

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on **30 September 1998**  
before **BAM P** and **GILDENHUYS J**

**CASE NUMBER: LCC 89/98**

In the matter between

**MSEVULA PHILEMON MOKWENA**

**Applicant**

and

**MARIE APPEL BELEGGINGS CC**

**First Respondent**

**THEODORUS CORNELIUS ERNEST KLEINHANS**

**Second Respondent**

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## JUDGMENT

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### **BAM P :**

[1] The Applicant is a male pensioner who resides in Section 5 of the farm Mooifontein in the district of Middelburg. He and his family settled there during 1992 or 1993. He has a residence of his own on the farm and a vegetable garden. He currently grazes approximately 14 head of cattle in a camp measuring some ten hectares, adjacent to his residence. He worked as a foreman on the farm for a lessee, Mr Marthinus van der Merwe, until 1994 when, due to an accident on the farm, he sustained an injury in the course of his employment as a result of which he was unable to continue with his normal duties. None of the above facts in respect of the Applicant are in dispute in the documentation or in the submissions on behalf of any of the parties to this application.

[2] The First Respondent is a close corporation and the registered owner of Portion 5 of the farm Mooifontein.

[3] The Second Respondent is a male adult farmer who resides in Portion 3 of the farm Tweefontein, Arnot, in the district of Middelburg. It is common cause that he is the sole member of First Respondent since the end of 1997.

[4] The Applicant filed an urgent application to this Court on the 13<sup>th</sup> August 1998 for an interim order restraining the Respondents from carrying out certain activities prejudicial to him on the one hand and, on the other, compelling them to grant certain concessions and facilities beneficial to him in the enjoyment of his rights of occupation. These rights, he alleged, were by virtue of his status as a labour tenant acquired in terms of the Land Reform (Labour Tenants) Act, Act No 3 of 1996 (herein after referred to as "the Act").

[5] The Respondents (in reality Mr Kleinhans in both instances), contest the Applicant's

claim that he fulfills all the requirements of labour tenancy, as set out in the Act. That being the case, they submit that this Court has no jurisdiction to hear the application and to grant any of the prayers sought by the Applicant in his Notice of Motion.

[6] Since the matter had been brought to the Court on an urgent basis (allegations of imminent and dire consequences particularly to the Applicant's cattle were made), the Court gave an early trial date, even before there had been an opportunity to receive answering and other affidavits from the parties. The date was 16 September 1998.

[7] Subsequently the parties, by mutual agreement and having assured the Court that suitable interim arrangements were to be made for the grazing and watering for Applicant's cattle, applied for the matter to be removed from the roll of 16 September 1998. This gave the parties time to prepare their papers for the application which was then set down again, this time for the 30<sup>th</sup> September 1998.

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

[9] Nonetheless, the Court was of the view that it could make a determination in respect of some of the requirements of labour tenancy on the facts before it which was either common cause or did not generate a genuine or real dispute.<sup>1</sup>

[10] The Court decided on this course in order to expedite the adjudication of the matter and also to fully utilize the time and effort expended thus far by the parties. The legal representatives did not object to this proposal and the case proceeded to argument on that basis. In the course of argument, however, Mr Bignaut, for the Respondents, submitted that the whole question of labour tenancy should be referred to oral evidence and not be treated piecemeal.

[11] It is clear from the papers and from argument that a fundamental difference in the points of departure between the parties relates to the question whether or not the Applicant's residence, grazing and watering on the farm are based and have been based upon any underlying agreements. It appears to be the Applicant's contention that while he asserts that such agreements do exist (which is disputed by Respondents), they are not an essential or even necessary ingredient for the acquisition of the status of labour tenancy. Mr Coertse, for the Applicant, submits in this regard that the status of labour tenancy is not the product of either a lease or a labour contract but of a *de facto* historical relationship having now been accorded *de jure* recognition by statute. This argument is very persuasive but should not be stretched so far as to imply that no agreements of any kind are relevant to the determination of the existence or not of a labour tenancy. Section 2(6) of the Act obliges the Court to take them into account:

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<sup>1</sup> *Peterson v Cuthbert Co Ltd* 1945 AD 420 at 428-9;  
*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 at 1163;  
*Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 at 634I-635A;  
*Dhladhla and others v Erasmus* LCC11/98, 24 November 1998, as yet unreported (par [13] and the cases cited therein).

“For the purpose of establishing whether a person is a labour tenant, a court shall have regard to the combined effect and substance of all agreements entered into between the person who avers that he or she is labour tenant and his or her parent or grandparent, and the owner or lessee of the land concerned.”

[12] The Respondents’ contention, on the other hand, is that such agreements are essential and that they did not exist in the present case. The Respondents readily admit that the Applicant resided on the farm since 1992 but deny that he thereby acquired a right to such residence. In short, Respondents’ version is that after the Applicant was injured in 1994, he no longer worked, no longer received a salary but was allowed, as an act of grace, to live on the farm for as long as Marthinus van der Merwe leased the farm. When Mr van der Merwe sold the farm, so the Respondents argued, this right came to an end. The continued occupation and use of grazing land by the Applicant after the farm was sold is admitted, and is explained as follows :<sup>2</sup>

“Dit word erken dat die Applikant tans ongeveer veertien beeste op die plaas laat wei. Die Applikant het sedert die Tweede Respondent die belang in die Eerste Respondent bekom het, die beeste in die betrokke kamp laat wei en wei die beeste tans nog in die kamp. Die vee word slegs om menslikheidsredes daar laat wei sonder dat die Respondente enige reg van die Applikant daartoe erken.”<sup>3</sup>

This indicates that there was at least a tacit recognition in respect of the Applicant’s tenancy by the Respondents.

[13] The greater part of the case for the Respondents is premised on the basis that the Applicant had never been authorised or permitted (my emphasis) to live on the farm or any part of it. I am of the view that this is barking up the wrong tree. Consensus of the parties in any form is neither an expressed nor an implied requirement in determining the status of labour tenancy. The furthest that the Act goes is, as indicated above, the requirement in Section 2(6) that where such agreements do exist, (my emphasis), the Court should have regard to their combined effect. In the instant case, the Court must take cognisance of the unchallenged labour agreement between Mr Philemon Mokwena and Mr Marthinus van der Merwe from about 1992 up until 1994 as well as of his unchallenged subsequent residence and the grazing of his stock on the farm continuously until now.

[14] The real and pertinent issue which is capable of decision at this hearing on the papers is whether the three elements contained in paragraphs (a), (b) and (c) of the definition of a labour tenant in Section 1 of the Act have been met. In terms of the section, the Applicant must establish that he is 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,”

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<sup>2</sup> Page 86 of the bundle.

<sup>3</sup> See also page 99 of the bundle.

If that is established, the person will be a labour tenant, unless he is a farmworker.<sup>4</sup>

[15] This Court has held in several cases<sup>5</sup> that the definition requires that there must be compliance cumulatively with paragraphs (a), (b) and (c). The three components are to be read conjunctively and a person who fulfills them all is presumed not to be a farmworker, unless the contrary is proved.

[16] (a) As regards the first requirement relating to residence, there is no dispute whatsoever on the papers and it is common cause that the Applicant resides on the farm. This suffices to comply with the first leg, although it is expressed in alternative terms, the other being

“... or has the right to reside on a farm...”

which is disputed by the Respondent.

(b) The Applicant clearly satisfies the second requirement, for it is not in dispute that he has had (if he does not still have) the right to use grazing land on the farm and it is also not in dispute that he has provided labour for Marthinus van der Merwe. The fact that all this may have occurred in the past, the fact that the contractual basis of the Applicant’s right of residence may have terminated and the fact that he is no longer working, are all irrelevant. Paragraph (b) refers to rights which exist or have existed (my emphasis) in the past, and to labour which is being provided or was provided (my emphasis) in the past.

(c) There was some argument in respect of requirement (c) to the effect that the parent of the Applicant, Jacob Mokwena, had never been in service on the farm and had in fact died before the Applicant came to settle on the farm. It was, however, not disputed that the said father, resided

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<sup>4</sup> A farmworker is defined in Section 1 of the Act as follows :

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

- (a) in return for the labour which he or she provides to the owner or lessee of the farm, he or she shall be paid predominantly in cash or in some other form of remuneration, and not predominantly in the right to occupy and use land; and
- (b) he or she is obliged to perform his or her services personally.”

<sup>5</sup> *Mlifi v Klingenberg* [1998] 3 All SA 636 (LCC) at 642g-650d; *Ngcobo and another v Van Rensburg and others* [1997] 4 All SA 537 (LCC) at 540i-547h; *Zulu and others v Van Rensburg and others* 1996 (4) SA 1236 (LCC) at 1253H-1254E; *Mahlangu v De Jager* 1996 (3) SA 235 LCC at 241C-242A. The KwaZulu Natal High Court interpreted the second and third requirements of the definition disjunctively: see *Klopper and others v Mkhize and others* 1998 (1) SA 406 (N) at 408E-I and *Tselentis Mining (Pty) Ltd and another v Mdlalose and others* 1998 (1) SA 411 (N) at 415C-419I and [1997] 3 All SA 647 (N) at 661c-665e. The Transvaal High Court agreed with the interpretation of this Court and held that the disjunctive approach followed by the KwaZulu Natal High Court is wrong: see *Mosehla v Sancor CC*, TPD Case No A1557/97, 7 September 1998, as yet unreported at page 11 of the judgment and *Van Niekerk v Nqonwange*, Case No TPD 24921/96, 15 April 1996, unreported at page 4 of the judgment.

and served on another part of the property and had use of grazing on that part. I have not been persuaded that the earlier decisions<sup>6</sup> in this Court which interprets the section as including a farm other than the one on which the Applicant resides are wrong and I will follow them. Hence, I find that there has been compliance with this requirement on the part of the Applicant.

[17] Once the above three elements have been satisfied, as I find them to have been, then in terms of Section 2(5) that person is presumed not to be a farmworker unless the contrary is proved. It is common cause that the question of whether the Applicant was a farmworker had not been adequately canvassed and that there is a dispute in respect of it and that this part of the enquiry would accordingly be referred to oral evidence. It is also common cause that the onus is upon the Respondents to show that the Applicant is a farmworker.

[18] A submission that the Applicant did not qualify as a labour tenant as of 2 June 1996 (obviously an error for 1995) appears in Respondents' answering affidavit in the following terms :

“Weer eens [word dit] benadruk dat die Applikant nie enige regte tot en op die plaas het nie, nie 'n huurarbeider is of was nie en beslis nie as huurarbeider kwalifiseer het op 2 Junie 1996 (sic) nie. Die Agbare Hof sal tydens aanhoor van die aansoek volledig oor hierdie aspek toegesprek word.”

When the submission was advanced during the hearing, Mr Blignaut's argument seemed to be that if the Applicant had been truly a labour tenant on 2 June 1995, he would have nominated a substitute to provide labour in his stead [presumably in terms of Section 4(1)] after sustaining an injury in 1994 and the fact that he failed to do so indicates that he was not a labour tenant. Furthermore, he seemed to suggest that if he was not actually providing service on 2 June 1995 and had failed to exercise the right to nominate another person in his stead, this was fatal to his claim.

[19] I cannot accept this argument as valid. The Applicant's failure to nominate a substitute to provide labour cannot be a waiver of the rights given to him under the Act. Under paragraph (b) of the definition of labour tenant, it is sufficient if labour was provided in the past. Nowhere is it required that labour must have been provided (either by the labour tenant himself or by a substitute) on 2 June 1995.

[20] Accordingly the following order is made :

- (a) The issue of whether the Applicant is or was a farmworker is referred to oral evidence;
- (b) The names and a brief summary of the evidence of any witness who has not given

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<sup>6</sup> In the case of *Zulu v Van Rensburg* 1996 (4) SA 1236 (LCC), this Court interpreted the section as including a farm other than the one on which applicant resides. The High Court in KwaZulu-Natal came to a contrary decision in the matter of *Salimba v Ngcobo and others*, NPD 340/96, 4 November 1997 as yet unreported, on page 22. This Court followed the *Zulu* judgment in the matters of *Mlifi v Klingenberg* supra n5 at 650a-b and *Dhlahdla and others v Erasmus* supra n1.

an affidavit in the case must be delivered at least five days before the hearing; and

- (c) Costs will be determined when the issue mentioned in (a) has been decided

[21] The Registrar is directed to communicate with the parties to determine a date for hearing of oral evidence in terms of order (a) above.

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**PRESIDENT F C BAM**

I agree

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**JUDGE A GILDENHUYS**

**Heard on :**30 September 1998

**Handed down on :** 09 February 1999

For the Applicant:

*Mr C J Coertse* instructed by *Hilmer W Kruger* (Witbank)

For the Respondents :

*Adv J G Blignaut* instructed by *Gerhard van Zyl* (Middelburg)