

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 19 February 1999  
before **Bam P** and **Dodson J**

**CASE NUMBER: LCC75/98**

In the case of:

**K M DE JAGER & SONS**

Applicant

and

**ELFAS MANDLA KUMALO**

Respondent

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## JUDGMENT

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### **DODSON J:**

#### Introductory

[1] The applicant is a partnership which conducts a farming business on the farm Rehna in the district of Kliprivier, Kwazulu-Natal. The partners are brothers. I will refer to them as “C” and “K”. The farm Rehna is owned by C and is in fact made up of four separate farms held under a single deed of transfer. I will refer to them collectively as “the farm”. The respondent resides on the farm with his family and previously provided labour to the applicant.

[2] On 20 June 1997, the applicant issued an application for the eviction of the respondent, his family and his possessions, including his livestock, from the farm. The application was issued out of the Natal High Court. The applicant also sought a declaratory order to the effect that on 2 June 1995 the respondent was not a labour tenant, alternatively, not an associate, as defined in the Land Reform (Labour Tenants) Act<sup>1</sup> (I will refer to it as “the Labour Tenants Act”). On 15 October 1997, the respondent filed an answering affidavit in the Natal High Court in which he averred, amongst other things, that he was indeed a labour tenant as defined in the Labour Tenants Act. On 21 November 1997, the Labour Tenants Act was amended by the incorporation

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1 Act 3 of 1996.

of section 13(1A).<sup>2</sup> Section 13(1A) requires a magistrate's court or a High Court to transfer a matter to this Court where it is called upon to interpret or apply the Labour Tenants Act, and no oral evidence has been led. By order of the Natal High Court on 6 May 1998, the matter was transferred to this Court pursuant to section 13(1A) of the Labour Tenants Act and costs were reserved for decision by this Court. The matter was then argued before this Court on 19 February 1999.

### Factual background

[3] The respondent provided labour to the applicant on the farm from approximately October 1988. He has since that time and continuously up until the present time resided on the farm. Whilst he provided labour for the applicant, his residence on the farm was with the consent of the applicant. He was allowed to graze cattle and goats and cultivate a crop. There are factual disputes regarding some of the finer details of the grazing and cropping and about the contractual basis upon which it was allowed. The respondent was also remunerated in cash and kind for his labour. Again there are some factual disputes about this. I will revert to the factual disputes later when I deal with the question of whether or not the respondent qualifies as a labour tenant as defined in section 1 of the Labour Tenants Act.

[4] During October 1996, there was a dispute between the respondent and K. The upshot of this was that the respondent stopped working until 11 November 1996. He started working again on 11 November 1996, but the relationship thereafter was a fraught one. He was ultimately dismissed on 11 December 1996 after a disciplinary enquiry and an appeal before a neighbouring farmer. The reason for the dismissal was an alleged further instance of absenteeism. The respondent referred a dispute to the Commission for Conciliation, Mediation and Arbitration in terms of the Labour Relations Act<sup>3</sup> on the basis of an allegation that he had been unfairly dismissed. Settlement negotiations took place under the auspices of the Commission resulting in the signature of a "settlement agreement" which reads as follows:

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2 Section 34 of the Land Restitution and Reform Laws Amendment Act, 63 of 1997.

3 Act 66 of 1995.

“IN THE DISPUTE BETWEEN

General United Workers Union of South Africa

APPLICANT PARTY

and

K M De Jager en Seuns

RESPONDENT PARTY

THE UNDERSIGNED PARTIES RECORD THE SETTLEMENT OF THEIR DISPUTE IN THE FOLLOWING TERMS:

1. The respondent hereby agrees to the following:

Pay the applicant R300,00 (Three Hundred Rand) in cash on 5/2/97.

2. The applicant will have 90 days from date of dismissal 7/12/96-7/3/97 to evacuate all his belongings including farm animals off the respondent's farm.

2.1 This being in full and final settlement of the said dispute.

2.2 No variation of this agreement will be legally binding unless reduced to writing.

THIS DONE AND SIGNED AT DUNDEE ON THE 5 DAY OF FEBRUARY 1997.”

The agreement is then signed with the respondent's mark in the form of a cross which was witnessed by two witnesses. It is also signed on behalf of the applicant.<sup>4</sup>

[5] The respondent did not vacate the farm in accordance with the settlement agreement. Instead he maintains that he is not bound by the agreement because he was unduly influenced by his trade union representative to sign it. He also maintains that his signature of the agreement was the result of a knowingly false statement made to him by K. In the alternative, he says that the agreement constitutes a waiver of his rights as a labour tenant as contemplated in section 3(6) of the Labour Tenants Act, which requires the approval of the Director-General in terms section 3(7)(a) of the Labour Tenants Act before it is of any force or effect, and no such approval has been provided. The respondent says he was unaware of his rights as a labour tenant at the time. He says that subsequent to his signing of the agreement, he has been advised of his rights generally and as a labour tenant. On this basis he refuses to vacate the farm.

#### Is the Respondent a Labour Tenant?

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4 In the proceedings before the Commission for Conciliation, Mediation and Arbitration, the applicant in this case was the respondent and the respondent in this case was the applicant.

[6] A labour tenant is defined in the Labour Tenants Act as follows:

“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;”<sup>5</sup>

A farmworker is defined as follows:

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

- (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 land; and
- (b) he or she is obliged to perform his or her services personally;”<sup>6</sup>

[7] In order to qualify as a labour tenant, a person must qualify cumulatively with paragraphs (a), (b) and (c) of the definition of that term.<sup>7</sup> If one then applies the definition to the facts as alleged by the respective parties, it is common cause that the respondent satisfies paragraph (a) of the definition in that he resides on the farm.

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5 Section 1.

6 Ibid.

7 *Ngcobo and Others v Salimba CC* and *Ngcobo v Van Rensburg*, as yet an unreported decision of the Supreme Court of Appeal in case numbers 50/98 and 631/97, 26 March 1999 at paras [4] to [12] at pages 6 to 30. This resolved conflicting decisions from the Land Claims Court, the Transvaal and Natal High Courts. See, for example, *Ngcobo and Another v Van Rensburg and Others* [1997] 4 All SA 537 LCC at 540i to 547d; *Salimba v Ngcobo and Others*, NPD 340/96, 4 November 1997, unreported at 14 to 19 and *Van Niekerk v Nqonwange*, TPD24921/96, 14 August 1997, unreported at 4, in which it was held that compliance with paragraphs (a), (b) and (c) cumulatively was required. Contra *Klopper and Others v Mkhize and Others* 1998 (1) SA 406 (N) at 408 G to I and *Tselentis Mining (Pty) Ltd and Another v Mdlalose and Others* [1997] 3 ALL SA 657 at 661c to 665e, 1998 (1) SA 411 (N) at 415C to 419I.

[8] As far as paragraph (b) is concerned, the respondent says that he did indeed have cropping and grazing rights on the farm and, in consideration of such rights, provided labour to the owner. The applicant admits that he had grazing rights. As far as cropping rights were concerned, the applicant admits that the respondent was allocated an area of two hectares which the applicant ploughed and for which it provided fertiliser. The applicant admits that the respondent provided the seed and maintained and harvested the crops planted in that area. However, the applicant denies that this arrangement amounted to “a right to use cropping land” as contemplated in paragraph (b) of the definition of labour tenant. This denial is devoid of any merit. The applicant’s contribution of ploughing and fertiliser does not detract from the fact that this amounted to “a right to use cropping land”.

[9] However, the applicant further denies that the respondent provided labour in consideration for the grazing rights (and, by implication, the cropping rights which I have found to have existed). The applicant contends that the use of grazing and cropping land by the respondent was a mere “vergunning”. There is thus a dispute of fact in relation to this issue which, along with other factual disputes, the applicant suggests should be referred to oral evidence. The approach to be adopted in the face of such a dispute was set out by this Court in the matter of *Dhlahla and Others v Erasmus*.<sup>8</sup>

“In application proceedings, if factual disputes arise from the papers before the Court, the Court must follow the approach described by Corbett JA (as he then was) in the well-known case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, as follows:

“[W]here in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact ... If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court ... and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so

far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.’

If, on the papers before the Court, the probabilities overwhelmingly favour a specific factual finding, the Court should take a robust approach and make that finding. The same applies when a denial by a respondent of a fact alleged by an applicant is insufficient to give rise to a real, genuine or *bona fide* dispute of fact. This approach should, however, be followed with some circumspection. The Court should not lightly settle a factual dispute solely by weighing up the probabilities emerging from the papers, without the advantage of *viva voce* evidence. In the matter of *Kalil v Decotex (Pty) Ltd and Others* the Court gave the following guidelines:

‘Naturally, in exercising this discretion the Court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent.’

[10] Applying the above extract from the *Dhlahdla* case, one must, before referring the matter to oral evidence, consider where the balance lies as far as the probabilities are concerned. The applicant seeks to explain its contention regarding the status of the grazing and cropping by the respondent in K’s replying affidavit as follows:

“4.12 Daar word met respek aangevoer dat die opwaartse aanpassing van die kontantloon van die Respondent met verloop van jare, in ooreenstemming is met die normale diensverhouding van ’n plaaswerker, in teenstelling met die diensverhouding van ’n huurbeider, wat juis bewonings,-aanplantings en beweidingsregte verkry, as vergoedende teenprestasie vir dienste gelewer. Daarbenewens is vergoeding aan plaaswerkers in die vorm van ’n kontantloon, tesame met rantsoene, nie vreemd of ongewoon in die landboubedryf nie.

4.13 Die bewering dat die Respondent oorwegend (predominantly) vergoed is, in ’n vorm anders as ’n kontantloon of *in natura* vergoeding met kontantwaarde, word ontken en word met respek aangevoer, dat die Respondent poog om ’n gekunstelde regstegniese betekenis te heg, aan gebruiklike menslikheidsvergunnings, wat eie is aan die landboubedryf.

4.14 Dit word met respek aangevoer, dat vanweë die unieke situasie in die landboubedryf, waar daar op dieselfde plek gewoon en gewerk word, die vergunning om vee aan te hou of vir eie gebruik aanplanting van groente of mielies te doen, gebruiklik is sedert die vroegste tye en nie ’n inherente vergoedingswaarde veronderstel nie.

....

4.16 Dit word uitdruklik aangevoer, dat die boerdery op geen stadium gedurende die dienstermyn van die Respondent, enige vergoedende waarde geplaas het op behuising, hout, water of weiding, wat deur die Respondent benut is nie en is daar ook geen aftrekking teen die kontantloon van die Respondent vir sodanige benutting gemaak nie. Die Respondent poog om deur ’n eensydige waardebeplanning, ’n regstegniese nexus te skep, tussen sodanige gebruiklike vergunning en die vergoeding situasie van ’n huurarbeider, wat in plaas van loon vir gelewerde arbeid,

gebruiksregte geniet vir dienste wat deur homself of iemand anders ten behoeve van hom gelewer word.

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- 4.19 Die boerdery [referring to the applicant] het oor baie jare heen 'n spesifieke beleid gehandhaaf, met betrekking tot die vergunning aan plaaswerkers om beperkte getalle eie vee aan te hou en in die onmiddellike omgewing van die nedersetting, vir eie gebruik aanplanting van groente te doen.
- 4.20 . . . elke plaaswerker as familiehoof, [is] toegelaat om 'n maksimum van 15 beeste en 15 bokke te hou.
- 4.21 Die toegewing ten aansien van die aanhou van eie vee, hou eenvoudig verband met die feit dat die boerdery op relatief intensiewe skaal, boer met vee en daar ten alle tye, gewaak word teen oorbeweiding . . .”

He then refers to and annexes the affidavits of two persons who say that they are fellow farm workers on the farm who confirm, amongst other things, that all the farm workers have an agreement with the applicant to keep a maximum of 15 cattle and 15 goats and that they are not obliged to pay the applicant for this or any other practice associated with their use and occupation of the farm.

[11] In my view, there are the following flaws in the case which the applicant seeks to make out:

- (i) The Readers Digest English-Afrikaans Dictionary gives the following translation for “vergunning”:

“permission, leave, concession, permit, license, tolerance, act of grace, indulgence.”<sup>9</sup>

The HAT<sup>10</sup> defines “vergunning” as “toestemming, permissie of verlof”. Labuschagne and Eksteen<sup>11</sup> include in the definition of “vergunning” “daad van vergun” and define “vergun” as “as guns toestaan, bewillig, verlof gee, toelaat, toestem, veroorloof”. The applicant sought to make out a case that the grazing and cropping by the respondent was pursuant

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9 The Reader’s Digest Afrikaans-Engelse Woordeboek, *English-Afrikaans Dictionary*, Grobbelaar (ed), 6th reprint (Reader’s Digest Association South Africa, Cape Town, 1994).

10 Schoonees et al, *HAT Verklarende Handwoordeboek van die Afrikaanse Taal*, 3 ed (Perskor, Midrand 1994).

11 Labuschagne and Eksteen, *Verklarende Afrikaanse Woordeboek*, 8 ed (J L van Schaik, Pretoria 1993).

to a “vergunning” in the sense of an indulgence or favour on compassionate grounds. Yet this is contradicted by the fact that the applicant also speaks of the grazing rights conferred on each labourer, including the respondent, being in terms of an agreement between the labourer and the applicant. The applicant is at pains to point out that that agreement includes among its terms that the cattle and goats should be restricted to fifteen of each per labourer. An agreement gives rise to enforceable rights. An enforceable right cannot be characterised as an indulgence or favour. It is characteristic of an indulgence or favour that it is at the discretion of the grantor and can be unilaterally revoked. On the applicant’s version this was not the case here. The contractual basis for the grazing was something which this Court took into account in rejecting a similar argument (ie that the grazing was not in consideration for the provision of labour) in the *Dhlahla* case.<sup>12</sup>

- (ii) The cropping and grazing rights were linked to the continued provision of labour by the respondent. This is borne out by the fact that the applicant does not deny that the respondent’s cropping rights came to an end at the end of 1996 which is the time when he stopped providing labour to the applicant.
- (iii) I cannot see the relevance of the applicant’s repeated insistence that he did not require payment or a reduction in wages in respect of the grazing rights and other rights associated with the respondent’s use and occupation of the farm. The fact that he did not require such payment supports the probability that it was the labour that was given in return for those rights. A similar argument was also rejected in the *Dhlahla* case.<sup>13</sup> The assertion that the applicant attached no value to the respondent’s use and occupation of the farm also takes the matter no further. It does not take into account the value which the respondent must have attached to those rights. In any event, the applicant’s insistence on limiting stock numbers and fixing the area for cropping, points to a considered concession of rights to use productive land in return for the services which the labourers could provide.

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12      Supra n 8 at 1075A to G.

13      Supra n 8 at 1075C to D.

- (iv) The main thrust of the applicant's argument was that farm workers were generally allowed to use and occupy the land of their employers only in terms of an indulgence, not as a matter of right and not in return for labour. It seems that we were called on to take judicial notice of this. If one had regard to the nature of the relationship between the applicant and the respondent, so the argument went, the arrangements regarding use and occupation of land by the respondent in this case were typical of those in respect of farm workers generally. Therefore the use of the farm by the respondent for cropping and grazing was also in terms of an indulgence here. The problem with this argument is that no case has been made out that we can take judicial notice that this is the typical arrangement with farm workers. Moreover, the Labour Tenants Act itself, in the definition of "farmworker", contemplates that a person can still be a farm worker even if he or she has rights to use and occupy land in return for the labour which he or she provides.
- (v) It was also suggested that the payment to the applicant of a cash salary which increased over time was something from which one could infer a farm worker relationship of the type referred to in paragraph (iv) rather than a labour tenancy relationship. However, once again, no case has been made out for such an inference to be drawn. The difficulty which the applicant faces, once more, is that the definition of "farmworker" in the Labour Tenants Act also contemplates that a person can be a labour tenant if he or she receives "cash or . . . some other form of remuneration", provided that this does not predominate over the value of the right to use and occupy land.

[12] In the circumstances, I have come to the view that the overwhelming probability is that the respondent's use and occupation of the farm for grazing and cropping was based on rights which he enjoyed in consideration for the provision of labour as contemplated in paragraph (b) of the definition. There is no need to refer the matter for the hearing of oral evidence.

[13] In so far as paragraph (c) is concerned, the respondent says that his father resided on a farm "Skietnek", where he had the use of cropping and grazing land and, in consideration for those rights, provided labour to the owner of that farm. The applicant's response to this as set out in K's replying affidavit was as follows:

“Origens konstituteer die bewering met betrekking tot die beweerde diensverhouding van die Respondent se vader, hoorsê getuienis , maar word die korrektheid daarvan vir die doeleindes van hierdie aansoek aanvaar, by gebrek aan enige kennis tot die teendeel.”

It is further common cause that neither C nor K nor the applicant has ever owned or in any other way been connected with the farm “Skietnek”. At the time that the matter was argued, there were conflicting decisions as to whether or not, on those facts, the respondent complied with paragraph (c) of the definition. In the decision of the Natal High Court in *Salimba v Ngcobo*<sup>14</sup> Hurt J held that -

“in relation to requirement (c), he must show that the farm on which his parent or grandparent resided and had usage rights in return for labour is or was a farm belonging to the owner of the farm referred to in requirement (b) or to such owner’s predecessors in title”.

On that basis, which is the one for which the applicant contended, the respondent would not comply with the requirements of paragraph (c). However, this Court had held in the matter of *Zulu and Others v Van Rensburg and Others*<sup>15</sup> that there was compliance with paragraph (c) if the parent or grandparent resided or had resided on any farm whatsoever and had had cropping or grazing rights in return for the provision of labour to the owner of the farm where he or she so resided or had resided. This Court did not require that the owner referred to in paragraph (c) should be the owner of the farm referred to in paragraph (b) or his or her successor or predecessor in title.<sup>16</sup> This Court followed that decision in subsequent cases.<sup>17</sup>

[14] As I have indicated, since this matter was argued, judgment has been handed down by the Supreme Court of Appeal<sup>18</sup> in relation to an appeal which was pursued against the decision of

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14 Unreported case no 340/96 dated 4 November 1997.

15 1996 (4) SA 1236 (LCC).

16 Ibid at 1257C to 1258A.

17 *Mokwena v Marie Appel Beleggings CC and Another*, LCC89/98, 9 February 1999, [1998] JOL 4151 (LCC), internet web site address: <http://www.law.wits.ac.za/lcc/1999mokwenasum.html> at para [16]; *Dhladhla and Others v Erasmus*, supra n 8 at 1078C to 1079A; *Mlifi v Klingenberg* [1998] 3 All SA 636 (LCC) at 646j to 650c.

18 *Ngcobo and Others v Salimba CC and Ngcobo v Van Rensburg* supra n 7.

Hurt J in the *Salimba* case.<sup>19</sup> Olivier JA, giving the unanimous decision of the Court, held as follows in relation to the proper interpretation to be given to paragraph (c):

“I respectfully disagree with the decision of Hurt J in the court *a quo* that the rights under discussion should have been exercised by the present tenant and his or her parent or grandparent on a farm or farms belonging to the same owner or his or her predecessors or successors.

I am of the view that the change from ‘the’ farm to ‘a’ farm in the definition cannot be ignored, *i. e.* that ‘a’ cannot simply be replaced by ‘the’. The same reasoning which I have applied earlier in this judgment in respect of ‘and’ and ‘or’ would seem to be applicable.

I am not convinced that Hurt J in the court *a quo* was correct in saying that the Act was intended to protect only those who had been bound to a property of the same owner (or his predecessors or successors) by the bonds of a feudal labour tenant system over an appreciable period, nor in saying that it was intended to narrow down the class of persons who would qualify for benefits under the Act.

I believe on the contrary, that the view taken by Dodson J in *Zulu and Others v Van Rensburg*, . . . and the contentions there advanced by him . . . are correct (see also on this point Meskin J in the *Tselentis* - case at 419J - 420B for the correct perspective). The object of the Act was to give a wide and equitable protection to labour tenants without ignoring the rights of the owners of farms. This balance can be achieved more justly and equitably by adhering to the text of paragraph (c) of the definition, rather than by substituting ‘the’ for ‘a’ farm.”<sup>20</sup>

[15] The Supreme Court of Appeal has thus resolved the uncertainty which previously existed on the basis of the broader interpretation of paragraph (c) which had been preferred by this Court. The parties were given the opportunity to file further heads of argument dealing with the impact of the Supreme Court of Appeal’s decision. In the further heads filed for the applicant, it was argued that the formulation adopted in the replying affidavit was based on the decision of Hurt J in the Natal High Court: there was no need to deny the respondent’s version as it did not make out a case on paragraph (c) on the approach adopted by Hurt J. In view of the Supreme Court of Appeal’s decision overturning this, it was suggested in the further heads that this matter too must be referred as a dispute of fact for the hearing of oral evidence and the applicant be allowed to supplement his papers by way of oral evidence. I have the following difficulties with this suggestion:

- (i) there is no dispute of fact on the papers in relation to paragraph (c) which can be referred;

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19 Supra n 14.

20 *Ngcobo and Others v Salimba CC* and *Ngcobo v Van Rensburg* supra n 7 at para [20] at pages 40 to 42.

- (ii) at the time the application was launched, this Court had already adopted a different approach to the definition of paragraph (c)<sup>21</sup> and the applicant's legal representatives must have been aware that a higher court may adopt an approach which differed from that of Hurt J;
- (iii) there was ample opportunity after the referral of the matter to this Court to apply for leave to file supplementary affidavits which dealt with the matter on the basis of this Court's approach;
- (iv) it is difficult to see how the applicant can take the matter any further, if, on its own version, it has no knowledge in regard to these allegations;
- (v) applying the *Dhladhla*<sup>22</sup> case, there seems to me little prospect of oral evidence tipping the scales in the applicant's favour.

In the circumstances, I am able to find, on the papers, that the respondent complies with paragraph (c).

[16] In order to qualify as a labour tenant, the respondent must also not be a "farmworker" as defined.<sup>23</sup> In the *Salimba* appeal, Olivier JA approached this aspect on the following basis:

"Two questions arose : firstly, what stage and what duration in a person's occupancy of land must be considered to determine whether he is a 'farmworker' or a 'labour tenant'? And, secondly who bears the *onus* of proving whether the status in question is that of farmworker or labour tenant?"

As regards the relevant time or period that must determine whether a tenant is a labour tenant as defined in the Act, and thus not a farmworker, several options were debated in this Court. (It should be noted that the amendments to sections 2(5) and (6) of the Act in 1997 are not applicable to the present appeals.)<sup>24</sup>

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21 *Zulu and Others v Van Rensburg and Others* supra n 15 at 1257C to 1258A.

22 Supra n 8.

23 The definition is set out in para [6] above.

24 *Ngcobo and Others v Salimba CC* and *Ngcobo v Van Rensburg* supra n 7 at paras [22] to [23] at page 43. Sections 2(5) and (6) were introduced into the Act by section 33 of the Land Restitution and Reform (continued...)

Olivier JA then referred to the conflicting approaches in the decided cases regarding the first of these questions and went on to hold:

“In my view, the only way to make sense of the confusion reigning in this area is to conclude that the proviso relating to ‘farmworker’ cannot, for the reasons advanced above, refer only to the present time. It must refer to the whole period in respect of which the present occupier, whose occupation is under attack, has been occupying the land in question. The proviso relating to farmworker applied not only to paragraph (a), but also to (b), which also refers to the past.

If one approaches the definition in this holistic or continuous sense, it follows that what has to be established is the predominant quality of occupation over the whole period during which the present occupier has been complying with paragraphs (a) and (b). It may be, as illustrated above, that in respect of some periods, the remuneration paid to the occupier in cash or some other form or remuneration (see paragraph (a) of the definition of farmworker) may have exceeded the value of the right to occupy and use the land; and *vice versa*. What we have to find is the overall sense and value of the occupation. The present time is but one moment in this continuum.

The final question then takes this form : who bears the *onus* to prove or disprove the overall sense and value of the occupation?

Interesting as this question may be, it is not necessary to decide the issue in this appeal. For, assuming that the *onus* is on the Appellants, they have succeeded on a balance of probabilities in proving that they were not farmworkers at the relevant time.

There is an admitted paucity of evidence relating to the value of the rights to residence, grazing and cultivating the land in question, and to the value of the remuneration paid to the Appellants whether in cash or in *specie*. But what is clear is that the Appellants and their forebears had for many years received the absolute minimum in the form of remuneration for their services. It must be overwhelmingly clear that the value of residence, grazing, cultivation and of having a hearth and home of their own, a place where they could find the fundamental security of living and surviving off the land, must have far outweighed the benefits they received as remuneration in cash or in kind.”<sup>25</sup>

[17] When this Court called for further heads of argument in relation to the Supreme Court of Appeal’s decision, the parties were specifically invited to submit argument on:

“Whether the Supreme Court of Appeal’s decision does not bind the Land Claims Court to find that the respondent in case no lcc 75/98 is not a farmworker, regard being had to -

2.1 the approach adopted by the Supreme Court of Appeal at paragraph 28 of its judgment; and

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24(...continued)

Laws Amendment Act supra n 2. In this matter, section 2(6) does not apply because it is a substantive amendment not affecting pending proceedings. Section 2(5) is dealt with in n 26 below.

25 *Ngcobo and Others v Salimba CC* and *Ngcobo v Van Rensburg* supra n 7 at paras [26] to [28] at pages 49 to 51.

- 2.2 a comparison of the remuneration received by the respondent in case no lcc 75/98 and that received by the first appellant in the ‘*Salimba* appeal’ (the remuneration is apparent from the judgment of Hurt J in the court a quo).”

The applicant, in the further heads filed on its behalf, did not respond specifically to this invitation, but (by implication) called for this aspect also to be referred to oral evidence. It was also argued that, given the time when proceedings were launched,<sup>26</sup> the onus lay on the respondent to prove all components of the definition of a labour tenant, including proof that he is not a “farmworker.”<sup>27</sup> However, even if I assume that the applicant is correct in regard to onus, in the light of the approach of the Supreme Court of Appeal in the *Salimba* case as set out in paragraph 16 above, this aspect of the matter can be resolved without referring the matter to oral evidence.

[18] The terms of the relationship between the respondent in the *Salimba* case and the first appellant (who appears to have been the more generously remunerated of the two appellants) are apparent from the judgment of Hurt J in the court a quo.<sup>28</sup> From 1987 until the time when he retired in or about 1991,<sup>29</sup> the first appellant was paid approximately R170,00 per month together with weekly rations comprising 6.25 kg mielie meal, 400g of beans, 500g of sugar, an unspecified amount of salt, two stock cubes and one toilet roll.<sup>30</sup> This remuneration package was

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26 The issue here is whether or not section 2(5) of the Labour Tenants Act applies to these proceedings. It came into force on the 21 November 1997, after these proceedings were launched (supra n 24). It provides as follows:

“(5) If in any proceedings it is proved that a person falls within paragraphs (a), (b) and (c) of the definition of 'labour tenant', that person shall be presumed not to be a farmworker, unless the contrary is proved.”

The answer depends on how the statute should be interpreted. On the basis of some of the decided cases, this depends on whether or not this amendment is procedural only in nature. If it is, then section 2(5) applies in these proceedings despite their having been launched before the amendment. If it is other than procedural, it does not, because of the presumption against retrospectivity. See in this regard Devenish *Interpretation of Statutes* 1 ed (Juta and Co Ltd, Cape Town 1992) at 192 to 194. Given my assumption that the respondent still bears the onus, it is not necessary to decide this issue .

27 As was held by this Court in relation to proceedings in terms of section 12 of the Labour Tenants Act in *Mahlangu v De Jager* 1996 (3) SA 235 (LCC) at 241E to F; [1996] 2 All SA 522 (LCC) at 526b to c.

28 *Salimba v Ngcobo* supra n 14.

29 The time of his retirement is referred to in the Supreme Court of Appeal’s judgment, supra n 7 at para [23] at page 45.

30 *Salimba v Ngcobo* supra n 14 at 25 to 27.

characterised by Olivier JA as “the absolute minimum”. On the other side of the equation, the first appellant grazed between 8 and 17 cattle<sup>31</sup> and also had occupation rights.

[19] Turning to the facts of this matter, it seems to me that the respondent can also be said to have received the absolute minimum in the form of remuneration for his services. Assuming in the applicant’s favour that its version of the respondent’s remuneration must prevail, he received a cash salary of R130,00 at the time of his dismissal at the end of 1996. That was the high water mark, as his salary had, according to the applicant, increased to that level over the years. He received an 80kg bag of mielie meal worth R120,00 per month. That was all he received as of right. There was also provision for a monthly performance-linked incentive bonus consisting of a further R20,00 and a ration pack of unspecified groceries. This comes down to a remuneration package which, for all practical purposes, is not distinguishable from that of the first appellant in the *Salimba* case. However, against this had to be weighed the right, established for a number of years, to graze 15 cattle and 15 goats, to cultivate 2 hectares of maize, which could yield up to 10 bags of mielies, and the right to grow vegetables in the vicinity of his residence. On this side of the equation, which favours labour tenancy status, the respondent was certainly more generously remunerated than the first appellant in the *Salimba* case. Together with this has to be weighed, to use the words of Olivier JA, “the value . . . of having a hearth and home of [his] own, a place where [he] could find the fundamental security of living and surviving off the land”.<sup>32</sup> In the circumstances, I am bound to find that the respondent was not a “farmworker” as the value of his right to use and occupy the farm exceeded the value of his remuneration. The respondent is accordingly found to be a labour tenant.

[20] As I understood the parties’ arguments, it is common cause that if the respondent is a labour tenant as defined in the Labour Tenants Act, no case has been made out in terms of that Act for his eviction. Even if my understanding is incorrect, that is the consequence of my finding. Once a person is a labour tenant, there is a procedure which must be followed<sup>33</sup> and there are certain

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31 *Salimba v Ngcobo* supra n 14 at 28.

32 *Ngcobo and Others v Salimba CC* and *Ngcobo v Van Rensburg* supra n 7 at para [28] at page 51.

33 Section 11 of the Labour Tenants Act.

requirements which must be met<sup>34</sup> before he or she may be evicted. There has not been any attempt to make out a case that these aspects of the Labour Tenants Act have been complied with. It is not necessary in the circumstances to go into the dispute regarding the validity of the settlement agreement referred to in paragraph [4] above. The application accordingly fails.

### Costs

[21] Mr Loots, on behalf of the respondent, sought a costs order against the applicant. This Court has indicated that it will not generally order costs in relation to matters falling under the Labour Tenants Act,<sup>35</sup> unless there are particular circumstances justifying this. No such circumstances have been shown to exist in this case, either in relation to the proceedings in this Court or those in the Natal High Court. I appreciate that in making this decision regarding costs, that part of the proceedings which took place before the Natal High Court is dealt with, in so far as costs are concerned, on a different basis to that ordinarily adopted by the High Courts. In my view this is consistent with the approach which was intended by section 13(1A) ie that where no evidence has been led, the matter is essentially dealt with as though it had been commenced in this Court from the outset. This is also consistent with the intention of the judge who ordered the transfer of the case to this Court and reserved the question of costs for our decision.

### Order

[22] I accordingly order that the application is dismissed.

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34 Section 7 of the Labour Tenants Act.

35 *Ntuli and Others v Smith and Another*, LCC27/99, 3 March 1999, [1999] JOL 4526 (LCC), internet web site address: <http://www.law.wits.ac.za/lcc/1999/ntulisum.html> at para [25]; *Van Zuydam v Zulu* [1999] 2 All SA 100 (LCC) at 112 to 113; *Mahlangu v De Jager* [1999] 1 All SA 691 (LCC) at 705; *Mlifi v Klingenberg* [1998] 3 All SA 636 (LCC) at 664c; *Hlatshwayo and Others v Hein* [1997] 4 All SA 630 (LCC) at 641a to h and at 642f to 644c; *Ngcobo and Another v Van Rensburg and Others* supra n 7 at 548b to h.

**JUDGE A C DODSON**

**BAM P:**

[23] I have read the judgment prepared by my colleague Dodson J in this matter and fully agree with the conclusions arrived at by him. As my reasons for reaching that conclusion differ in certain respects from his, it is necessary to state them briefly. It is also my wish to focus on the Court's jurisdiction pertaining to declaratory orders.

[24] The historical and factual background to this case is set out in Dodson J judgment at para [1] to [5].

[25] As stated, the applicant seeks an order of eviction against the respondent and all the members of his family and the movable assets and livestock belonging to him and his family from the farm Rehna. The respondent's defence to this application is that he is a labour tenant as defined in the Land Reform (Labour Tenants) Act (hereinafter referred to as the Labour Tenants Act).<sup>36</sup> This Act sets various limitations to the granting of an eviction order to the owner of land which are not to be found in the common law. Consequently, the applicant, as a preliminary step to obtaining an eviction order, seeks a declaratory order to the effect that the respondent is not a labour tenant.

[26] This Court has statutory jurisdiction conferred upon it in terms of section 33(2A)<sup>37</sup> of the Labour Tenants Act to determine, upon application from any interested party, whether someone is a labour tenant. This is by no means to suggest that a declaratory order is something to which a party is entitled as of right and for the asking in judicial proceedings.<sup>38</sup> The discretion lies with the Court but it is one to be judicially exercised<sup>39</sup> and there is nothing, in my view, in the instant

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36 Act 3 of 1996.

37 Section 33(2A) was inserted by section 5 of the Land Affairs General Amendment Act, 61 of 1998, which commenced on 28 September 1998.

38 *Herbert Porter & Co Ltd and another v Johannesburg Stock Exchange* 1974 (4) SA 781 (W) at 796E-G.

39 Ibid.

case to make its exercise inappropriate.<sup>40</sup> All the questions of fact and law underlying such relief have been aired as exhaustively as was possible on the papers and on the submissions from counsel.

[27] Since the case in *Ex parte Nell*,<sup>41</sup> the High Court has expanded rather than limited the scope of circumstances that justify an application for a declaratory order. It appears that the only circumstances in which that court will not consider such an application are as follows:

- \* where the applicant does not have an interest and so would not be bound;
- \* where the applicant's interest, if any, is or has become abstract, academic or hypothetical;<sup>42</sup>
- \* where the legal position has already been clearly laid down by statute or been decided upon by a competent court;<sup>43</sup>
- \* where the court, by making a declaratory order would usurp the functions of an inferior tribunal or in a roundabout way assume a jurisdiction expressly reserved for the Constitutional Court;<sup>44</sup> or
- \* where the order would interfere in the administration of criminal justice.

None of the above are applicable to the case before us. On the contrary, there is an existing dispute in the present case which clearly impacts on existing, future and contingent rights and obligations of the parties and on the consequential relief to be claimed by either of the parties depending on the declaratory order. It was established authority in the High Court a decade before

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40 Ibid.

41 1963 (1) SA 754 (A).

42 See, for example, *Ex parte Mouton and Another* 1955 (4) SA 460 (A); *Tri-Cor Industries (Pty) Limited v Chairman of the Mpumalanga Tender Board and Others* 1997 (4) All SA 414 (T) at 420; *J T Publishing (Pty) Ltd v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) at 525.

43 Erasmus, *Superior Court Practice*, Service 8 (Juta & Co Ltd, Cape Town 1997) at A1-34.

44 *Masuku and Another v State President and Others* 1994 (4) SA 374 (T).

*Ex parte Nell*, that a declaratory order could be sought and granted in advance of the date when a cause of action arose for consequential relief such as, for example, ejection.<sup>45</sup>

[28] It is accordingly my view that there is compelling authority that in the judicial exercise of its discretion, the High Court has progressively been expansive and that this is a trend to be welcomed and encouraged even further in a court such as ours.

[29] In cases like the present where the determination of the status of one of the parties is absolutely essential and in the interests of all, a declaratory order is an expeditious procedure. If we are able to find on the papers that the respondent was or was not a labour tenant that, in my view, would illuminate the path and hasten the pace of whatever subsequent legal steps might be taken.<sup>46</sup>

[30] The procedural form adopted in seeking a declaratory order poses no intrinsic difficulties and may be by summons or on notice of motion. However, some have stated that it has to be by summons if there is a dispute of fact and may be on notice of motion if there is no dispute of fact.<sup>47</sup> The sole authority quoted by them for this assertion is the case of *Hattingh v Ngake*.<sup>48</sup> It is my view that these writers have overstated the position. The case quoted was dealing with a situation in which the judge said the applicant, in making his choice, ought to have anticipated that there would be a real and genuine ('egte') dispute of fact. In other words it was not the mere existence of disputed facts but disputed facts that were real and *bona fide*.

[31] This position tallies very well then with that in respect of all applications (not just declarations) that are brought on notice of motion where this Court has in previous cases adopted the robust approach (to disputes of fact arising from affidavits) such as was pronounced by

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45 *Lawson & Kirk (Pty) Ltd v Phil Morkel Ltd* 1953 (3) SA 324 (A) at 333D; *South African Reserve Bank v Photocraft (Pty) Ltd* 1969 (1) SA 610 (O) at 614.

46 This approach was also followed by Meer J in *Van Zuydam v Zulu* [1999] 2 All SA 100 (LCC).

47 Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4<sup>th</sup> ed (Juta & Co Ltd, Cape Town 1997) at 1061.

48 1966 (1) SA 64 (O).

Corbett JA (as he then was) in the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*<sup>49</sup> as follows:

“[W]here in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks . . . Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.”

In the reported case of *Dhladhla and Others v Erasmus*<sup>50</sup> this Court echoed the remarks of Corbett and stated that :

“If, on the papers before the Court, the probabilities overwhelmingly favour a specific factual finding, the Court should take a robust approach and make that finding. The same applies when a denial by a respondent of a fact alleged by an applicant is insufficient to give rise to a real, genuine or *bona fide* dispute of fact. This approach should, however, be followed with some circumspection. The Court should not lightly settle a factual dispute solely by weighing up the probabilities emerging from the papers, without the advantage of *viva voce* evidence”.

In yet another case namely *Mokwena v Marie Appel Beleggings CC and Another*<sup>51</sup> this Court was not deterred by the existence of factual disputes in an application on motion and stated the following:

“It became apparent once all the necessary affidavits had been filed that the central issue was that of labour tenancy and that could not be fully resolved on the papers, as they stood by reason of inadequacies and factual disputes in them.

Nonetheless, the Court was of the view that it could make a determination in respect of some of the requirements of labour tenancy on the facts before it which was either common cause or did not generate a genuine or real dispute.

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49 1984 (3) SA 623 (A) at 634H- 635C.

50 1999 (1) SA 1065 (LCC) at 1072 C-D.

51 LCC89/98, 9 February 1999, [1999] JOL 4464 (LCC), internet website address: <http://www.law.wits.ac.za/lcc/1999/mokwenasum.html> at paras [8] to [10].

The Court decided on this course in order to expedite the adjudication of the matter and also to fully utilize the time and effort expended thus far by the parties. The legal representatives did not object to this proposal and the case proceeded to argument on that basis.”

[32] We have yet another such application before us in the present matter in which an application for a declaratory order has been lodged and factual disputes have emerged from a perusal of the affidavits. Counsel for the applicant has sought to persuade us that such discrepancies need not deter us from declaring that the respondent is not a labour tenant.

[33] Although the definition of a labour tenant contains three requirements in the Labour Tenants Act, there are in reality four hurdles to the enquiry and if the respondent should fail on any one of them, he cannot be a labour tenant.

[34] A labour tenant is defined in section 1 of the Labour Tenants Act as 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,”

If the three requirements are established and assuming, without deciding, that section 2(5)<sup>52</sup> is not retrospective, the labour tenant may further have to prove that he is not a farmworker and this constitutes the fourth hurdle. The Supreme Court of Appeal has in *Ncgobo and Others v Salimba CC and Ncgobo v Van Rensburg*<sup>53</sup> confirmed this Court’s decision in several cases<sup>54</sup> that paragraphs (a), (b) and (c) of the definition of a labour tenant must be read conjunctively.

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52 Section 2(5) reads as follows :

“If in any proceedings it is proved that a person falls within paragraphs (a), (b) and (c) of the definition of ‘labour tenant’, that person shall be presumed not to be a farmworker, unless the contrary is proved”.

53 As yet an unreported decision of the Supreme Court of Appeal in case numbers 50/98 and 631/97.

54 See, for example, *Ncgobo and Another v Van Rensburg and Others* [1997] 4 All SA 537 (LCC) at 540i-547d; *Mlifi v Klingenberg* [1998] 3 All SA (LCC) at 641f-g.

[35] As regards the first requirement relating to residence, there is no dispute on the papers and it is common cause that the respondent resides on the farm Rehna with his family. This is acknowledged at paragraph 2.1 of the affidavit of Mr Klaas Marthinus De Jager one of the partners of applicant in the following terms:

“Die respondent is MANDLA ELFAS KUMALO (ook bekend as ELFAS), ’n meerderjarige plaaswerker voorheen in diens van die Applikant en tans werkloos en woonagtig saam met sy gesin op die plaas algemeen bekend as REHNA”

No issue was made of this by counsel for the applicant in either his heads of argument or in his submissions. What was disputed by the applicant was that he had a right to reside on the farm but that is of no consequence since mere residence alone suffices.

[36] The second part of the enquiry is concerned with whether the respondent has or has had the right to use cropping or grazing land on the farm in consideration of which right he provides or has provided labour to the applicant. There is a dispute of fact on the papers in this regard. It does not relate so much to the fact, which is common cause, that the respondent in fact did use land for grazing. It relates more specifically to whether such grazing was in consideration for labour rendered. The respondent deposes that it was and the applicant deposes that it was a ‘vergunning’ or favour and not a *quid pro quo* remuneration for labour. The applicant goes further to state that the respondent’s remuneration was in the form of cash in the amount of R130,00 per month and 80 kilograms mealie-meal ration: a typical contract, so it is contended, between a farmworker and employee.

[37] Mr K M De Jager, a partner of the firm, is explicit in his founding affidavit on this aspect and states:-

“Die respondent het in die vooropstelling, ten alle relevante tye, terwyl hy in diens van die boerdery gestaan het, ’n kontantloon ontvang vir gelewerde dienste as plaaswerker en het hoegenaamd nie ’n bewoningsreg, ’n bewydingsreg of ’n aanplantingsreg verwerf of geniet, as vergoedende teenprestasie vir gelewerde dienste nie.”<sup>55</sup>[my emphasis]

[38] The respondent is equally adamant<sup>56</sup> that he grazed and is still grazing an average of 24 head of cattle, 50 goats and 3 horses, that he cultivated mealies on the farm Rehna and that in consideration of the aforementioned rights he has provided labour to the owner of the farm and was entitled to nominate someone else to provide such labour in his stead.

[39] These bold assertions on both sides, for all their repetitiveness and mechanical adherence to the language of the Act, are not of any assistance in the attempt to find wherein the preponderance of probabilities lies. Being formulated in words that merely parody the Labour Tenants Act, they are no more than typical adversarial assertions and denials. The Court must therefore look elsewhere in the papers to find if there are other factors indicating the existence or not of the right to cropping and grazing on the part of the respondent and whether in consideration thereof he provided labour to the owner.

[40] It is common cause that not only the respondent but also the other workers had the right, in terms of an agreement, to keep stock and therefore to use grazing land on the farm. Elphius Mabaso deposes that he has worked for many years for the applicant and -

“[e]k het nog altyd my eie vee gehad en op die plaas gehou, saam met ander plaaswerkers wat ook vee het.

Dit was nog altyd die ooreenkoms, dat elke plaaswerker nie meer as 15 beeste en 15 bokke op die plaas mag hou nie en al die plaaswerkers van die boerdery weet dit”.

[41] The affidavit of K M De Jager in respect of stock even more explicitly acknowledges the respondent’s right to keep a certain amount of stock.

“Op 4 Desember 1996 is respondent skriftelik in kennis gestel, om sy vee te verminder na die ooreengekome getalle, soos blyk uit die skriftelike kennisgewing daartoe, gedateer 4 Desember 1996, waarvan ’n afskrif hierby aangeheg word, gemerk Aanhangsel “E”. Ingevolge die ooreenkoms tussen die partye was die respondent geregtig, om slegs 15 beeste en 15 bokke aan te hou, maar ongeveer 18 beeste en 48 bokke aangehou”

There is accordingly no doubt that the respondent had the right to grazing land subject to the quotas mentioned. The question is whether in consideration of it, he has provided labour to the

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56 Transcript of proceedings at paras 9.2.3-9.2.7 at pages 61-62.

owner but more of that at a later stage. First we must determine to what extent, if any, he had the right to use cropping land concerning which there is a dispute in the papers.

[42] Again the depositions of the parties are not helpful in determining the existence and the nature of cropping rights now or in the past. The respondent makes the following assertion:

“ . . . as at 2 June 1995, I have had the right to use cropping land on the farm Rehna where I cultivated mealies upon which my family depend for our maintenance and of which right I was forcefully deprived of by applicant during the end of 1996 . . . ”

K M De Jager counters:

“Met verwysing na die beweerde aanplanting, wat deur die respondent self gedoen sou gewees het, word dit uitdruklik ontken en word aangevoer dat die boerdery vir baie jare reeds eie implemente en toerusting aangewend het, om vir die onderskeie nedersettings van die plaaswerkers te ploeg en het die boerdery op eie onkoste kunsmis voorsien vir sodanige aanplanting, terwyl die saad voorsien is deur die plaaswerkers.”<sup>57</sup>

It is significant that there is no reference at all to cropping in any of the other affidavits filed on behalf of the applicant. Even so it is clear from applicant’s replying affidavit that they presently still provided their own seed and also did their own weeding and reaping.

“Dit was van die plaaswerkers verwag om die aanplantings wat aldus is, skoon te hou en te oes. Vir elke plaaswerker is ’n aanplanting van ongeveer 2 hektaar gedoen en by gebrek aan intensiewe verbouing, het dit hoogstens en rojal gereken, ’n opbrengs van 10 sak mielies per jaar gelewer”<sup>58</sup>

[43] In my view, the right to use cropping land is not necessarily eliminated by the use of the farm’s implements and the provision of fertiliser in the production process if the crop is still claimable by the worker concerned. The access and availability to crops plus the participation in providing seed and weeding and reaping, suffice to establish the right to cropping. I therefore come to the conclusion that the balance of probabilities that such use of cropping land existed in one form or another, favours the respondent. It remains to deal with the question whether in consideration of one or both of these rights the respondent had provided labour to the owner. In

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57 Record of proceedings at page 92.

58 Applicant’s replying affidavit at para 4.2.3 at page 10.

the case of *Dhladhla and Others v Erasmus*<sup>59</sup> this Court in circumstances very similar to the present and in which the Court had to decide the above question also on probabilities, Gildenhuys J said the following:

“The probabilities, in my view, overwhelmingly favour the position that those applicants who worked on the Farm on 2 June 1995, were allowed to use grazing land on the farm, and to a limited extent also the right to use cropping land, in consideration for the provision of labour. Even if there was no ‘uitdruklike ooreenkoms’ entitling the applicants concerned to cropping and grazing rights, the motive for allowing them to plant crops and to graze cattle was to give consideration to the labour which they provided. Had there been no labour given, the cropping and grazing would not have been allowed”[my emphasis].

[44] I fully agree with the above *dictum* by my colleague but also wish to go further and make the following observations: firstly, there appears to be a presumption by Mr Dreyer in his heads of argument, unjustified in my view, that the words in the Labour Tenants Act

“... in consideration of such right provides or has provided labour . . . ”<sup>60</sup>

signify a remunerative *quid pro quo* or a ‘vergoedende teenprestasie’. The words actually used in the Act are “consideration” in English and ‘teenprestasie’ in Afrikaans: there is no ‘vergoedende’ qualifying ‘teenprestasie’. In my view neither of these words exclude the notion of ‘counter performance’ which bears in mind an implied or express agreement based on the provision of labour irrespective of its terms or conditions.<sup>61</sup> This, in my view, accords with the historical reality for which the Act was passed to protect those who lived and worked on farms. The submission that owners of land gratuitously and without consideration but, as an act of grace, gave cropping and grazing rights to people does not accord with that historical reality. It is accordingly my finding that in respect of this second leg of the enquiry, the preponderance of probabilities is strongly in favour of the respondent.

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59      Supra n 50 at para [23].

60      Section 1, paragraph (b) of definition of a labour tenant, quoted in para [34] above.

61      There is nothing in the Act that requires that such counter-performance be remunerative or be in lieu of wages. In slave society, the slaves, ie people whose labour was on principle not remunerated, were nonetheless provided with accommodation and sometimes cropping. The motive for doing so was in consideration of the free labour they provided- it was a convenience and not a “vergoedende” prestasie. Even today it is common for domestic servants to live in a back room for which they do not pay rent and which is not reckoned against their wages. Such accommodation is in consideration or by virtue of them being providers of labour. It is a practical convenience and not a “vergoedende teenprestasie”.

[45] The third hurdle to clear is whether the respondent is a person -

“(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,”<sup>62</sup>

[46] In this regard the respondent deposed in his answering affidavit as follows:

“My father, Charlie Kumalo was born on the farm Skietnek where he provided labour to the owner of the farm Skietnek in consideration of his rights to reside on the farm Skietnek and to use cropping and grazing land on the said farm;

I have been informed by my father that he acquired the aforementioned rights in terms of a verbal agreement which he concluded on the farm Skietnek with its owner, a Mr Frank. In terms of this agreement my father said, he, alternatively a nominee of his, was to provide labour to the owner of the farm Skietnek;

Before I commenced to provide labour in my personal capacity, when I got married, I did so as nominee of my father in terms of an agreement between him and Mr Frank; . . .”

The only issue taken against the respondent in this regard is legal rather than factual. It is set out in Mr Dreyer’s heads of argument in the following terms:

“Op eie weergawe van die respondent was sy vader skynbaar woonagtig en werksaam op die plaas Skietnek, wat behoort of behoort het aan ene Mnr Frank. Die applikant het nie direk of indirek enige eiendomsregtelike verbintenis met sodanige plaas nie.

Daar sal volledige argument in die verband aangevoer word, tot die effek dat die verwysing na “*plaas*” in paragraaf c (derde kompoent) van die omskrywing van huurarbeider, betrekking het op ’n plaas ten aansien waarvan die applikant ’n direkte of indirekte eiendomsregtelike verbintenis het.”

[47] In his argument, Mr Dreyer was brief and confined himself to citation of conflicting interpretations in certain judgments of the High Court as against those of this Court in making the submission that there was still the possibility that respondent had not complied with paragraph (c). The reason, he submitted, being that it was common cause that there was neither a direct nor an indirect nexus between the farm Rehna, owned by the applicant, and the owner of the farm Skietnek where the respondent’s father provided labour in earlier years. Apart from this legal issue, there was otherwise no factual dispute in the papers before the Court.

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62 Section 1, paragraph (c) of definition of a labour tenant, quoted in para [34] above.

[48] The legal dispute referred to above has since been finally put to rest by the Supreme Court of Appeal in the case of *Ncgobo and Others v Salimba CC and Ncgobo v Van Rensburg*<sup>63</sup> in which the Supreme Court of Appeal endorsed this Court's reasoning and conclusion in the case of *Zulu and Others v Van Rensburg and Others*<sup>64</sup> as against that in the case of the court *a quo* in *Salimba v Ncgobo and Others*.<sup>65</sup>

There is accordingly no doubt in my mind that the respondent fulfills the requirement in paragraph (c) of the definition of a labour tenant. His statement that his father resided and provided labour on the farm Skietnek where he had cropping and grazing land was not contested in the papers.

[49] The final hurdle to the determination whether the respondent was a labour tenant or not, hinged on whether he was or was not a farmworker. A farmworker-

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

- (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 land; and
- (b) he or she is obliged to perform his or her services personally.”<sup>66</sup>

[50] This aspect of the case was presented in a fashion that left much to be desired in the papers. In the first instance, although there are two parts to the Labour Tenants Act's definition of farmworker, the parties almost exclusively addressed only one part. It is the part that states that a farmworker is a person who is paid predominantly in cash or in some other form of remuneration and not predominantly in the right to use and occupy the land.

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63      Supra n 53.

64      [1996] 2 All SA 615 (LCC); 1996 (4) SA 1236 (LCC).

65      NPD 340/96, 4 November 1997.

66      Section 1 of the Labour Tenants Act.

[51] Little attention was paid to the second part which states that a farmworker is a person who is obliged to perform his or her services personally. There is a bare assertion<sup>67</sup> in this regard by the respondent to which the applicant responds with a bare denial.<sup>68</sup>

[52] The Supreme Court of Appeal has in the meantime indicated the proper approach to the debate regarding the evaluation of payment in cash, or some other form of remuneration, *vis-a-vis* payment in the right to occupy and use land in the case of *Ncgobo and Others v Salimba CC and Ncgobo v Van Rensburg*.<sup>69</sup>

[53] This approach is described by the Court itself as ‘holistic and continuous’ which seeks to find the ‘overall sense and value of the occupation’ *vis-a-vis* the cash payment. Once this legal (and binding) approach is transferred and applied upon the agreed facts of the present case, then it is clear that no expert valuation reports on housing, fire-wood, grazing, etc are needed to demonstrate that they are worth more than the cash payment of R130,00 per month, 80 kilograms of mealie-meal, rations and a R20,00 bonus. In this regard I associate myself with the more adequately motivated remarks of Dodson J at para [19] of his judgment.

[54] As in the *Salimba* case, I do not find it necessary, therefore, to deal with the question of onus to prove or disprove the ‘overall sense and value of the occupation’. It is self evident, even though there was no concrete or expert evidence relating to the value of the rights to residence, cropping and grazing.

[55] In the result, I find that the respondent in this case is, in accordance with the approach and reasoning of the Supreme Court of Appeal, a labour tenant as defined in the Labour Tenants Act.

[56] Accordingly the Court makes the following order:

- (i) the application is dismissed; and

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67 Record of proceedings at para 9.2.6, at page 61.

68 Record of proceedings at para 4.4, at page 86.

69 *Supra* n 53.

- (ii) no order as to costs.

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**PRESIDENT F C BAM**

**Heard on:** 19 February 1999

**Handed down on:** 14 May 1999

For the Applicant:

*Adv W Dreyer* instructed by *Du Toit Roux Attorneys*, Pretoria

For the Respondent:

*Mr C Loots* of *Loots Inc*, Vryheid