements can be removed without injury to the property, the owner of the property may be allowed to waive his enrichment in which case the possessor has to be satisfied with the removal of his

material. Alternatively the owner may be allowed to retain the attachment on payment to the possessor of the value the material would have after separation.”⁵⁹

[114] Removal of and compensation for improvements by the possessor are reconcilable with the principle of *jus tollendi*, I believe, and need not depend on any prior contractual stipulations between the parties, as suggested by Mr Dreyer.

[115] Mr Dreyer argued also that in terms of the common law, compensation could only be given for necessary improvements which enhance the value of the property. The structures were built by plaintiff before defendant bought the farm. Accordingly the defendant did not have to compensate the plaintiff for improvements which predated his arrival.

[116] I cannot find any merit in either of these arguments. The doctrine of *jus tollendi* imposes limitations not found in sections 10(2) and 12(2)(c) of the Act. These sections clearly envisage ownership of structures by labour tenants in allowing compensation for and replacement value of structures and improvements. The test is not what the defendant has gained, but rather what the plaintiff has lost. The Act in permitting compensation at section 10 clearly supercedes the common law position regarding improvements.⁶⁰

Compensation/damages

[117] Mr Dreyer argued that the plaintiff was claiming not compensation but damages which the Land Claims Court lacks jurisdiction to grant. He based this argument on the wording of sections 7 and 10 of the Act. Section 7, deals with orders for eviction granted by the Land Claims Court. Section 10 deals with the effect of such eviction orders. Section 10(1)(a) provides that:

“10. Effect of order for eviction -

(1) If the Court makes an order for eviction in terms of section 7 -

(a) the Court shall order the owner to pay compensation to the extent that it is just and equitable ...”

[118] This provision, argued Mr Dreyer, makes it clear that the Land Claims Court may award compensation only where *it* has granted an eviction order. This, he said is rendered clear by the use of the words “the Court” as opposed to “any court” or “any other process” used elsewhere in the Act. Only if “the Court” (the Land Claims Court), grants an eviction order is “the Court” (the Land Claims Court), empowered to award compensation. The plaintiff in this case was not evicted by the Land Claims Court and therefore could not claim compensation in it. The plaintiff

⁵⁹ Lotz “Enrichment” in Joubert (ed) *LAWSA 2 ed* (Butterworths, Durban 1996) at para 98.

⁶⁰ Devenish *Interpretation of Statutes* 1ed (Juta, Cape Town 1992) at 160 cites Wessels J in *Seluka v Suskin & Salkow* 1912 TPD 258 at 265:

“However if it is categorically clear from both the language and the import of the statute that it is designed to alter the common law, ‘then full effect must be given to the object’.”

had only a claim for general damages which he should have pursued in a court with appropriate jurisdiction.

[119] There is no merit to this argument. Section 12 does not contemplate the reinstatement of persons evicted by the Land Claims Court, as it is applicable only to persons who were evicted between 2 June 1995 and the date of the commencement of the Act - 22 March 1996⁶¹, namely persons whose evictions predated the Act. Section 12(2)(c)'s reference back to section 10 is, I believe, not a reference to that section's eviction order provisions,⁶² but to its just and equitable compensation provisions.⁶³

[120] The compensation claimed by the plaintiff is accordingly not general damages but compensation within the ambit of section 12(2)(c) which the Land Claims Court enjoys jurisdiction to grant.

[121] Regard being had to all of the above, I find that the plaintiff was a labour tenant on 2 June 1995 on the farm Groothoek. and that he is entitled to be reinstated to the said farm. subject to the terms and conditions which originally applied to his labour tenancy. I have not attempted to make any findings on what those terms and conditions were. In the event of a dispute pertaining to such terms and conditions arising, any party may apply for the reinstatement of this matter on the same papers to determine such terms and conditions.

[122] I turn now to the question of costs. The Land Claims Court has a wide discretion in dealing with costs.⁶⁴ Viewing the merits and equities of this case as a whole, I think that the discretion granted to me to make such order for costs as I deem just, would be properly exercised if no order for costs is granted.⁶⁵

[123] The following order is made:

1. plaintiff is declared a labour tenant for the purposes of the Land Reform Labour Tenants Act 3 of 1996;
2. plaintiff is reinstated as a labour tenant to the farm Groothoek, subject to the terms and conditions which originally applied to his labour tenancy;
3. plaintiff is granted leave to submit to the court within one month of date hereof, a list of materials required to rebuild the structures which were demolished and, the cost thereof. Upon receipt of such list the court will call a pre-trial conference to determine further proceedings;
4. There is no order as to costs.

⁶¹ By virtue of ss 12(1)(a) and (b).

⁶² Section 10(1).

⁶³ Section 10(2).

⁶⁴ Section 35(2)(g) of the Restitution of Land Rights Act No 22 of 1994. See also *Hlatswayo and others v Hein* (1997) 4 ALL SA 630 LCC at 640B

⁶⁵ See *Hlatswayo v Hein* ibid at 641.

JUDGE Y S MEER

I agree

JUDGE F BAM

**MR C A YOUNG
ASSESSOR**

Heard on: 3 June 1998

Handed down on: 3 August 1998

For the applicant:

Ms F Kathree instructed by *Legal Resources Centre, Johannesburg.*

For the defendant:

Mr Dreyer instructed by *Buitendags Inc.*