

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **DURBAN** on 22 June 2001
before **Gildenhuis AJ**

CASE NUMBER: LCC 122/2000

Order made on: 22 June 2001
Reasons given on: 3 July 2001

In the matter between:

MWELASE, B First Applicant

MWELASE, X Second Applicant

SKHAKHANE, M Third Applicant

MNGOMA, N Fourth Applicant

and

THE HILTONIAN SOCIETY Respondent

JUDGMENT

GILDENHUYS AJ:

[1] This is an interlocutory application to set aside certain processes in the main application. The applicants in the main application have applied by notice of motion for a declaratory order that they are “labour tenants” on certain land, within the meaning of that term as defined in the Land Reform (Labour Tenants) Act.¹ They have also lodged an application under section 17 of the Act with the Director-General of the Department of Land Affairs, for the acquisition of the land concerned. The respondent in the main application is the owner of the land concerned. It has given notice that it wishes to participate in the case.

1 Act 3 of 1996, as amended.

[2] The notice of motion and the accompanying founding affidavit by the first applicant were prepared in a slovenly manner. The notice of motion does not follow the prescribed form. It refers to the proceedings as an “action”. It contains no prayer. A prayer is, however, contained in the founding affidavit, and asks for:

“[A]n Order in terms of the Notice of Motion prefixed hereto including *inter alia* :

1. A declaration in terms of Section 32(2A) if (*sic*) Act 3 of 1996, that the Applicants are labour tenants.
2. Costs of suit.
3. Further and/or alternative relief.”

[3] During April 2001 the respondent, through its attorneys, served a notice in terms of rule 32(5) of the Land Claims Court rules² on the applicants’ attorneys, requiring it to “rectify or withdraw the ‘Notice of Motion’ issued by the Applicants”. The notice lists a number of alleged defects in the notice of motion. The applicants’ attorney did not respond to this notice. The respondent then brought an application in terms of rule 37 of the rules of this Court for an order:

“That the process initiated by the Applicants in this Honourable Court under Case No. LCC122/2000 and under the title ‘NOTICE OF MOTION’ be and is hereby set aside, alternatively that the Applicants’ claims as formulated in aforementioned document are hereby struck out;”

I heard this application on 22 June 2001 and made the order set out in paragraph [9] of this judgment. I undertook to give reasons later. These are my reasons.

[4] Mr Lotz, for the respondent, submitted that the respondent is unsure whether the proceedings constitute an action or an application. In my view, despite the inappropriate use of the word “action”, it is quite clear that it is an application. The heading of the document initiating the proceedings is “Notice of Motion”. It is supported by a founding affidavit. It calls for a replying affidavit.³ The fact that the Notice of Motion contains no prayer, together with the improper use of the word “action”, would not mislead any reasonable person into believing that the applicants brought an action and not an application.

2 The rules are available on the internet at www.law.wits.ac.za/lcc/rules.

3 It should have called for an answering affidavit.

[5] Apart from the use of the words “including *inter alia*”, the prayer at the end of the founding affidavit clearly indicates what relief the applicants are seeking. I have the power to strike out the offending words, which Mr Vahed (for the applicants) suggested I do. Accordingly, I struck out the offending words.

[6] The approach of this Court has always been to get to the merits of a case, rather than to allow technicalities to thwart a proper ventilation of the issues.⁴ That is not to say that practitioners may be slack in complying with the rules of the Court. Where there has been a flagrant disregard of the rules, as in this case, the disregard may be pardoned if there was no prejudice to the other side. The Court may mark its disapproval by an appropriate cost order. I did so in this case, by not awarding the applicants any costs in respect of the failed rule 37 application.

[7] Lastly, Mr Lotz submitted that because the applicants, alleging that they are labour tenants, applied under section 17 of the Act for the acquisition of land,⁵ the decision of whether in fact they are labour tenants should be taken during that process, and not by way of a separate application. Under section 17(6) of the Act the Director-General must, if it is not admitted that the applicants are labour tenants, refer the application for the acquisition of land to this Court. This Court may then decide the issue of whether or not the applicants are labour tenants, or it may refer the issue to an arbitrator. In the past, the Court has not brought in an arbitrator, but has decided such issues itself.

[8] Section 33(2A) of the Act gives the Court jurisdiction to determine whether a person is a labour tenant. The section reads:

“(2A) At the instance of any interested person, including a person who avers that he or she is a labour tenant, irrespective as to whether or not such person has lodged an application in terms of section 17, the Court may determine whether a person is a labour tenant.”

4 *Malan v Gordon and Another* 1999 (3) SA 1033 (LCC) at para [24(3)]; [1999] 3 All SA 389 (LCC) at para [24(iii)]; *Rix v Arnolds and Others*, LCC 59R/99, 16 November 1999, internet web site <http://www.law.wits.ac.za/lcc/1999/rixsum.html> at para [20].

5 See also section 16 of the Act.

It is clear from section 33(2A) that a pending application under section 17 does not exclude a concurrent application for a declaratory order. There is also no practical reason why I should stay the application for a declaratory order pending finalisation of the section 17 application.⁶ On the contrary, a declaratory order on the status of the applicants will be helpful when the section 17 application is being dealt with.

[9] For the reasons set out above, I made the following order on 22 June 2001:

- “1. The words ‘including *inter alia*’ in the founding affidavit of Bhekindlela Mwelase dated 2 December 2000 are struck out;
2. The application in terms of Rule 37 is dismissed;
3. No order is made as to costs.”

ACTING JUDGE A GILDENHUYS

For the Applicants:

Adv R A K Vahed SC, with him *Adv A A Gabriel* instructed by *Ridl-Glavovic, Durban*.

For the Respondents:

Adv G M E Lotz, instructed by *Shepstone & Wylie Tomlinsons, Pietermaritzburg*.

⁶ See *Van Zuydam v Zulu* 1999 (3) SA 736 (LCC); [1999] 2 All SA 100 (LCC) at paras [13]-[15].

