

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **VRYHEID** on **23 to 24 June 1999**
before **Gildenhuis** and **Moloto JJ**

CASE NUMBER: LCC10/97

In the case between:

M P MDLETSHE

Plaintiff

and

N J NXUMALO
AYR BOERDERY CC
MINISTER OF LAND AFFAIRS

First Defendant
Second Defendant
Third Defendant

JUDGMENT

GILDENHUYS J:

[1] This is an action by Mr M P Mdletshe, who previously lived on the farm known as Sub 2 of Bassan No 382, situated in the district of Vryheid (I will hereinafter refer to it as “the farm”). He was evicted from the farm, and he applied for the reinstatement of his rights to the farm. The second defendant is Ayr Boerdery CC, a close corporation which is the registered owner of the farm. The first defendant is Mr N J Nxumalo, who is presently the sole member of the close corporation. The first and second defendants defended the action. The third defendant is the Minister of Land Affairs. The third defendant abides the decision of the court.

[2] The farm was originally part of a much larger land unit, also known as Bassan. The plaintiff testified that he was born on Bassan on 10 October 1931. His father had a kraal there, and was working on Bassan. In return, he was given cropping and grazing rights. The plaintiff testified that he too worked on Bassan when he was “a boy who was still playing”. He played with the child of the farm owner and worked in the farm owner’s garden. It is not clear to me whether the plaintiff was born and worked on that part of Bassan which now constitutes the farm. Although considerable time was spent on this issue, I do not consider it relevant for the adjudication of the disputes in this case. When he was still very young, the plaintiff left Bassan and moved with his father to the farm Klipdrift, in the same vicinity. Some time later, during

approximately 1959, Plaintiff left the Vryheid area and went to Paulpietersburg, where he was employed by the South African Railway Services as a driver of trucks and small trains.

[3] During 1990, the plaintiff retired from his employ with the South African Railway Services. In 1991, he returned to the farm. After his return he stayed on the farm for some years. On 3 October 1996 he was, pursuant to an order of the Vryheid Magistrate's Court dated 8 March 1996, physically evicted from the farm. He instituted action in this Court, claiming the reinstatement of his rights to the farm in terms of section 12(1) of the Land Reform (Labour Tenants) Act.¹ I will hereinafter refer to that Act as the Labour Tenants Act.

[4] Section 12(1) of the Labour Tenants Act reads as follows :

“12(1) A person who-

- (a) in terms of section 3 would have had a right to occupy and use land if the provisions of this Act had been in force on 2 June 1995; and
- (b) between 2 June 1995 and the commencement of this Act vacated a farm or was for any reason or by any process evicted,

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

Section 3 of the Labour Tenants Act, to which section 12(1) refers, reads as follows:

“3(1) Notwithstanding the provisions of any other law, but subject to the provisions of subsection (2), a person who was a labour tenant on 2 June 1995 shall have the right with his or her family members-

- (a) to occupy and use that part of the farm in question which he or she or his or her associate was using and occupying on that date;
- (b) to occupy and use that part of the farm in question the right to occupation and use of which is restored to him or her in terms of this Act or any other law.

....”

1 Act 3 of 1996, as amended.

A labour tenant, to which section 3(1) refers, is defined in section 1 of 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.”

[5] I have already held, after a previous hearing of this case, that plaintiff was evicted by order of the Magistrate’s Court dated 8 March 1996, and therefore complies with the requirements of section 12(1)(b) of the Act.² The cardinal remaining dispute is whether the plaintiff provided labour to the owner or lessee of the farm in consideration for the right to use cropping or grazing land. By way of background, I will first describe the circumstances which existed on the farm at the time of plaintiff’s return. Thereafter I will set forth and analyse the evidence as to subsequent events.

[6] When plaintiff returned to the farm, the entire membership interest in the second defendant belonged to a Mr C J Coetzer. Mr Coetzer did not live on the farm and he conducted no agricultural activities on the farm. There were then four kraals on the farm. The kraal heads were Mr Mbatha, Mr Nkosi, Mr Ndwandwe (also known as Mr Nxumalo) and Mr Masuku. Mr Coetzer required the kraal heads to look after the roads, fences and fire breaks on the farm. They were allowed to keep a limited number of cattle, and could also plant crops. There was a dwelling house on the farm. Mr Coetzer allowed a certain Mr T I H Steenkamp to live in the house with

² My judgment pursuant to that hearing is reported as *Mkwanazi v Bivane Bosbou (Pty) Ltd and Another* and three similar cases 1999 (1) SA 765 (LCC), [1999] All SA 59 (LCC).

his family, and to undertake some farming activities for his own account. Mr Steenkamp was in dire financial straits at the time. The purpose of installing him on the farm was to give him refuge, to have somebody to look after the farm and to prevent vandalism.

[7] The plaintiff testified that when he came back to the farm, he first stayed with his sister at the Masuku kraal. The farm owner (referring to Mr Coetzer) was not on the farm at that stage. Some time later, so the plaintiff testified :

“Mr Mbatha, Mr Nkosi, Mr Ndwandwe and Masuku, they came together and said, Mdletshe, we are going to give you a place to build your kraal, but we will then have to speak to the farm owner when he comes back”

Mr Mbatha testified that this evidence “is not the real truth” and Mr Nkosi testified that it is “n leuen, ek weet daar niks van af nie”.

[8] The plaintiff proceeded to build his kraal. Some time later, Mr Coetzer arrived on the farm and met with the kraal heads and with plaintiff. Plaintiff testified as follows on what transpired at the meeting:

“Mr Van der Walt³ : and what did you and him discuss?

Khipinkunzi (Mr Coetzer) asked me where have I been residing. I said I was residing at Paulpietersburg at Dumbe. I further informed him that I originated from that area. I then asked his permission to have my home built on his farm. That was in 1991. Khipinkunzi asked me what kind of job was I doing at Paulpietersburg. I told him that I was the driver. He asked me what was I driving. I informed him that I was driving lorries. He asked me my licence code. I informed him that I had Code 14. Khipinkunzi then said I have been looking for someone who has got the code you have because there was a Pedi person who was driving the lorry that I have, but they do not want a Pedi in this area. The Zulus do not want the Pedi in that area. He then stated that his lorry was at Richard’s Bay, but when he needs me he was going to call me so I should continue and build my kraal on his farm. He then said I must stay where I was so that it would be easy for him to get in touch with me when he needs me. Khipinkunzi asked me how would he get in touch with me, how would he phone me. I told Khipinkunzi to give me his telephone number. Then he gave me his telephone number.

Did he also ask you to do other jobs for him or not, sir?

Yes, there other work that he asked me to do for him.

What work was that?

He said we must prevent veld fires so that his farm cannot be burnt.

Did he ask you personally to help him with that, or did you hear that from other people?

He asked me personally.

Are you referring here to the making of fire-breaks, to prevent fire from spreading on the farm?

Yes, I am referring to fire-breaks.”

Curiously, the plaintiff did not testify that he also had to assist with the upkeep of fences and maintenance of the roads, tasks which the other kraal heads had to undertake.

[9] Mr Coetzer’s evidence on this meeting is as follows:

“I told him that he’s put me in a difficult situation now, because I don’t want any more people and he’ll have to look for a place and move off the property again.”

He followed this up by the following:

“I, on numerous occasions I did tell Mr Mdletshe that, ‘When are you leaving, you know, I don’t want you here’, and I didn’t leave any doubts of what my feelings were about the matter, I told him straight that I don’t want any more people.”

Mr Mbatha testified that Mr Coetzer told the plaintiff at the meeting that “you have moved onto my farm without my knowledge, so I do not want you on my farm.” Mr Steenkamp and Mr Nkosi gave evidence to the same effect.

[10] Mr Coetzer, in his evidence, stated that from time to time, when he visited the farm, he asked plaintiff when he would be leaving. However, he delayed formal eviction proceedings. Mr Coetzer explained the delay as follows:

“I just want to point out to the Court that they should have understanding for the way I treated this man, with understanding with the problem he had also in moving off now, and that’s why I was very lenient, and I had big patience with this man. I never spoke one bad word to him and I think he can acknowledge that, that I was always very nice to him, I never was bad about the matter.”

Eventually, Mr Coetzer did cause a lawyer's letter to be delivered to the plaintiff in terms whereof plaintiff was required to vacate the farm by 30 November 1992. Mr Steenkamp testified that he delivered the letter to the plaintiff, and said:

“Ek het die brief aan mnr Mdletshe gegee, ek het die inhoud van die brief in Zulu aan hom vertaal, hom gevra of hy verstaan wat in die brief staan. Hy het my nie geantwoord nie en toe ek die brief aan hom wou oorhandig toe weier hy om dit te aanvaar. Ek het die brief gevat en dit voor hom op die grond neergesit.”

It was put to plaintiff in cross-examination that he refused to sign the acknowledgment of receipt on the duplicate copy of the letter, and he responded:

“I never refused because I never saw this letter, I don't remember any time when this letter was ever handed to me.”

[11] The plaintiff testified that he used grazing land on the farm and also planted crops on land designated for that purpose by Mr Steenkamp. Mr Steenkamp denied that he ever designated land to plaintiff to be used for cropping. Evidence from defence witnesses does, however, support plaintiff's testimony that he used land on the farm for grazing and cropping purposes.

[12] The plaintiff testified that he worked on fire-breaks, and said:

“We made 'full buns'. We made fire-breaks. They call it 'full buns'. We are using trees to blow the fire out . . .”

Mr Mbatha testified that he and the others on the farm were responsible for fences, road maintenance and fire breaks. On being asked whether the plaintiff did any of these tasks, he testified that the plaintiff “never took part in those duties”. He amplified this by stating “not a single member of his (plaintiff's) family ever took part”, and concluded by stating that, if the plaintiff testifies that he did so, “that would be telling lies”. Mr Nkosi testified that plaintiff never participated in carrying out these tasks on the farm, stating “hy was nooit daar nie, ek het hom nooit gesien nie”. In cross-examination, he conceded that for a period of one year he worked away from the farm every day, and that it could be possible that plaintiff participated in the tasks

without his knowledge. Mr Steenkamp, who for a year also worked away from the farm, testified that after each task was performed, he specifically enquired who was there and who was not, and it was reported to him that plaintiff never participated.

[13] At some stage, Mr Coetzer bought two tractors, according to his evidence for purposes of speculation. After the purchase, and at the request of Mr Steenkamp, the plaintiff drove one of the tractors from Vryheid to the farm. The use of these tractors was extensively dealt with in evidence. Plaintiff testified:

“Khipinkunzi (Mr Coetzer) bought some tractors from Transvaal and he transported them to Reitz and he asked me to collect them from Vryheid. Those tractors are the ones that I used to plough for Khipinkunzi.”

The plaintiff then proceeded to state:

“People on the surrounding farms would come to Steenkamp and asked for help that tractors would be used to plough their fields, and they would pay some money to Steenkamp. He (plaintiff) was then driving the tractor when it had to plough for the people who have talked to Steenkamp and paid some money for the tractor to plough for them. The people used to give the money to me. That money I would then pass over to Steenkamp.”

He was asked whether he received money for that work, and he replied that he “did not receive any money from Steenkamp”. On being asked on how often he drove tractors for Mr Coetzer or Mr Steenkamp, he stated:

“It happened very often, because there were two tractors. Sometimes Steenkamp would take another tractor and go to plough for the people. I also used to plough for Steenkamp himself because there is a ploughing field in front of the house where Mr Steenkamp was staying. ”

On being confronted with the statement that Mr Coetzer will deny that plaintiff was employed to render services on the farm, plaintiff responded:

“Well, he may deny that, but he knows himself there is enough evidence, because most people could see me ploughing the fields, for them around the farm.”

[14] Except for plaintiff's brother, plaintiff did not call any of the people who allegedly saw him ploughing to give evidence. The plaintiff's brother, Mr M Mdletshe, testified that he saw the plaintiff ploughing with a tractor:

"I saw him ploughing at Mthetwa family, when I asked him, he said he was working under Mr Umkonkoni (Steenkamp), they were getting money out of ploughing, for the people."

He also said:

"Previously, Petros Mdletshe used to work for Sappiko, but after Khipinkunzi had bought the tractor, then Petros had to come back and drive that tractor."

Nobody else (including plaintiff) testified that while plaintiff lived on the farm, he worked at "Sappiko"(probably Sapekoe), and had to give up his work at Sapekoe to become a tractor driver for Steenkamp.

[15] Mr Coetzer testified about the tractors as follows:

"In a certain time I went to Transvaal and as I came back, I saw a board alongside the road 'Sale', and I went in there and there was, because I used to buy a lot of things, speculating, and I saw there was tractors standing there, and I bought two tractors the day on the sale, and these tractors came to the farm. They were there and the people asked me can't they - can't I just help them to plough their lands this year with the tractors, which I did, the people on the farm would witness that. At that stage, Mr Steenkamp was on the farm, staying in the house, and I also gave him the right to use tractors to plough for himself also. Mr Steenkamp was very poor, he didn't have anything, and I said to him, 'Well you can also plough outside the farm and get a few rand in from people which hasn't got cattle', and he did so."

Mr Steenkamp testified that he did use the tractors, but employed a tractor driver from a neighbouring farm to drive the tractors. The evidence hereunder then followed:

"Mnr Van der Merwe⁴ : Nou wil ek tog net vir u sê dat hier getuienis voor hierdie Hof tot die effek dat die eiser mnr Mdletshe beweer het dat hy in diens was as trekkerdrywer daar op die plaas in die tyd wat u daar was.

Nee, dit is onwaar.

Was hy op die plaas terwyl u die dam gebou het?

Ja, hy was. Ek kan net miskien byvoeg waarom sal ek 'n trekkerdrywer gaan huur vanaf 'n ander plaas as ek een daar het? Ek meen dit maak nie vir my sin nie.”

And later:

“Mnr Van der Merwe: Nou ek moet dit aan u stel dat die getuienis van mnr Mdletshe was tot die effek dat hy in diens was op die plaas. Wat sê u daarvan dat hy gewerk het op die plaas?

Dis 'n blatante leuen.

Tewens hy gaan voort en hy impliseer u persoonlik en hy sê dat u het hom in diens geneem om vir u te ploeg op die plaas en ook op ander plase.

Nee, dit is 'n blatante leuen.”

Mr Mbatha testified that the tractors were only about a year on the farm, and were never used (which is obviously incorrect). Mr Nkosi also gave evidence about the tractors. He said:

“Daar was trekkers op die plaas maar ek het hom (plaintiff) nooit sien trekker bestuur nie. Ek het op die pad gewerk en ek was nie altyd by die huis maar ek het hom nooit gesien nie.”

Under cross-examination, Mr Nkosi said that the tractors were driven by others. This corroborates Mr Steenkamp's evidence that a different driver (not plaintiff) drove the tractors.

[16] First defendant bought the membership interest in second defendant from Mr Coetzer on 2 December 1993, and took possession of the farm. He caused a letter requiring the plaintiff to vacate the farm by 30 November 1994 to be served by the sheriff. Personal service was effected on 12 August 1994. Despite personal service of this letter, plaintiff denied that first defendant ever asked him to vacate the farm. Thereafter, on 19 January 1995, the first defendant issued summons against the plaintiff out of the Magistrate's Court, Vryheid, for an order of eviction. Plaintiff also denied receiving the summons, notwithstanding that notice of appearance was subsequently entered. The action was eventually settled on 17 October 1995. The deed of settlement required the plaintiff to vacate the farm before or on 28 February 1996. The plaintiff did not do so. An order for his ejection was obtained in the Magistrate's Court on 8 March 1996, and he was actually ejected from the farm on 3 October 1996.

[17] The plaintiff testified under cross-examination as follows concerning the deed of settlement:

“Mr Van der Merwe: Can you remember that you signed that document at the Magistrate’s Court in Vryheid, in the presence of your then lawyer, Ms Witcher, of the Legal Resource Centre?

Yes, I remember that.

In that document you undertook to leave the farm, Bassan, by the 28th of February 1996?

Well, I was not aware that the document said I’ll have to move from the farm.

Well, Mr Mdletshe, I put it to you that if you seem to suggest that that was the case, then you suggest that your lawyer misled you into signing that document?

If the document I signed stated that I should leave the farm, then my lawyer then misled me, because my understanding was that I signed that document with the understanding that I’ll go back and stay where I’m staying for a year and look for a place, and if I don’t get a place, I’ll come back and report, that’s my understanding of signing this document.”

The settlement agreement was made an order of court. In that connection, the plaintiff responded to cross-examination as follows:

“Mr Van der Merwe : Mr Mdletshe, I put it to you that this deed of settlement was even made an order of court in your presence?

Was there a person who was informing me of what was going on, or was there anyone who was interpreting that day?

I put it to you, yes that is what happened.

So the interpreter was telling me what you say is written in this document?

I put it to you.

I don’t know anything about that, I never, there was not a single person who interpreted anything to me.”

[18] Finally, it was put to plaintiff that his attorneys agreed on his behalf that certain of his cattle which were attached to satisfy a costs order in the Magistrate’s Court, would be made over to first defendant in full and final settlement of the cost obligation. The plaintiff replied:

“Well it was not explained to me that my cattle would be taken to pay for the costs, as it’s stated.”

He admitted that cattle were taken, and it is obvious to me that it was for plaintiff’s obligation to pay costs.

[19] Before evaluating the evidence, I must say something about the witnesses who testified. In support of plaintiff’s claim, plaintiff himself testified and also his brother, Mr M Mdletshe, who did not live on the farm. For the defence, evidence was given by Mr Coetzer (the previous owner of the membership interest in second defendant), Mr Steenkamp (who lived in the dwelling house on the farm), Mr Nkosi and Mr Mbatha (kraal heads living on the farm) and the first defendant himself. The evidence of plaintiff (corroborated to a limited extent by his brother) is in direct conflict with most of the evidence presented by the defence. Plaintiff’s brother’s evidence covers but a narrow ambit of the case.

[20] The plaintiff was not a good witness. Although unsophisticated, he is by no means ignorant. He was able to secure and hold down employment as a driver of trucks and small trains. He was argumentative in cross-examination and tended to respond to questions by putting counter-questions. On many of the crucial issues, his testimony as a single witness stands in direct conflict with the testimony of several defence witnesses. On some issues, his evidence is highly improbable, which must affect the weight to be given to his evidence as a whole. Of importance in this respect, is his consistent denial that he received the letters demanding his vacation of the farm and also the summons for his eviction, when it is obvious that he must have got them. His statement that the settlement agreement was not properly explained to him and understood differently by him, is highly implausible. I cannot imagine that an attorney, who is an officer of the Court, would allow her client to sign a settlement agreement without making sure that its contents are known and understood. The same criticism applies to plaintiff’s denial that he was ever told that his cattle were taken to pay for costs.

[21] The evidence given by the witnesses for the defence is also not free from criticism. Mr Coetzer could not always remember very well. I did, however, get the impression that he tried to assist the Court to the best of his ability. Both Mr Mbatha and Mr Nkosi are unsophisticated farm

labourers, Mr Nkosi perhaps more so than Mr Mbatha. I was not always sure that Mr Nkosi fully understood some of the questions put to him. Both of them, however, tried to assist the court with their evidence. Mr Steenkamp gave his evidence in a convincing manner. He has no direct or indirect interest in the outcome of the litigation. Mr van der Walt (for plaintiff) criticised Mr Steenkamp's evidence because he put the rhetorical question in his testimony of why he would hire a tractor driver from elsewhere if he already had one on the farm. I do not follow the criticism. Mr Steenkamp never conceded that plaintiff was obliged to work as tractor driver on the farm. On the contrary, he intimated through the rhetorical question that if plaintiff was so obliged, it would not have been necessary for him to hire a tractor driver from elsewhere. Mr Steenkamp's evidence was also criticised because he did not mention that he worked on the road while he lived on the farm. This is not correct. He testified as follows during his evidence in chief:

“ . . . ek het ander werk gesoek en na 'n rukkie het ek toe by die RDP 'n tydelike posisie gekry om met hande-arbeid 'n pad te bou . . . ”

It is correct, as Mr van der Walt pointed out, that the defence witnesses, amongst themselves, differed in their evidence on several issues. These are, in my view, peripheral issues. Many of them concern the happenings of long ago. I must take cognisance of the frailty of human memory, especially on facts which do not relate directly to the issues in dispute between the parties and are therefor less likely to be remembered. On the main issues, the defence witnesses supported each other.

[22] It is common cause that on 2 June 1995 the plaintiff was living on the farm. There is also uncontested evidence that his father lived and worked on Bassan, and in return was given cropping and grazing rights. The plaintiff therefore complies with two of the three components of the definition of “labour tenant”. To comply with the outstanding component, the plaintiff must prove that he was using cropping or grazing land on the farm, and in consideration of such right provided labour to the owner or lessee of the farm. On the evidence, there can be no doubt that, after his return to the farm, the plaintiff did use cropping and grazing land on the farm. It is disputed that plaintiff had any right to do so and that he provided any labour in consideration thereof.

[23] Plaintiff testified that he entered into an explicit agreement with Mr Coetzer on the occasion of his first meeting with Mr Coetzer, to the effect that he may live on the farm, may graze cattle and plant crops, and in return would provide labour. This evidence is not corroborated by any other witness. On the contrary, four witnesses called on behalf of the defence deny that such an agreement was concluded. It is, in my view, improbable that Mr Coetzer would have concluded such an agreement, because he was not farming and had no need for additional labour. I accordingly find that no such agreement was concluded.

[24] It was attempted, on behalf of plaintiff, to find corroboration for the alleged agreement from evidence that plaintiff did actually work on the farm. Insofar as work on fire-breaks is concerned, plaintiff's evidence stands alone against the evidence of Mr Mbatha and Mr Nkosi that he did not participate in such work, and against the evidence of Mr Steenkamp who testified that after each task was performed, it was reported to him that plaintiff did not participate. Although Mr Nkosi had to concede that plaintiff might have worked without him knowing about it, the evidence of the other two stands. It is questionable why plaintiff, in describing the work he had to do, did not include the upkeep of fences and the maintenance of roads, work for which the other kraal heads were responsible. If Mr Coetzer did in fact contract with him to work on the farm, it is unlikely that the lastmentioned tasks would not have been included. I must therefore reject plaintiff's evidence that he worked on fire-breaks on the farm.

[25] Insofar as plaintiff's alleged work as tractor driver is concerned, although there is evidence by plaintiff's brother that he saw him working at the Mthetwa family, Mr Steenkamp denied that he ever employed plaintiff as tractor driver. Mr Mbatha testified that the tractors were never used (which is clearly not the case) and Mr Nkosi said he never saw plaintiff working as a tractor driver. According to him, the tractors were driven by other people. I do not consider the single occasion when plaintiff admittedly drove one of the tractors from Vryheid to the farm to be labour as envisaged in the definition of labour tenant. It was clearly done as a favour. Plaintiff's brother testified that plaintiff gave up his work at Sapekoe to drive the tractors which Mr Coetzer bought. If this was so, I would have expected the plaintiff to give evidence to that effect. On the probabilities, I cannot find that plaintiff provided labour as a tractor driver, to an extent which will satisfy the apposite requirement in the definition of labour tenant. Even if plaintiff did work

as a tractor driver, such labour would, on the evidence, be labour provided to Mr Steenkamp, and not to the owner or lessee of the farm. Under the definition of labour tenant, it is necessary that the labour must be provided to the owner or to the lessee of the farm.

[26] First defendant bought the membership interest in second defendant from Mr Coetzer on 2 December 1993, and took possession of the farm. Plaintiff testified that he never worked for first defendant:

“He never asked me to come and work for him and among all the people who reside on the farm there was no one who was working for him. Afterward I saw children of the other residents of the farm working for the defendant, and I asked them why don’t you tell me that now children are needed to hew (sic) on the fields.”

[27] It was argued on behalf of the plaintiff that through the delay in bringing legal proceedings, the second defendant (as owner of the farm) or Mr Coetzer or first defendant acquiesced in plaintiff’s occupation of the farm or gave him tacit consent to remain on the farm. This argument, in my opinion, misses the point. It is not necessary that the plaintiff’s occupation of the farm must be lawful (that is, with consent) for that person to comply with the first component (residence) of the definition of labour tenant. I have already reached that conclusion in par [9] of my earlier judgment in this case.⁵ It is common cause that on 2 June 1995 the plaintiff was living on the farm. What the plaintiff must show is that he was given grazing and cropping rights in return for the provision of labour. That requires *consensus*, whether explicit or tacit, and not consent. At best for plaintiff, any delay in preventing his use of cropping and grazing land or in securing his eviction from the farm might point to the existence of such *consensus*.

[28] It was furthermore argued that through the conduct of Mr Coetzer or of first defendant, a tacit agreement came into existence in terms whereof the plaintiff was allowed to live on the farm and use land for cropping and grazing purposes, in return for the provision of labour. Corbett JA (as he then was) set out the requirements for the establishment of a tacit agreement

5 Supra n 2 at 771B-C and 64b-c respectively.

in the case of *Standard Bank of South Africa Ltd v Ocean Commodities Inc and Others*⁶ as follows:

“In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact *consensus ad idem*.”

The delay in obtaining a restraining or eviction order against plaintiff is not “unequivocal conduct” pointing towards a meeting of the minds. Delay may in appropriate circumstances give rise to an inference that the owner has agreed to somebody occupying his or her land⁷, but it is nothing more than an inference. In this case, any such inference is negated by the lawyer’s letters delivered at the behest of Coetzer and of first defendant, and also by Coetzer’s numerous biddings that plaintiff and his stock must vacate the farm. Also, the delay is not unreasonable, particularly where it is not coupled with silence on the part of Coetzer or first defendant on their desire that plaintiff leave the farm. An inference of *consensus* is also negated by the improbability that Coetzer or first defendant would have accepted the one-sided bargain which plaintiff contends he made. Why would they be prepared to allow plaintiff to live on the farm and give him cropping and grazing rights in return for labour which they did not need? Both Mr Coetzer and first defendant were compassionate towards plaintiff, and wanted to give him every opportunity to find alternative accommodation. The Court should not discourage that kind of compassion by being too quick to deduce tacit consent or a tacit agreement from mere inaction. In this case, there are no circumstances which required Mr Coetzer or any of the defendants to embark on expeditious eviction proceedings.⁸

[29] Section 12(1) of the Labour Tenants Act gives a person who would have had a right in terms of section 3 to occupy and use land, if that Act had been in force on 2 June 1995 and who was evicted between 2 June 1995 and the commencement of the Act, the right to apply for reinstatement. Section 3(1), to which section 12(1) refers, gives a person who fell within the

6 1983 (1) SA 276 (A) at 292B.

7 *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others* 1997 (1) SA 526 (W) at 531H.

8 Compare *Kiloverter Sales (Pty) Ltd v Mackenzie’s Garage (Pty) Ltd* 1975 (1) SA 223 (N) at 225E-G.

definition of labour tenant on 2 June 1995 the right to occupy and use that part of a farm which he or she was actually using and occupying on that date. To fall within the definition of labour tenant, it is necessary, in terms of para (b) of that definition, that the person:

“has or has had the right to use cropping or grazing land . . . and in consideration of such right provides or has provided labour to the owner or lessee (my emphasis).”

It is clear from para (b) that the labour must be provided as consideration for the right to use the land.⁹ The word “has” in the definition relates to the word “provides” and the words “has had” to the words “has provided”. It follows that a person would not be a labour tenant if there was no reciprocal provision of labour (or at least a readiness to comply with a reciprocal obligation to provide labour) at the time when the right to use cropping or grazing land existed.¹⁰

[30] I conclude that plaintiff does not qualify for relief under section 12(1) of the Labour Tenants Act, firstly because he never had a right to use cropping or grazing land on the farm and secondly because, since his return to the farm in 1991, he never provided labour to the owner or the lessee. Labour which he may have provided when he was still a boy and before he left the farm to move to Klipdrift does not qualify, firstly because it was not provided in return for cropping or grazing rights, and secondly because the legislature could never have intended that labour provided by a person in the remote past could possibly qualify to be labour through which such a person could establish himself as a labour tenant more than thirty years later, especially where he had been absent from the farm during the intervening period.

[31] The Labour Tenants Act is social legislation. It has been the practice of this Court, in the absence of special circumstances, not to make costs orders. In my judgment there are no special circumstances in this case which would warrant a costs order.

9 *De Jager and Sons v Kumalo* [1999] 2 All SA 629 (LCC) at 634f-g and 638e.

10 I do not propose to decide the related issue whether, in an application for restitution under section 12(1), a person qualifies for relief if his use of cropping or grazing land on 2 June 1995 was without any right to that use. The Supreme Court of Appeal judgment of *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA) does not seem to run contrary to an interpretation that the use of cropping or grazing land on 2 June 1995 must be as of right. See page 1075C-D of the judgment. This issue was also discussed in *Mlifi v Klingenberg* [1998] 3 All SA 636 (LCC) at 645b-f, where Meer J appears to have reached a different conclusion.

[32] The claim is dismissed. No order is made as to costs.

JUDGE A GILDENHUYS

I agree

JUDGE J MOLOTO

Heard on: 23 and 24 June 1999

Handed down: 17 August 1999

For the plaintiff:

Adv C G van der Walt instructed by *Loots Attorneys*, Pietermaritzburg

For the defendants:

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