

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 4 & 24 April 2001
before **Moloto AJ**

CASE NUMBER: LCC 115/99

Decided on: 29 May 2001

In the matter between:

COMBRINCK HJ

Plaintiff

and

NHLAPO T

Defendant

JUDGMENT

MOLOTO AJ:

[1] The plaintiff caused a summons to be issued out of the Carolina Magistrate's Court on 4 May 1999 for the eviction of the defendant from his farm Twyfelaar, district of Carolina, Mpumalanga ("Twyfelaar"). The plaintiff was represented by an attorney in the matter. The plaintiff alleged that the defendant was an occupier as defined in the Extension of Security of Tenure Act¹ ("ESTA"), whose right of residence had been terminated in terms of the Act. The defendant entered appearance to defend through a firm of attorneys. The plaintiff applied for summary judgment. In the opposing affidavit to the summary judgment, the defendant stated that he was protected by the Land Reform (Labour Tenants) Act² ("the Labour Tenants Act"), as he was a member of his father's family or his father's associate as defined in that Act; alternatively that he was an occupier as defined in ESTA. The magistrate granted the defendant leave to defend and a plea was filed. The plea repeated the defence under the Labour Tenants Act and the magistrate transferred the case to this Court, as the jurisdiction of the magistrate's court to hear cases under the Labour Tenants Act is ousted by section 13(1A) of that Act. It reads:

1 Act 62 of 1997, as amended.

2 Act 3 of 1996, as amended.

- “(1A) With the exception of issues concerning the definition of ‘occupier’ in section 1(1) of the Extension of Security of Tenure Act, 1997 (Act 62 of 1997), 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.”

After the pleadings had closed, the defendant’s attorney withdrew and the defendant conducted his own defence.

The facts

[2] At a hearing in this Court the plaintiff testified and called one other witness, Mr Elliot Ngcongwane. Whereas the particulars of claim stated that the plaintiff resides on Twyfelaar, the plaintiff testified that he resides on the farm Goedehoop which is next to Twyfelaar. He said he acquired Twyfelaar in 1988, whereupon he asked the people he found on Twyfelaar to work for him. Some agreed and others did not. Among those who agreed to work for him was Mr Albert Nhlapo, the defendant’s father (“Mr Nhlapo”). The workers who agreed to work for the plaintiff signed service contracts. According to the plaintiff the defendant was not on Twyfelaar at the time. The plaintiff saw the defendant later when he was told that the defendant is Mr Nhlapo’s son and he is visiting his father. When the “visit” became extended the plaintiff expressed his disapproval thereof to Mr Nhlapo. The plaintiff had meetings with some of his staff to whom he complained about the defendant’s extended stay on Twyfelaar. The plaintiff noticed a house being built next to Mr Nhlapo’s house and established that it was being built by the defendant. The plaintiff told the defendant that he disapproved and the defendant told him he is looking for a place. He told the defendant, Mr Nhlapo and some of his staff (including Mr Elliot Ngcongwane) a few more times that he does not allow people who do not work for him to stay on Twyfelaar. The defendant has never worked for the plaintiff. Finally he gave the defendant a written notice to vacate Twyfelaar. The notice was witnessed by two workers, one of whom was Mr Ngcongwane. The defendant refused to sign the notice and said it must be given to his father.

[3] The plaintiff handed into Court a copy of Mr Nhlapo's service contract. In terms of the contract, Mr Nhlapo keeps livestock on Twyfelaar for which he pays R10,00 per month per large stock unit to the plaintiff. The following are deductions from his monthly gross salary before he receives a nett of R390,00.

Mealie Meal	R 40,00
Food	R180,00
Accommodation, water and wood	R 50,00
Milk	R 24,00
5 cattle @ R10,00 per head	<u>R 50,00</u>
Total	<u>R344,00</u>

That concluded the plaintiff's evidence.

[4] The plaintiff had indicated in his evidence that Mr Elliot Ngcongwane would confirm the allegation that the defendant did not stay on Twyfelaar, but only came on Twyfelaar around the time the plaintiff first noticed him. On this point, Mr Ngcongwane stated that the defendant had always lived with his father on Twyfelaar. Mr Ngcongwane resides on plaintiff's farm Goedehoop where he has worked for 30 years. He always saw the defendant when he (Mr Ngcongwane) came to visit on Twyfelaar over week-ends. When he came to Goedehoop 30 years ago, he found Mr Nhlapo resident on Twyfelaar. The workers each cultivate a field which is less than a hectare for their own benefit. Mr Nhlapo had a field to cultivate when Mr Ngcongwane first came to work 30 years ago. Mr Ngcongwane confirmed the meetings with the plaintiff about the defendant and the notice given to him to vacate Twyfelaar. That was the plaintiff's case.

[5] The defendant testified on his own behalf and called Mr Nhlapo as a witness. The defendant testified that he was born on Twyfelaar in 1968, Mr Nhlapo was also born on Twyfelaar and the defendant's grandfather, in his lifetime, had been resident on Twyfelaar. His grandfather had worked for previous owners of Twyfelaar, had a field to cultivate and kept cattle on Twyfelaar. The defendant grew up on Twyfelaar. Mr Nhlapo worked for Mr Corrie Mostert and later Mr Piet de Klerk. At some

stage he attended school away from Twyfelaar, hence the plaintiff did not see him. He built a one-roomed house next to his father's house in 1985, whilst still a student. This was his bedroom. When he finished school he worked for various employers on other farms. He never worked on Twyfelaar and not for the plaintiff. When he worked on a neighbouring farm he slept at Twyfelaar every day. Otherwise if he worked far from Twyfelaar, for example in Belfast, he stayed there for a week and came home over week-ends. When the employment terminated he always came back to Twyfelaar. Currently he works for a mechanic. In 1995 he extended his one-roomed house to accommodate his wife and children. That is when the plaintiff objected. The plaintiff spoke to him on three occasions telling him to leave. He said he would make a plan. He then went to work for one Mr Pretorius, but was dismissed because the plaintiff told Mr Pretorius that he (the defendant) has "a bad attitude". So he returned "home" to Twyfelaar. Apart from interruptions when he worked for other farmers, he has worked for the mechanic since 1989 to date. The defendant has no field to cultivate on Twyfelaar, neither does he keep cattle on Twyfelaar. He is a member of his father's family. That was the defendant's evidence.

[6] Mr Nhlapo testified for the defendant. He said that his ancestors lived on Twyfelaar even before any white people lived there. He and his father were born there. His ancestors grazed many cattle on Twyfelaar and tilled the soil; as did his father and himself. The first white people came to Twyfelaar when he was a child. He was born on 1 August 1926. The first white person on Twyfelaar was, according to him, Mr Willie Mostert. Grandfather Nhlapo (grandfather to defendant) worked for Mr Willie Mostert. Grandfather Nhlapo had more than 100 cattle. Twyfelaar was divided into camps. Grandfather Nhlapo's cattle grazed on one large camp and another large camp was cultivated for his benefit. The farmer's cattle grazed on separate camps. Grandfather Nhlapo worked seasonally for Twyfelaar's owner and he worked elsewhere for the other season and also ploughed his field. Grandfather Nhlapo paid no rent. Grandfather Nhlapo and his wife are buried on Twyfelaar, as well as grandfather Nhlapo's father. One of Mr Nhlapo's brothers is still living on Twyfelaar. When Mr Nhlapo, as an adult, worked for Mr Corrie Mostert (the son of Mr Willie Mostert), he grazed cattle and ploughed the fields. He had more than 30 cattle. He used the camps that had been used by Grandfather Nhlapo. He, like Grandfather Nhlapo before him, worked seasonally. He paid no rent. Mr Piet de Klerk took over Twyfelaar from Mr Corrie Mostert. Mr Piet de Klerk paid Mr Nhlapo

R6,00 per month and gave him 80 kilogram of mealie meal. Workers worked for a full year for Mr de Klerk, with two weeks leave per year. The workers, including himself, cultivated fields and grazed cattle. Mr De Klerk sold Twyfelaar to Mr Louis Horak. Mr Horak paid Mr Nhlapo R12,00 per month. Mr Nhlapo continued to graze cattle and cultivate the land in Mr Horak's time. Mr Oki Doyer took over Twyfelaar from Mr Horak. Mr Nhlapo continued to graze and cultivate the land under Mr Doyer. Mr Doyer paid him R14,00 per month and an 80 kilogram bag of mealie meal. He worked for the whole year. Mr Piet de Klerk (the son of the first-mentioned Piet de Klerk) took over Twyfelaar from Mr Doyer. Mr Nhlapo worked for Mr Piet de Klerk (junior) until 1988 when the latter disposed of Twyfelaar to the plaintiff. Mr Piet de Klerk (junior) paid Mr Nhlapo R20,00 per month and a bag of mealie meal (80 kilogram). Mr Nhlapo paid no rent. He grazed about 30 cattle on the camp and although it was reduced in size, it was still large. He also ploughed a smaller field, slightly bigger than a soccer field. He harvested about 70 bags of mealies from this smaller field. When the plaintiff took over, Mr Nhlapo continued to cultivate the slightly bigger than a soccer field camp, and kept less than 10 cattle. The plaintiff said the field for ploughing must be reduced to about half of a soccer field to be shared between two people. Mr Nhlapo shared his half-a-soccer field with his son David. He now harvests only about 7 to 10 bags of mealies. In the beginning the plaintiff said nothing about the number of cattle allowed on Twyfelaar, but later restricted the number to five. Mr Nhlapo further confirmed the defendant's version that the defendant was born on Twyfelaar, attended school away from Twyfelaar at some stage and when he finished school he worked for various employers while staying at home on Twyfelaar or coming home over weekends. Mr Nhlapo stated that even at the time of testifying the defendant stayed at home with him, in the extended house.

[7] Although initially Mr Nhlapo did not seem to remember signing an agreement with the plaintiff, he later appeared to remember and generally agreed with the deductions from his salary that were referred to by the plaintiff although he did not know the actual amounts for some deductions. Mr Nhlapo attended school for only one year. Mr Nhlapo did not remember when the defendant had built his house but said the defendant was no longer attending school when it was built. It was not clear whether he meant the building of the one-roomed part or the extension thereof. That was the defendant's case.

Is the defendant an associate/family member?

[8] Mr Brandmuller, for the plaintiff, argued that the defendant is neither a labour tenant nor an associate. In support of the contention that the defendant is not a labour tenant, Mr Brandmuller stated that he does not provide labour to the plaintiff and has never provided labour to him. I agree that for that reason alone, the defendant is not a labour tenant.³ Besides, he does not have a nominee to provide labour on his behalf. However, it is not the defendant's case that he is a labour tenant. His case is that he is an associate or family member of his father's. On the question whether the defendant is an associate, Mr Brandmuller first addressed the question whether Mr Nhlapo was a labour tenant (for the defendant to succeed on the defence that he is an associate, he must be an associate of a labour tenant). Mr Brandmuller submitted that, because as at 2 June 1995⁴ Mr Nhlapo was paid in cash and he paid for the grazing, cropping and rent, he was not a labour tenant. It is important to note that the term "labour tenant" is defined in the Labour Tenants Act without reference to the date 2 June 1995 or any date whatsoever.⁵ The definition reads:

“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;”

3 *Mahlangu v De Jager* [1996] 2 All SA 522 at 526d.

4 According to section 3 of the Labour Tenants Act, a person who was a labour tenant on 2 June 1995 has the right with his or her family 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.

5 Section 1 of the Labour Tenants Act. See also *Ngcobo & Others v Salimba CC; Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA); [1999] 2 All SA 491 (A) at paras [25] - [27].

[9] I am in no doubt that the relationships that the defendant's grandfather had with successive owners on Twyfelaar is the same as that referred to in paragraph (c) of the definition of a labour tenant. I am accordingly satisfied that Mr Nhlapo falls within the definition of labour tenant. It remains to determine whether he is a farmworker. A farmworker is defined as follows:

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

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

In comparing the amounts deducted from Mr Nhlapo's salary for occupying and using the land (accommodation, water, wood and grazing), they are less than the cash or other form of remuneration. But the value of his harvest has not been added yet. Also, in determining his status, the entire period of his stay on Twyfelaar must be considered, not just a point in time.⁶ Taking into account his relationship with the plaintiff and the plaintiff's predecessors-in-title, I am satisfied that, notwithstanding the amount of cash payments he receives from the plaintiff in relation to the value of the right to use and occupy Twyfelaar, Mr Nhlapo is a labour tenant.⁷ Mr Nhlapo has the right to be on Twyfelaar, he provides labour to the plaintiff, he has the right to graze and crop, his father before him also had the right to reside on Twyfelaar, to graze and crop. For a long period Mr Nhlapo cultivated a large field and grazed cattle in a large camp. He harvested 70 bags of mielies from the field and kept 30 cattle, while being paid minimal cash amounts. He is not a farmworker.

[10] It remains to determine whether the defendant is an associate or family member of his father's.

An 'associate' means:

“a family member of a labour tenant, and any other person who has been nominated in terms of section 3 (4) as the successor of such labour tenant, or who has been nominated in terms of section 4 (1) to provide labour in his or her stead.”⁸

6 *Salimba* above n 5 at para [27].

7 See section 2(6) of the Labour Tenants Act and *Salimba* above n 5.

8 See the definitions section of the Labour Tenants Act.

A “family member” is, in turn, defined as “a labour tenant’s grandparent, parent, spouse (including a partner in a customary union, whether or not the union is registered), or dependant.”

[11] The question whether Mr Nhlapo had nominated the defendant in terms of section 3(4)⁹ or 4(1)¹⁰ was not pertinently addressed. However, factors surrounding Mr Nhlapo’s family arrangements need to be noted. His two elder sons have moved out of his homestead to establish themselves independently of him. His eldest son, David, has his home elsewhere on Twyfelaar and is employed by the plaintiff. The second son, Elias, left Twyfelaar some five years ago. The defendant is the only one left with his father and who is establishing his home in his father’s yard. This may very well mean that Mr Nhlapo intends leaving the defendant in charge of his remaining family, should he die, and that he expects the defendant to step into his own shoes. In other words it may be Mr Nhlapo’s intention to nominate the defendant as his successor in terms of section 3(4) or to provide labour in his stead in terms of section 4(1) but until he has made such nomination to the owner I cannot find the defendant to be an associate.

[12] I now need to determine whether the defendant is an occupier in terms of ESTA, and if so, whether he stands to be evicted. The plaintiff alleges in his particulars of claim that the defendant is an occupier. The definition of “occupier” reads:

“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 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

9 “3(4) If a labour tenant dies, becomes mentally ill or is unable to manage his or her affairs due to another disability or leaves the farm voluntarily without appointing a successor, his or her family may appoint a person as his or her successor and shall, within 90 days after being called upon in writing to do so by the owner, inform the owner of the person so appointed.”

10 “4(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.”

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;”¹¹

I do not know how much the defendant earns so I am unable to make any order in terms of ESTA at this stage. I do, however, need to make some comments on the application of ESTA to the facts of this case. Before an occupier may be evicted the land owner must lawfully terminate the right of residence. The plaintiff alleges that he is entitled to evict the defendant because the defendant does not work for him. This allegation cannot be accepted because the defendant does not derive the right to reside on Twyfelaar from an employment relationship with the plaintiff. Twyfelaar has been the defendant’s home from the time of his birth. I am not satisfied that the right of residence of the defendant has been lawfully terminated. The parties are encouraged to seek a non-litigious resolution to their problems especially in the light of the fact that there are clear indications that Mr Nhlapo intends nominating the defendant as his associate in which event the defendant will no longer be an occupier. Mr Nhlapo would then become the associate of the defendant.

Costs

[13] The defendant did not ask for costs. I do not consider that a costs order is appropriate in this case which, as this Court has indicated in previous cases,¹² is governed by social legislation.

Order

11 The prescribed amount is R5000,00. See Regulation R1632 Government Gazette 19587, 18 December 1998.

12 See for example *Ngcobo and Another v Van Rensburg and Others* 1999 (2) SA 525 (LCC); [1997] 4 All SA 537 LCC at para [29]- [30] and *New Adventure Investments and Another v Mbatha and Others* 1999 (1) SA 776 (LCC) at para [6].

The plaintiff's action is dismissed.

ACTING JUDGE B J MOLOTO

For the plaintiff:
Brandmuller-Taljaard Attorneys, Middelburg.

For the defendant:
In person.