

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on **10 May 1999**
before **Bam P** and **Moloto J**

CASE NUMBER: LCC139/98

In the case between:

SIKHOVA OBED MASONDO
MSHISELENI GIDEON KHUMALO
ENOCH SHABANGU
MHLOMELENI AMOS KHUMALO

First Appellant
Second Appellant
Third Appellant
Fourth Appellant

and

E WOERMAN

Respondent

JUDGMENT

MOLOTO J:

Introduction

[1] This is an appeal against the whole of the judgment and order of the Magistrate for the district of Vryheid delivered on 4 August 1998 in the Magistrate's Court, case number 143/97. The four appellants were defendants in the Magistrate's Court and the respondent was the plaintiff. The Magistrate granted respondent an order for ejectment with costs against the appellants and an order against fourth appellant to pay respondent an amount of R6 000,00.

[2] Applications were also made to this Court-

- (i) for condonation of the late noting of the appeal and omitting to mention the court to which this appeal was being noted; and
- (ii) to amend the notice of appeal to indicate that the appeal was to this Court.

Both applications were unopposed.

Applications for condonation and amendment

[3] Condonation for failure to properly or timeously comply with the rules governing appeals is in the discretion of the appeal court.¹ The courts have resisted framing an exhaustive definition of grounds for condonation, as that would tend to limit the discretion. Hence, Innes J (as he then was) said the following:

“Any attempt to do so would merely hamper the exercise of a discretion which the rules have purposely made very extensive, and which it is highly desirable not to abridge. All that can be said is that the applicant must show . . . ‘something which entitles him to ask for the indulgence of the Court . . .’.”²

[4] The Court must, therefore, consider all the facts and circumstances of each case to determine whether sufficient cause exists for condonation and to justify it in granting leave to appeal.

[5] Appellants’ attorney explained the facts and circumstances of this case in great detail. It is not necessary to repeat the details here, save to point out that, he had to be away from his office for conveyancing examinations at the critical time when the appeal had to be noted. This was in the period 24 to 27 October 1998. In addition, his secretary underwent an operation on 28 October 1998 and only returned to the office on 2 November 1998 (the last day on which the appeal should have been noted, to be timeous). With the pressure of work, there was an omission to diarise the matter and the attorney first noticed that he was out of time when he received a letter on 4 November 1998 from respondent’s attorneys, advising that they were going to issue a warrant of ejectment.

[6] Negotiations to stop the ejectment culminated in unsuccessful applications in the Magistrate’s Court and a Notice of Appeal being issued and served on 6 November 1998.

1 Van Winsen et al, *Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa*, Dendy (ed), 4th ed (Juta & Co, Cape Town 1997) at 895-96.

2 *Cairn’s Executors v Gaarn* 1912 AD 181 at 186. See, however, *Rose and Another v Alpha Secretaries Ltd* 1947 (4) SA 511(A) at 517 where the Court preferred the formulation: “something which the court considers sufficient to justify it in granting indulgence”.

Application for condonation and amendment of the Notice of Appeal was brought on 20 November 1998, following certain agreements between the parties about a stay of ejectment.

[7] The delay in noting the appeal was very short, only four ordinary days from 2 to 6 November 1998. The delay was caused partly by absence of staff from the attorney's office and partly by administrative oversight in that office. When the irregularity was discovered, prompt action was taken to remedy the situation. Besides, no negligence can be attributed to the appellants themselves.

[8] The appellants' prospects of success have been demonstrated in the affidavit in support of the application for condonation and will be considered together with the merits of the appeal.

[9] The case is important to the appellants as their lives would be fundamentally changed by the uprooting of their families from a place where they have lived for a long time. It takes time, money and personal effort to establish oneself and given the advanced ages of at least two of the appellants, it will be quite traumatic to eject them. It is therefore necessary that before such a drastic step is taken, the matter must be properly ventilated. Much as respondent may want finality, so too do the appellants. Respondent has lived with these appellants for some time and any prejudice she may suffer by their continued stay must be outweighed by the prejudice they would suffer if they were to leave the land pending finalisation of the matter.

Grounds of Appeal

[10] Appellants furnished the following grounds in support of their appeal:

"TEN OPSIGTE VAN EERSTE APPLIKANT:

1. Ten aansien van die Spesiale Pleit van huurarbeider:
 - 1.1 deurdat die Agbare Landdros gefouteer het deur die Eerste Applikant se Spesiale Pleit, dat hy 'n huurarbeider is soos omskryf in die Wet op Grondhervorming (Huurarbeiders) Wet 3 van 1996, en dat die Agbare Hof gevolglik nie jurisdiksie het nie, van die hand te wys;

- 1.2 dat die Agbare Landdros gefouteer het deur te bevind dat die Eerste Applikant die plaas 'Grootfontein' vrywillig verlaat het op 03/01/97 en dat hy nie meer permanent daar woonagtig is of die bedoeling het om daar woonagtig te wees nie;
 - 1.3 dat die Agbare Landdros gefouteer het deur te bevind dat die Eerste Applikant nie 'n huurarbeider kan wees nie synde hy nie op 2 Junie 1995 arbeid verrig het nie, maar reeds omstreeks 1989 opgehou werk het;
 - 1.4 dat die Agbare Landdros gefouteer het deur te bevind dat die Eerste Applikant hoofsaaklik in geld by wyse van 'n kontantloon vergoed is, en nie in die uitoefening van plant- of weidingsregte nie;
 - 1.5 dat die Agbare Landdros gefouteer het deur te bevind dat die Eerste Applikant hom nie van die bewyslas gekwyt het om te bewys dat sy weidingsplantregte meer werd is as finansiële besoldiging nie;
 - 1.6 dat die Agbare Landdros gefouteer het deur te bevind dat die Eerste Applikant bloot 'n pensionaris was ten tyde van sy aankoms op die plaas 'Grootfontein', en dat hy as sulks slegs aangebly het omrede wyle Mnr. Woerman hom oor die Eerste Applikant ontferm het, omdat hy op daardie stadium nie 'n blyplek gehad het nie;
 - 1.7 dat die Agbare Landdros gefouteer het deur te bevind dat die Eerste Applikant nie as huurarbeider kan kwalifiseer nie omrede sy ouers and voorouers nie huurarbeiders op die betrokke grond was nie, maar elders 'n funksie as diesulkes verrig het, en dat hy nie 'n tweede generasie huurarbeider was nie;
 - 1.8 dat die Agbare Landdros gefouteer het deur te bevind dat die Eerste Applikant se reg om op die plaas 'Grootfontein' te bly, gekanselleer is deurdat die ooreenkoms tot dien effekte tussen Eerste Applikant en wyle Mnr. Woerman deur laasgenoemde se dood ontbind is;
 - 1.9 dat die Agbare Landdros gefouteer het deur te bevind dat die Eerste Applikant se toestemming om op die grond te bly, welke toestemming onttrek is, regsgeldiglik afdwingbaar is omrede die onttrekking van toestemming redelik was;
 - 1.10 dat die Agbare Landdros gefouteer het deur te bevind dat die Eerste Applikant se verblyfreg regmatig beëindig is.
 - 1.11 dat die Agbare Landdros gefouteer het deur te bevind dat die Eerste Applikant nie 'n huurarbeider is soos omskryf deur die wet nie, maar wel 'n plaasarbeider en dat hy dus nie die beskerming onder die Wet op Huurarbeiders 3 van 1996 geniet nie;
 - 1.12 dat die Agbare Landdros gefouteer het deur te beslis dat die Eerste Applikant uitgesit kan word, welke beslissing teenstrydig is met die bepalinge van Artikel 9(1) van die Wet op Grondhervorming (Huurarbeiders), Wet 3 van 1996, synde die Eerste Applikant 'n huurarbeider is wat reeds die ouderdom van 65 jaar bereik het en as sulks nie uitgesit mag word nie.
2. Ten aansien van die alternatiewe Spesiale Pleit van 'okkupeerder' in terme van die Wet op die Uitbreiding van Sekerheid van Verblyfreg 62/1997:
- 2.1 dat die Agbare Landdros gefouteer het deur te beslis dat die Eerste Applikant nie op 4 Februarie 1997 die toestemming gehad het om op die plaas 'Grootfontein' te woon nie, en dat hy as sulks nie 'okkupeerder' soos bedoel in die wetsomskrywing is nie;

- 2.2 dat die Agbare Landdros gefouteer het deur te beslis dat die Eerste Applikant nie op 4 Februarie 1997 nie op 'Grootfontein' gewoon het nie;
- 2.3 dat die Agbare Landdros gefouteer het deur te beslis dat die Eerste Applikant uitgesit kan word, synde hy reeds 'n periode van 10 jaar op die plaas 'Grootfontein' gaan woon het en reeds die ouderdom van 60 jaar bereik het soos bedoel in Artikel 8(4) van bovermelde wet;
- 3. dat die Agbare Landdros gefouteer het deur te beslis dat die Eerste Applikant genoegsame kennis ontvang het om die plaas 'Grootfontein' te ontruim.

TEN OPSIGTE VAN DIE TWEEDE APPLIKANT:

- 4. Ten aansien van die Spesiale Pleit van huurarbeider:
 - 4.1 dat die Agbare Landdros gefouteer het deur die Tweede Applikant se Spesiale Pleit, dat hy 'n huurarbeider is en dat die Agbare Hof gevolglik nie jurisdiksie het nie, van die hand te wys;
 - 4.2 dat die Agbare Landdros gefouteer het deur te bevind dat die Tweede Applikant hoofsaaklik in geld by wyse van 'n kontantloon vergoed is en nie in die uitoefening van plant- of weidingsregte nie, en verder gefouteer het deur te bepaal dat hy hoofsaaklik vir 'n kontantloon gewerk het;
 - 4.3 dat die Agbare Landdros gefouteer het deur te bevind dat die Tweede Applikant nie as huurarbeider kan kwalifiseer nie omrede sy ouers en voorouers nie huurarbeiders op die betrokke grond was nie, maar elders 'n funksie as diesulkes verrig het, en verder gefouteer het deur as maatstaf te gebruik dat hy nie 'n tweede generasie huurarbeider is nie;
 - 4.4 dat die Agbare Landdros gefouteer het deur te bevind dat die Tweede Applikant se verblyfreg regmatig beëindig is;
 - 4.5 dat die Agbare Landdros gefouteer het deur te beslis dat die Tweede Applikant genoegsame tyd gehad het om die plaas te verlaat;
 - 4.6 dat die Agbare Landdros gefouteer het deur te bevind dat die Eerste Applikant nie 'n huurarbeider is soos omskryf deur die wet nie, maar wel 'n plaasarbeider en dat hy dus nie die beskerming onder die Wet op Huurarbeiders 3 van 1996 geniet nie;
- 5. Ten aansien van die alternatiewe Spesiale Pleit van 'okkupeerder' in terme van die Wet op die Uitbreiding van Sekerheid van Verblyfreg 62 van 1997:
 - 5.1 dat die Agbare Landdros gefouteer het deur te beslis dat die Tweede Applikant nie op 4 Februarie 1997 die toestemming gehad het om op die plaas 'Grootfontein' te woon nie, omrede sodanige toestemming aldus onttrek en beëindig is;
 - 5.2 dat dit onnodig was om te kyk na Artikel 8 van die Wet op Uitbreiding van Sekerheid van Verblyfreg 62 van 1997;
- 6. Ten aansien van die Pleit self:
 - 6.1 dat die Agbare Landdros gefouteer het deur te beslis dat die Tweede Applikant genoegsame kennis ontvang het om die plaas 'Grootfontein' te ontruim.

TEN OPSIGTE VAN DERDE APPLIKANT:

7. Ten aansien van die alternatiewe Spesiale Pleit van 'okkupeerder' in terme van die Wet op die Uitbreiding van Sekerheid van Verblyfreg 62 van 1997 (sic):
- 7.1 dat die Agbare Landdros gefouteer het deur die Derde Applikant se Spesiale Pleit, dat hy 'n huurarbeider is en dat die Agbare Hof gevolglik nie jursdiksie het nie, van die hand te wys;
- 7.2 dat die Agbare Landdros gefouteer het deur te bevind dat die Derde Applikant hoofsaaklik in geld vergoed is en nie in die uitoefening van plant- of weidingsregte nie;
- 7.3 dat die Agbare Landdros gefouteer het deur te bevind dat die Derde Applikant se verlyfreg regmatig beeindig is;
- 7.4 dat die Agbare Landdros gefouteer het deur te bevind dat die Derde Applikant nie 'n huurarbeider is soos omskryf deur die wet nie, maar wel 'n plaasarbeider en dat hy dus nie die beskerming onder die Wet op Huurarbeiders 3 van 1996 geniet nie;
- 7.5 dat die Agbare Landdros gefouteer het deur te beslis dat die Derde Applikant genoegsame tyd gehad het om die plaas te verlaat;
8. Ten aansien van die alternatiewe Spesiale Pleit van 'okkupeerder' in terme van die Wet op die Uitbreiding van Sekerheid van Verblyfreg 62 van 1997:
- 8.1 dat die Agbare Landdros gefouteer het deur te beslis dat die Derde Applikant nie op 4 Februarie 1997 toestemming gehad het om op die plaas 'Grootfontein' te woon nie;
- 8.2 dat die Agbare Landdros gefouteer het deur te bevind dat die uitsetting nie strydig was met Artikel 26(3) van die Grondwet nie;
9. Ten aansien van die pleit self:
- 9.1 dat die Agbare Landdros gefouteer het deur te beslis dat die Derde Applikant genoegsame kennis ontvang het om die plaas 'Grootfontein' te ontruim.

TEN OPSIGTE VAN DIE VIERDE APPLIKANT:

- 10 Ten aansien van die alternatiewe Spesiale Pleit van 'okkupeerder' in terme van die Wet op die Uitbreiding van Sekerheid van Verblyfreg 62 van 1997 (sic):
- 10.1 deurdat die Agbare Landdros gefouteer het deur die Vierde Applikant se Spesiale Pleit, dat hy 'n huurarbeider is en dat die Agbare Hof gevolglik nie jursdiksie het nie, van die hand te wys;
- 10.2 dat die Agbare Landdros gefouteer het deur te bevind dat die Vierde Applikant hoofsaaklik in geld by wyse van 'n kontantloon vergoed is en nie in die uitoefening van plant- of weidingsregte nie;
- 10.3 dat die Agbare Landdros gefouteer het deur te bevind dat die Vierde Applikant nie as huurarbeider kan kwalifiseer nie omrede sy ouers en voorouers nie huurarbeiders op die betrokke grond was nie, maar elders 'n funksie as diesulkes verrig het;

- 10.4 dat die Agbare Landdros gefouteer het deur te bevind dat die Vierde Applikant se verblyfreg regmatig beëindig is;
- 10.5 dat die Agbare Landdros gefouteer het deur te bevind dat die Vierde Applikant nie 'n huurarbeider is soos omskryf deur die wet nie, maar wel 'n plaasarbeider en dat hy dus nie die beskerming onder die Wet op Huurarbeiders 3 van 1996 geniet nie;
- 10.6 deurdat die Agbare Landdros gefouteer het deur te beslis dat die Vierde Applikant uitgesit kan word, welke beslissing teenstrydig is met die bepalings van Artikel 9(1) van die Wet op Grondhervorming (Huurarbeiders), 1996, Wet 3 van 1996, synde die Vierde Applikant 'n huurarbeider is wat reeds die ouderdom van 65 jaar bereik het;
- 10.7 deurdat die Agbare Landdros gefouteer het deur te beslis dat die Vierde Applikant die bedrag van R6 000,00 aan die Eiser moet terugbetaal, omrede sy daarop geregtig is.

11. TEN OPSIGTE VAN AL DIE APPLIKANTE:

- 11.1 deurdat die Agbare Landdros gefouteer het deur te beslis dat outomatiese hersiening in terme van Artikel 19(3) van die Wet op die Uitbreiding van Sekerheid van Verblyfreg 62 van 1997 onnodig is.”

[11] Section 13(1A)³ of the Land Reform (Labour Tenants) Act⁴ (hereinafter referred to as the “Labour Tenants Act”) was introduced by section 34 of the Land Restitution and Reform Laws Amendment Act⁵ on 21 November 1997, hence when oral evidence was completed on 12 November 1997 and the Magistrate gave judgment on 4 August 1998, he had jurisdiction. Therefore, appellants’ ground of appeal that the Magistrate had no jurisdiction must fail.

[12] At the hearing of the appeal the following happened:

- (i) first appellant withdrew the alternative ground of appeal that he is an occupier in terms of the ESTA;

3 Section 13(1A) of Act 3 of 1996 reads:

“(1A) If an issue arises in a case in a magistrate’s court or a High Court which requires that court to interpret or apply this Act and -

- (a) no oral evidence has been led, such court shall transfer the case to the Court and no further steps may be taken in the case in such court;
- (b) any oral evidence has been led, such court shall decide the matter in accordance with the provisions of this Act.”

4 Act 3 of 1996, as amended.

5 Act 63 of 1997.

- (ii) second appellant withdrew the main ground of appeal that he is a labour tenant in terms of the Labour Tenants Act; and
- (iii) the appeal by fourth appellant against the order that he pays respondent an amount of R6 000,00 was withdrawn. He settled with respondent on the basis that he will pay respondent the amount.

The Facts

[13] Argument by both counsel on the main ground of appeal (that first, third and fourth appellants are labour tenants) accepted that appellants satisfy the requirements of paragraphs (a) and (c) of the definition of a labour tenant, and that the dispute seemed to be in respect of paragraph (b).

[14] Section 1(xi) of the Labour Tenants Act defines a labour tenant 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.”

[15] A “farmworker” is defined as -

“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.”

[16] The relevant facts as testified to by the appellants are briefly as follows:

(a) **The First Appellant**

[17] He was born in 1926 on a farm called Emakwabi. Both his parents lived and worked on the same farm. He lived with them there. They were paid no salary and received no rations for their work. They established a kraal on the farm, planted crops such as mealies, sweet potatoes and beans on many fields on the farm. They also kept cattle, goats, donkeys and horses on the farm. It is not stated whose farm it is, but it is accepted they had the owner's permission. When first appellant was 17 years old, his family left Emakwabi and went to KwaNtashala, whence he relocated with his wife and children to respondent's farm known as:

“Remainder of Sub 1 of the farm Grootfontein No 437, situated in the Administrative District of Vryheid, Province of KwaZulu-Natal, in extent Two Hundred and Two comma Three Four Three Nought (202,3430) hectares” also known as Vaalkop (hereinafter referred to as “the farm”).

At that time the farm was owned by respondent's husband. First appellant estimates that he lived on the farm for 13 to 14 years. Presently he lives in Mondlo because he fled when he was attacked by some unknown people on the farm. He fled the farm on 3 January 1997.

[18] While on the farm, first appellant worked in the chicken department of the farming enterprise. Mr Woerman, respondent's late husband, had agreed that first appellant may live on the farm and provide labour to him (Mr Woerman). First appellant established his homestead on the farm. He had no right to keep livestock except for the calves he used to buy from Mr Woerman and which he was allowed to keep until weaning age.

[19] First appellant had cropping rights on a field ploughed by Mr Woerman with his own tractor. Mr Woerman also provided manure and the seed. The produce from this field was, however, for first appellant's own consumption with his family. Both first appellant and his wife provided labour to Mr Woerman. At the commencement of his employment on the farm first appellant was paid R18,00 per week and towards the time he stopped working he was paid R40,00 per week. First appellant's wife earned R12,00 per week in the beginning and later, R16,00 per week.

[20] While Mr Woerman was still alive, the milking sheds were operated manually at first and later electrically. The same electricity plant supplied drinking water to the different homesteads on the farm. The milking sheds were shut down after Mr Woerman's death and electricity also cut off.

[21] First appellant remembers signing a document by making a cross. The document was brought to him by Mr Woerman. According to first appellant, who is illiterate, the document stated that he was going to stay on the farm until he died and that he must not sell liquor and dagga. He signed one document only and does not recognise the one showed to him in cross-examination and referred to as exhibit "A". This document, according to first appellant, was signed long after he had been on the farm.

[22] First appellant denies that he sold plots of Mr Woerman's farm to strangers. The allegation that he did, was unsubstantiated. First appellant further denied being given a notice to vacate the farm by Mr Woerman as a result of a misunderstanding about the purchase and sale of plots on the farm. He confirms that any misunderstanding between himself and Mr Woerman arising from this allegation was resolved and he was allowed to continue staying on the farm.

(b) **Third appellant**

[23] Third appellant states he was born in 1958 at Louwsburg. His parents lived on the farm and his father, Mr Elijah Shabangu, worked for Mr George Woerman, working with pigs at the pig sty. His mother did not work. His father had one beast which he kept and grazed on the farm and he planted mealies in the garden next to their home. The farm owner provided the tractor, which Mr Shabangu senior drove to plough the garden. The farm owner also supplied the seed. Third appellant and his parents came to the farm in 1974. After his father's death he took over and worked on the farm. But he left the farm for some time to stay at Mondlo and came back on the farm in 1994. When his father worked on the farm, the farmer was Mr J Woerman. (It appears George Woerman and J Woerman refer to one and the same person). Third appellant's father built houses for his family on the farm. Mr Woerman gave the family permission to live on the farm.

In preparation for his return from Mondlo to the farm, third appellant spoke to Mr J Woerman. He then moved on to the farm with his family - wife and children and his brothers. He moved into two houses built by the owner of the farm and then he (third appellant) built two more houses. Mr Woerman gave him permission to build the houses. Third appellant provided labour to Mr Woerman - ploughing fields and driving tractors and other vehicles. In return he was paid R120,00 per week. He received no rations. He stopped working on the farm in April 1996 because after the death of Mr Woerman in November 1995, he was told there was no more work, although he was still prepared to work. At the time of stopping work he still earned R120,00 per week. While working for Mr Woerman he contributed to the Unemployment Insurance Fund.

[24] Third appellant keeps a cow and a calf, chickens, four ducks and nineteen geese on the farm. Mr J Woerman gave him permission to keep the livestock. In terms of Mr Woerman's stipulation, third appellant was allowed to keep a maximum of five to six cattle. He planted crops when Mr Woerman was still alive. This was mealies. He ploughed himself, using Mr Woerman's tractor. Mr Woerman supplied the seed. Mr Woerman helped with the care of livestock.

(c) **Fourth Appellant**

[25] Mr Khumalo does not know when he was born as he is illiterate, but according to his identity document he was born on 11 March 1909. He was born at Eduduzini in Utrecht. The area is a farm. The owner of the farm was Mr Edward Gievers. Fourth appellant is married and has six children, only one of whom still stays with him and his wife. His father worked for Mr Gievers and lived on Mr Gievers' farm. He looked after Mr Gievers' cattle and worked on the potato field. His father earned R5,00 per month and received no rations. He had 30 cattle and cultivated mealies. Fourth appellant and his brother, Mr Simon Khumalo, worked for Mr Gievers. He worked on behalf of his father and earned R5,00 per month which he gave to him. His grandparents also lived on Mr Gievers' farm. His parents had their own kraal. After the death of his parents, he left Gievers' farm and settled on a farm called Vaalkop, near the farm (also Vaalkop). The owner was one Herman. He thinks he came to the farm in 1973. When he came to the farm, Mr Woerman was the owner. He still lives there even now. He looked after Mr Woerman's cattle. He came to the farm with his wife and six children. He built his homestead just

below the mountain, where Mr Woerman had said he may build his homestead. The homestead consists of eight houses.

[26] When fourth appellant first started working for Mr Woerman, he was paid R4,00 per week, which gradually increased to R80,00 per week. He kept cattle, goats and chickens on the farm. He had six cattle which he was told to reduce. He reduced them to five. Mr Woerman allowed him to keep livestock and restricted the goats he could keep to six. Fourth appellant also planted mealies on an approximately 20 metres wide field encircling his homestead of eight houses. Mr Woerman supplied a tractor and one of his drivers, but fourth appellant supplied his own seed. Fourth appellant and all his children provided labour to the farmer.

[27] Fourth appellant received a letter from the farmer's attorneys and he passed it on to his own attorney's office. Then Mr Woerman's son told him to vacate the farm. He (the son - known as Eckard) said he would give fourth appellant 20 head of cattle and money (as a sign of gratitude for making his father earn a lot of money). Eckard paid him R6 000,00 and promised to build a house for him and relocate him to the new house. But for the payment of the R6 000,00 he (Eckard) has not kept any of the promises. When he made these promises one Mr Mtshali, since deceased, was present.

Respondent

[28] Respondent was the only witness called in support of her case. She said appellants were not labour tenants because they always received a salary. However, she also stated that appellants were employed only by Mr Woerman, and that she was not involved in their employment. She mentioned that if they needed "land or grazing they would receive that too". She had no knowledge of the individual duties of the appellants.

[29] Respondent states that first appellant was not working at the time of her husband's death, but that second appellant was working because she had seen payment books. Beyond this, respondent's evidence does not take the case any further.

Whether the first, third and fourth appellants qualify a labour tenants⁶

[30] I propose to dispose of the aspect relating to labour tenancy before dealing with occupation under ESTA.

[31] Mr Van der Walt, for appellants, argued that it was either common cause or evident that all three appellants qualified in terms of paragraphs (a) and (c) of the definition of labour tenant and that it only remained to determine whether they qualified in terms of paragraph (b) and were in fact labour tenants. This was also the approach of Mr Roberts for the respondent. From the above facts, it is clear that all appellants provided labour to the previous owner (Mr Woerman) of the farm during his lifetime and they all used cropping and/or grazing land. This evidence was not disputed.

First appellant

[32] Mr Roberts, for the respondent, argued that-

- (a) first appellant left the farm of "his own accord on 3 January 1997", thereby repudiating whatever contract or relationship existed between himself and respondent;
- (b) that on 16 March 1989 first appellant and Mr Woerman concluded an agreement (annexure "A" to the papers) and first appellant was, at that time, already a pensioner;
- (c) that first appellant presently rents a house in Mondlo;
- (d) that he was not employed by Mr Woerman but was allowed to stay on the farm "out of the goodness of the heart of Mr Woerman";

6 See definition of labour tenant quoted in para [14] above.

- (e) that first appellant was given a small piece of land in the form of a garden to cultivate mealies for himself and his wife, which cultivation was done by Mr Woerman using his own tractor, manure and seed.
- (f) that first appellant was allowed to keep calves on the farm bought from Mr Woerman up to weaning age and that he never stated that such right (to keep calves) was in lieu of the provision of labour;
- (g) that first appellant stopped working after the fifth year on the farm of Mr Woerman;
- (h) that in first appellant's own words, he stated that he was a pensioner and that he "wanted a piece job";
- (i) there is no allegation that first appellant ever had the right to graze any cattle on the farm;
- (j) there is no evidence that first appellant had the right to appoint anybody else to work in his stead;
- (k) that first appellant was a "piece worker" and that there existed between him and Mr Woerman a contract of employment terminable by notice. That on appellant's own version, the contract of employment terminated long before the death of Mr Woerman; and
- (l) that first appellant's version in regard to the terms of employment of his parents is vague and should be rejected.

[33] There is no merit in the above arguments. Firstly, the argument that first appellant left the farm on 3 January 1997 of "his own accord" is not supported by the evidence. The uncontroverted testimony of the first appellant is that he fled the farm because he was attacked

by unknown people. He did not leave of his own free will. This cannot constitute a waiver of his rights under the Labour Tenants Act.⁷ First appellant, on his evidence, neither left voluntarily nor appointed a successor. Mr Roberts suggested that the date as at which it must be decided whether first appellant was a labour tenant, is 21 January 1997. I do not, however, agree that the 21 January 1997 is the operative date. According to section 3(1)⁸ of the Labour Tenants Act, the operative date for a person who is no longer residing and working on a farm is 2 June 1995.

[34] It does not matter whether first appellant was already a pensioner at the time he concluded the agreement with Mr Woerman. What matters is that he provided labour to Mr Woerman and his evidence to that effect stands undisputed. The labour provided was what Mr Woerman required of him, whether such labour was in the nature of a “piece job” or not. The Act does not exclude “piece jobs” as labour provided.

[35] It is immaterial whether first appellant was allowed to stay on the farm “out of the goodness of the heart of Mr Woerman”. What is material is that once he stayed, he provided

7 Section 3(2)(a) and (3) reads as follows:

“3(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;

....

(3) A labour tenant shall be deemed to have waived his or her rights if he or she with the intention to terminate the labour tenant agreement-

(a) leaves the farm voluntarily; or

(b) appoints a person as his or her successor”

8 Section 3(1) provides:

“(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 this 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.”

labour in return for staying and acquired other rights such as cropping rights. What is important is the nature of the relationship during its duration.⁹ The fact that the farmer supplies his tractor, manure and seed does not mean that the land is not cropping land made available to the appellant.

[36] The right to keep calves on the farm tends to weaken Mr Roberts' argument that first appellant had no grazing right. Surely, by the time the calves were weaned, they would already be grazing and this they did on the farm. Even if I am wrong in thinking so, first appellant need not have grazing rights as long as he had cropping rights. He is entitled to have either of these rights to establish his rights under paragraph (b) of the definition.

[37] The fact that first appellant stopped working after the fifth year on the farm does not terminate his status as a labour tenant. On Mr Roberts' own argument, when annexure "A" to the papers was concluded, first appellant was already a pensioner. It was to be expected that he would soon not be strong enough to work. The Labour Tenants Act protects labour tenants who have reached a certain age and are no longer providing labour.¹⁰ Of importance is the fact that during the five years when he provided labour, he did so in return for occupational and grazing or cropping rights.

[38] As regards the right to appoint someone to work in his stead, first appellant said he did not know whether he had this right or not. In this respect, it is significant to note the wording of section 4(1)¹¹ of the Labour Tenants Act which states that a labour tenant "may" appoint someone to work in his stead. He does not have to.

[39] Mr Roberts argued that first appellant was a "piece worker" and that a contract of employment, terminable by notice, existed between him and Mr Woerman. Labour tenancy is a

9 *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg* [1999] 2 All SA 491 (A) at 510.

10 Section 9(1).

11 Section 4(1) reads:

“(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.” [my emphasis]

relationship of employment and is terminable by notice. A labour tenant may, for example, give notice of his intention to leave the farm under circumstances envisaged in section 3(3)¹². The farmer may also give notice to a labour tenant to leave the farm provided he (the labour tenant) has committed certain transgressions¹³ and certain requirements¹⁴ are complied with. The fact that first appellant thinks the contract terminated long before Mr Woerman's death does not terminate the relationship. The Court must look at the entire relationship between the parties over its duration and determine whether a relationship of labour tenancy existed or not.¹⁵ I have already said that the label of "piece job" or "piece worker" is irrelevant, what is relevant is whether labour was provided in return for grazing or cropping rights.

[40] Mr Roberts does not say in what respects the relationship of first appellant's parents is vague. First appellant states clearly that his parents worked on a farm in return for cropping or grazing rights, although that farm did not belong to the respondent. The Supreme Court of Appeal has answered the question whether the farm must be a farm owned by the respondent in the negative.¹⁶ I am satisfied that first appellant's evidence satisfies the requirements of paragraph (c) of the definition of labour tenant.

[41] I therefore find that the first appellant satisfies the requirement of paragraph (b) of the definition of labour tenant.

[42] In examining the position of the third and fourth appellants, I will only deal with those arguments which are not common to those advanced with respect to the first appellant. For the common arguments I find as I did with respect to the first appellant.

Third appellant

12 Supra n 7.

13 Section 7(2).

14 Section 7(2).

15 *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg* appeal supra n 9.

16 *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg* appeal supra n 9 at 507 and 508.

[43] Argument presented in support of respondent's case against third appellant was that he earned R480,00 per month which amount, it was argued, is substantial when regard is had to the fact that the land which was cultivated for third appellant, was cultivated with Mr Woerman's implements and that Mr Woerman also provided the seed. Further that third appellant had only one cow on the farm. Therefore, so the argument went, the R480,00 outweighed occupation and use rights. It was further argued that the fact that third appellant contributed to the Unemployment Insurance Fund indicated that this was not a labour tenant contract, but a contract of a personal nature which ended at the death of Mr Woerman. The argument went further to say that obtaining other employment after Mr Woerman's death is a further factor to consider in assessing the true nature of the relationship. Lastly Mrs Woerman's testimony that the services of the employees of Mr Woerman had to be rendered personally by them and not by anybody else nominated by them must be accepted.

[44] Before assessing whether third appellant satisfies the requirements of paragraph (b) of the definition of labour tenant, it is necessary to consider the appropriateness of some of the arguments above. Firstly, the submission that third appellant kept only one cow on the farm, suggesting thereby that it is the value of keeping one cow that must be determined. It is common cause, and a fact alluded to in Mr Roberts' heads of argument, that third appellant had the right to keep a maximum of five to six cows. It is this number that he had a right to keep, that must be assessed, not the number of cows he actually kept. He also had chickens, four ducks and nineteen geese. Secondly, it is quite conceivable that a contribution to the Unemployment Insurance Fund can be made from the cash portion of a labour tenant's remuneration. Nothing in the Act prohibits such a contribution; and if it did take place, it would not change the nature of the labour tenancy relationship. It needs be remembered also that the information about this contribution is obtained from Mr Woerman's records. Although these records were discovered, they were not tendered as evidence by anyone who could swear positively to their correctness. They were tendered through the appellants during their cross-examination. It is trite law that such records cannot be admitted as evidence for the correctness of their contents. For that reason their contents cannot be accepted for that purpose.

[45] The argument that third appellant obtained other employment after Mr Woerman's death is without merit as a factor to consider in assessing the nature of the relationship between them. The argument loses sight of the fact that whereas all the appellants, including third appellant, were prepared to work, it was respondent who told them there was no more work. Naturally, they had to find alternative employment to maintain their families.

[46] Mrs Woerman's testimony that the services of the employees of Mr Woerman had to be rendered personally by them cannot be accepted for the simple reason that she stated categorically that she did not know the terms of employment of each of them because they were all employed by Mr Woerman without her involvement. Even when asked whether Mr Woerman had not discussed their employment conditions with her she said they had discussed their emotional problems. She does therefore not have any independent knowledge of their employment relationship which can withstand the testimony of the third appellant who was personally involved in the formulation of such relationship. The Court therefore has to rely on third appellant's testimony for the factual situation.

[47] I find that third appellant satisfies the requirements of paragraph (b) of the definition of labour tenant.

Fourth appellant

[48] In satisfaction of the requirements of paragraph (b) of the definition of a labour tenant, the relevant facts about fourth appellant are that he came to the farm in 1973. He worked for the then owner of the farm, Mr Woerman and was initially paid R4,00 per week which steadily increased to R80,00 per week by the time he stopped working. He kept six cattle, later reduced to five, and six goats, all of which grazed on the farm. He also kept chickens. He cultivated a mealie field 20 metres wide around his homestead of eight houses. Mr Woerman supplied the tractor but fourth appellant supplied his own seed.

[49] Mr Roberts argued that when fourth appellant came to the farm, he was 62 years old and came on the good will of Mr Woerman. Both these facts of old age and good will have already

been dealt with when dealing with first appellant. What I said in this regard with respect to first appellant applies equally with respect to the fourth appellant.

[50] Fourth appellant therefore satisfies the requirements of paragraph (b) of the definition of labour tenant.

Whether appellants are farmworkers

[51] Mr Roberts argued that the onus to prove that appellants are not farmworkers fell on appellants themselves, inasmuch as the action was instituted on 21 January 1997 and leading of evidence was completed on 12 November 1997. Section 2(5) of the Labour Tenants Act,¹⁷ which shifts the onus from the alleged labour tenant only came into operation on 21 November 1997. Judgment was delivered on 4 August 1998. I need not decide this point, as I am of the view that the appellants discharged any onus which they might have borne to show that they are not farmworkers, as will appear from what follows hereunder.

[52] Evidence was led about each appellant's cash and other remuneration as compared to the rights of occupation and use of the land. It is evident that the value of these latter rights exceeds the value of the cash and other remuneration. Quantitative evidence is only necessary when the excess is not obvious. The Magistrate, therefore, erred in finding that, because there was no "quantitative evidence" of the values of these rights, the cash and other remuneration exceeded the occupation and use rights. Indeed it is hard to understand how he reached that conclusion if he did not know what he was comparing the cash remuneration with.

[53] I proceed to make the evaluation and comparison.

17 Section 2(5) was introduced by section 33 of Act 63 of 1997 and reads as follows:

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

First appellant

[54] First appellant provided labour to Mr Woerman, initially in return for a cash remuneration of R18,00 per week which had increased to R40,00 per week by the time he stopped working. In addition, Mr Woerman supplied the tractor for cultivating the land on which first appellant planted his crop. Mr Woerman also supplied manure and seed to first appellant. First appellant received no rations from Mr Woerman.

[55] In return, first appellant was allowed to establish a homestead on the farm where he lived with his family. He used to buy calves from Mr Woerman which he kept on the farm until weaning age. He had cropping rights. The value of the right to establish a home, which right the Supreme Court of Appeal referred to as “hearth and home”;¹⁸ the value of keeping calves on the farm and planting crops obviously exceeds by far the value of R40,00 per week or R160,00 per month and the supply of the services of a tractor, manure and seed, even if the remuneration of first appellant’s wife were added to his cash remuneration.

[56] On the comparison of remuneration in cash and kind with other rights of the labour tenant, Mr Roberts argued that it is to the definition of labour tenant that we must look, to compare the cropping and grazing rights, as these are the rights in return for which labour is provided. It cannot be so. The comparison of these rights is not dealt with in the definition of labour tenant but in the definition of farmworker and it is to this latter definition that we must look. The definition is quite clear that the remuneration in cash or in some other form is compared with the

18 *Infra* n 21.

right to “occupy and use the land”¹⁹ (my emphasis). Obviously the occupation must refer to the right of residence while use must refer to cropping and grazing rights. Therefore, in comparing the value of these rights, the right of residence of first appellant with all his family members and associates must be brought into account, and the Magistrate should have compared all these rights with the R40,00 per week paid to first appellant. Although no “quantitative evidence” of first appellant’s rights was given, the Magistrate ought to have weighed the first appellant’s right to reside on the farm together with his family, the right to keep five to six calves up to weaning age and the cropping right, on the one hand and the wage of R40,00 per week on the other. It is not stated what quantity of mealies was harvested from this piece of land. In this regard, this Court has found itself unable to compare the value of the right to occupy and use the land with the cash or other form of remuneration where facts are not supplied on which to make such comparison. The Court concluded that -

“The applicant has therefore not discharged the burden of proof that he was a labour tenant on 2 June 1995, nor has the respondent placed sufficient evidence before the Court upon which the Court can make a positive finding that the applicant is not a labour tenant.”²⁰

However, the Supreme Court of Appeal expressed itself as follows on the point:

“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.”²¹

19 See paragraph (a) of the definition of “farmworker”:

“‘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 . . . 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)”

[my emphasis]

The full definition of “farmworker” is quoted in para [15] above.

20 Per Gildenhuys J in *Mahlangu v De Jager* [1996] 2 All SA 522 (LCC) at 527h-528a.

21 *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg* appeal supra n 9 at 510.

It is a very difficult exercise, even for qualified valuers, to value so personal a right as residence on farms, where the occupant has initially built the home himself on land belonging to another person. It would, however, be well nigh impossible for anybody to provide a home for a family, feed and clothe the family from an amount of R40,00 per week. In my view, it would be dangerous to venture a cut-off point where it can be said that the cash and specie remuneration is sufficient to compare favourably with the value of the right to occupy and use land. What is, however, clear is that the history of the farmworker/labour tenant on South African farms is one of meagre remuneration.

[57] It is overwhelmingly clear to me, even in the absence of valuation evidence that the right to occupy and use respondent's land exceeds by far the cash remuneration of R40,00 per week. To require, in these circumstances, formal valuation evidence would, in my view, be a waste of time and money.

[58] First appellant has accordingly discharged the onus of showing that the value of his cash and other form of remuneration is less than that of his occupational and use rights.

Third appellant

[59] Third appellant ploughed Mr Woerman's fields with the latter's tractor and drove other vehicles. He was paid R120,00 per week and received no rations. He was allowed to use Mr Woerman's tractor to plough his own fields and was supplied with seed by Mr Woerman.

[60] Third appellant's occupation and use rights comprised the right to establish a home on the farm where he lived with his wife, children and brothers. He kept a cow and a calf which grazed on the farm, but had the right to keep up to five or six cattle on the farm. He also kept chickens, four ducks and nineteen geese. He had a field which he cultivated for the benefit of himself and his family.

[61] There can be no doubt, even in the absence of valuation evidence, that the right to establish a home for one's family, to keep five to six cattle and to plough a field for the food needs of the family is worth much more than R120,00 per week plus the use of a tractor and receipt of seed.

[62] In the premises, third appellant has discharged the onus of showing that the value of his occupation and use rights exceeds that of his cash and other form of remuneration.

Fourth appellant

[63] When he came to the farm in 1973, fourth appellant looked after Mr Woerman's cattle and was paid R4,00 per week. By the time he stopped working he earned R80,00 per week.

[64] Fourth appellant came to the farm with his wife and six children. He established a home consisting of eight houses. He grazed six cattle on the farm but had to reduce their number to five. He also kept six goats on the farm. He cultivated a field about 20 metres wide going around his homestead of eight houses. Mr Woerman supplied the tractor and a driver to plough his field, but fourth appellant supplied his own seed.

[65] It remains to compare R80,00 per week, the services of a tractor-driver and a tractor, with the right to establish a home, the right to keep five cattle and six goats and to plant crops on a field going around a homestead of eight houses.

[66] The cash and other remuneration are plainly of less value than the occupation and use rights.

[67] Therefore, fourth appellant also discharged the onus to show that the value of his occupation and use rights is greater than the value of his cash and other form of remuneration.

[68] To sum up, all three appellants are found not to be farmworkers.

Whether appellants could nominate someone to work on their behalf

[69] There is no evidence with respect to first and third appellants on the question whether they could nominate someone to work on their behalf. Fourth appellant stated that he and his children supplied labour to Mr Woerman. Mr Woerman did not let him take time off because he (Mr Woerman) liked the way he (fourth appellant) worked. The fourth appellant also stated that he used to work in his own father's stead.

[70] It is, however, important to note that the right to nominate someone to work in one's stead does not form part of the definition of a labour tenant. The lack of such a right forms part of the definition of a farmworker. This does not mean that the right must be transposed as a part of the definition of labour tenant. Besides, the section that allows a labour tenant to nominate a substitute worker is merely permissive.²² Therefore, the fact that one does not nominate a substitute worker, or even thinks he does not have the permission to do so, does not cancel one's labour tenant status.

[71] I, therefore, find that the so-called right to nominate a substitute worker is not a requirement for labour tenancy.

[72] I accordingly find that first, third and fourth appellants are labour tenants and that the Magistrate erred in finding that they were not.

22 Supra n 11.

[73] It was argued on behalf of the third and fourth appellants in the alternative that they are occupiers in terms of ESTA. In the light of the finding on their main plea, I do not intend considering the alternative plea.

Whether second appellant is protected by the Extension of Security of Tenure Act

[74] It remains to deal with the second appellant, whose only plea is that he is an occupier in terms of the Extension of Security of Tenure Act²³ (hereinafter referred to as “ESTA”).

[75] Briefly, the facts of second appellant’s case are that his identity document shows he was born on 4 February 1939. He is married and has eight children and seven grandchildren. He lives on the farm with his family. Three of the grandchildren live in Johannesburg. He was born on one Kojie Human’s farm, where he lived with his parents.

[76] At the time of the hearing of the case (11 November 1997) in the Magistrate’s Court, he testified that it was his tenth year on the farm. He came to the farm with his family. The owner of the farm [one Mshomolozza, a name given to the owner because he (second appellant) did not know the owner’s name] gave him permission to settle on the farm. It appears Mshomolozza is Mr Woerman. His work on the farm entailed feeding the farmer’s cattle in return for which he agreed with the farmer that he would be paid R90,00 per week. He first stayed in two houses he found already built. The farmer later gave him permission to build his own houses and he built five of them.

[77] Initially second appellant kept cattle and horses on the farm, but the cattle died and he was told to remove his horses from the farm, which he did. Thereafter he kept no livestock on the farm. The farmer, however, gave him a small garden which the farmer ploughed for second appellant’s benefit. Second appellant planted mealies in this garden.

23 Act 62 of 1997, as amended.

[78] Both second appellant and his son provided labour to the farmer, his son being a tractor driver. Like the father, the son was also paid R90,00 per week, which amount they earned until they stopped working. On his version, they stopped working because they were chased away. Second appellant denied that he ever earned an amount more than R90,00. He specifically denied ever earning R106,00 per week or, later still, R144,25 per week. These figures were extracted from Mr Woerman's records and nobody testified to their correctness. However, the amount is immaterial, dealing as we are, with occupation under ESTA and not labour tenancy.

[79] The Deputy Sheriff served a letter from respondent's attorneys on second appellant on 16 December 1996, giving him notice to vacate the farm by 31 December 1996. Eviction proceedings were initiated on 21 January 1997, and evidence was led on 11 and 12 November 1997. The ESTA commenced on 28 November 1997.

Is second appellant an occupier?

[80] For second appellant to enjoy protection under the ESTA, he must show that he is an occupier as defined in that Act and that respondent failed to comply with the requirements of that Act in evicting him.

[81] Section 1(1) of ESTA defines an occupier as follows:

“Occupier’ means a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding-

- (a) a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act No 3 of 1996);
- (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and

(c) a person who has an income in excess of the prescribed amount.”

[82] The prescribed amount is R5 000,00 per month.²⁴

[83] Second appellant has resided on respondent’s land since around 1987 and has so resided continuously to date. He had the consent of Mr Woerman to reside on the farm and did not use the farm for any of the purposes described in paragraph (b) of the definition. He also did not earn a salary in excess of R5 000,00 per month. Respondent withdrew her consent for second appellant to reside on the land by letter served on him on 16 December 1996. Therefore, it would appear that on 4 February 1997 he did not have consent to reside on the farm, which would exclude him from the definition. However, he may be deemed to be an occupier in terms of section 3(2) of the ESTA.

Is second appellant deemed to be an occupier?

[84] Judgment was given by the Magistrate on 4 August 1998, summons having been issued on 21 January 1997. The ESTA commenced on 28 November 1997. Therefore at the time of commencement of the Act, the matter was pending before the Magistrate’s Court.

[85] In response to Mr Van der Walt’s argument that second appellant is protected by section 3 of the ESTA, Mr Roberts argued that section 3, which deals with consent to reside on land, is not applicable to pending matters, therefore the common law applies, and respondent was entitled not to comply with the ESTA.

[86] Section 3(2) reads:

“(2) If a person who resided on or used land on 4 February 1997 previously did so with consent, and such consent was lawfully withdrawn prior to that date-

24 Regulation 2(1) of the Regulations contained in Government Notice No R1632 in Government Gazette No 19587 of 18 December 1998.

- (a) that person shall be deemed to be an occupier, provided that he or she has resided continuously on that land since consent was withdrawn; and
- (b) the withdrawal of consent shall be deemed to be a valid termination of the right of residence in terms of section 8, provided that it was just and equitable, having regard to the provisions of section 8.”

[87] Section 16 makes sections 5, 6, 7, 8, 9, 10, 11, 12, 13 and 15 applicable to pending matters.

[88] To determine whether second appellant should be deemed an occupier, it is necessary to enquire into the applicability of section 3 to pending matters.

[89] From its language section 3 clearly operates retrospectively but only to cases that were not pending at the commencement of the ESTA. The sections which are made specifically applicable to pending matters are those mentioned in section 16.

[90] A look at section 14 demonstrates that the legislature considered people who were evicted before the commencement of ESTA. Subsection (2) reads:

“14(2) A person who-

- (a) would have had a right to reside on land in terms of section 6 of the provisions of this Act had been in force on 4 February 1997; and
- (b) was evicted for any reason or by any process between 4 February 1997 and the commencement of this Act,

may institute proceedings in a court for an order in terms of subsection (3).”

[91] A person covered by section 14 can therefore, institute action for reinstatement in the status of an occupier that he enjoyed between 4 February 1997 and commencement of the Act. Section 3, protects a person whose consent to occupy land (hence has had his occupier status terminated) was withdrawn on or before 4 February 1997. Finally, section 16 protects a person

whose status as occupier was in the process of being challenged by way of pending litigation at the time of the commencement of the Act. If the legislature wanted section 3 to be applicable to pending cases, it was the easiest thing to include it with the sections listed in section 16.²⁵

[92] I am satisfied that section 3 is not applicable to pending cases. Accordingly second appellant is not deemed to be an occupier.

Whether this Court has jurisdiction to evict second appellant

[93] This Court only has jurisdiction to evict labour tenants as defined in the Labour Tenants Act and occupiers as defined in the ESTA. Second appellant withdrew his appeal based on labour tenancy and is found not to be an occupier. Other occupants of land such as common law tenants and unlawful occupiers under the Prevention of Illegal Eviction and Unlawful Occupation of Land Act²⁶ fall outside the jurisdiction of this Court. I do not believe that Act 19 of 1998 is applicable because it commenced on 5 June 1998 and the leading of evidence was concluded on 12 November 1997. It may be so that before giving judgment on 4 August 1998, the Magistrate could have asked for submissions on the applicability of Act 19 of 1998. That was not done. Even if the Act is applicable, its provisions were not followed and respondent's case would fail on that account, leaving the common law remedy for investigation.

[94] Section 22(2)(c) of the Restitution of Land Rights Act²⁷ came into effect on 23 April 1999 and is not applicable as it was not the law at the time, even of giving judgment. It reads:

“(2) [T]he Court shall have jurisdiction throughout the Republic and shall have-

25 See also *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) at 884A-B; Kellaway, *Principles of Legal Interpretation: Statutes, Contracts & Wills* (Butterworths, Durban 1995) at 323.

26 Act 19 of 1998.

27 Act 22 of 1994, as amended.

....

- (c) the power to decide any issue either in terms of this Act or in terms of any other law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the Court considers it to be in the interests of justice to do so”.

[95] But section 20 of ESTA states :

“20(1) The Land Claims Court shall have jurisdiction in terms of this Act throughout the Republic and shall have all ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power -

- (a) to decide any constitutional matter in relation to this Act;
 - (b) to grant interlocutory orders, declaratory orders and interdicts;
 - (c) to review an act, omission or decision of any functionary acting or purporting to act in terms of this Act; and
 - (d) to review an arbitration award in terms of the Arbitration Act, 1965 (Act No 42 of 1965), in so far as it deals with any matter that may be heard by a court in terms of this Act.
- (2) Subject to the provisions of section 17(2), the Land Claims Court shall have the powers set out in subsection (1) to the exclusion of any court contemplated in section 166(c), (d) or (e) of the Constitution.

....”

[96] Clearly, this section does not confer jurisdiction on the Land Claims Court to decide matters falling outside the provisions of the Act. However, the finding that second appellant stands to be dealt with in terms of the common law is incidental to the enquiry whether he is an occupier in terms of the ESTA. It is my view, therefore, that this Court has jurisdiction to finally dispose of the matter under its ancillary powers contained in subsection (1) of section 20 above.

[97] If this Court’s power to decide the matter were to be ousted because what remains of the case falls to be determined in terms of the common law, that would result in duplication of

actions, unnecessary waste of costs, waste of time and undue inconvenience to the parties; all of which could not have been intended by the legislature and would not be in the public interest.²⁸

Costs

[98] Both parties argued for costs in this matter. Mr Roberts submitted that, notwithstanding the attitude of this Court to costs,²⁹ the Supreme Court of Appeal dismissed an appeal from this Court with costs.³⁰ Therefore, he argued, the successful party in this matter should be awarded costs. The Supreme Court of Appeal does not appear to have analysed the views of this Court on the subject. Once it reached its finding on the merits it gave orders with costs. It may yet find an opportunity to comment on this Court's reasoning for the stand it takes. Until then, I am not satisfied that the order of costs in that appeal is an expression of disagreement with this Court's view on the matter. I am particularly re-inforced in this view by the Supreme Court of Appeal's pronouncements³¹ on the subject in labour law cases, which this Court followed.

[99] The parties will continue to live together on the farm, possibly for a considerable length of time. To further strain their relations with an order of costs would be unfair. Each party believed fervently in the veracity of its case. On the part of the respondent the belief was that appellants were neither labour tenants nor occupiers, as defined, and that the common law notice

28 *Skhosana v Roos* [1999] 2 All SA 652 (LCC) at 660f and *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission and others* [1999] 3 All SA 365 (A) at 372.

29 In a number of cases this Court has expressed itself as reluctant to order costs, unless in exceptional circumstances, because it deals here with social legislation and often the relationship of the parties endures beyond the case. See *New Adventure Investments 19 (Pty) Ltd and Another v Mbatha and Another* 1999 (1) SA 776 LCC; *City Council of Springs v The Occupants of the farm Kwa Thema* 210 (1998) 4 All SA 155 (LCC); *Ntuli and Others v Smith and Another* 1999 (2) SA 540 (LCC), [1999] 2 All SA 1 (LCC).

30 *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg* appeal supra n 9.

31 *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* 1992 (1) SA 700 (A) at 738-39; *South African Society of Bank Officials v Standard Bank of South Africa Ltd* [1998] 1 All SA 363 (A) at 369.

coupled with the fact of ownership of the farm was all that was necessary to secure eviction. On the other side, the appellants believed themselves to be labour tenants, alternatively occupiers, hence subject to a different procedure and grounds of eviction. I am satisfied that neither party was frivolous and in keeping with the young tradition of this Court on the subject, I do not intend to award costs.

[100] Accordingly I find that first, third and fourth appellants are labour tenants as defined in the Labour Tenants Act and second appellant is not an occupier as defined in the ESTA.

[101] The order I make is:

- (1) (a) the application for condonation of late noting of appeal is granted; and
 - (b) the application to amend the notice of appeal is granted so that the amended notice will read, in part:

“Geliewe kennis te neem dat die applikant (verweerder in bogemelde saak) hiermee appèl aanteken na die Grondeisehof teen die hele uitspraak van die Landdros soos gelewer op 4 Augustus 1998 onder saaknommer 143/97, gehou in die Landdroshof vir die distrik van Vryheid waarin hy die eiser (respondent in bogemelde saak) se eis teen die applikante toegestaan het met koste.”
- (2) the appeal with respect to first, third and fourth appellants is upheld;
- (3) the appeal with respect to second appellant is dismissed;
- (4) the Magistrate’s order is set aside in part and replaced by:
 - (a) “Plaintiff’s claim for eviction is dismissed with respect to first, third and fourth appellants and granted with respect to second appellant.

- (b) Fourth appellant is ordered to pay respondent the amount of R6 000,00.
- (c) No order is made as to costs.”
- (5) the second appellant is ordered to vacate the farm within 30 days after service on him of this order, failing which, the sheriff is authorised to evict him immediately upon expiry of the 30 day notice period;
- (6) No order is made as to the costs of appeal.

JUDGE J MOLOTO

I agree

JUDGE F BAM

Heard on: 10 May 1999

Handed down: 4 August 1999

For the appellants:

Adv C G Van der Walt instructed by *Loots Attorney*, Pietermaritzburg

For the respondents:

Adv M G Roberts instructed by *Cox & Partners*, Vryheid