

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 23 October 2001  
Before: **Gildenhuis and Meer AJJ**

**CASE NUMBER:** LCC 29R/01

Decided on: 29 November 2001

In the case between:

**MAGODI, P** **First Appellant**

**MAHUNGELA, E** **Second Appellant**

**MUDZUSI, E M** **Third Appellant**

**RASHAVHA, M** **Fourth Appellant**

and

**JANSE VAN RENSBURG, H J** **Respondent**

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## JUDGMENT

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**GILDENHUIS AJ:**

General background

[1] The appellants are occupiers of the farm commonly known as Sandfontein. The farm is approximately 20 kilometers from Louis Trichardt and 12 kilometers from Maelula, in the Northern Province. The respondent leases the farm from its registered owner, and is the person in charge of the farm. The appellants are all erstwhile employees of the respondent. They were retrenched during October 1998, and their rights of residence terminated during December 1998.

[2] The respondent applied in terms of the Extension of Security of Tenure Act<sup>1</sup> (hereinafter

referred to as *the Act*) in the magistrate's court for the district of Soutpansberg, held at Louis Trichardt, for the eviction of the appellants from Sandfontein. The appellants (respondents in the case before the magistrate) were legally represented throughout the proceedings. Mrs H C Lombaard, chief probation officer, filed a well researched report in respect of each of the appellants, as required in terms of section 9(3) of the Act. On 19 January 2001, the magistrate granted an eviction order against all four appellants.

[3] The eviction order made on 19 January 2001 came before Moloto AJ on automatic review in terms of section 19(3) of the Act. On 1 March 2001 he confirmed the order against the first three appellants. The order against the fourth appellant was set aside and the matter referred back to the magistrate to consider whether or not section 8(4) of the Act is applicable,<sup>2</sup> and to consider the weight of the factors contained in the probation officer's report. The magistrate reconsidered the matter and made a fresh eviction order against the fourth appellant on 27 March 2001. That order was confirmed by Moloto AJ on automatic review on 25 April 2001.

[4] On 22 March 2001, the first, second and third appellants applied in this Court for leave to appeal to the Supreme Court of Appeal against the judgment of Acting Judge Moloto on the 1st March 2001. At that time, the magistrate had not yet reconsidered the position of the fourth appellant. After the magistrate made a fresh eviction order against the fourth appellant, the parties agreed to await the outcome of the automatic review of that order before proceeding with the application for leave to appeal. When the fresh eviction order was confirmed, the fourth appellant joined the other three in the application for leave to appeal.

[5] Moloto AJ came to the conclusion that the appeal lies to the Land Claims Court, not to the Supreme Court of Appeal, for reasons which he formulated as follows:

It is my view that where a party appeals against an order of this Court on automatic review in terms of section 19(3) of the Act, such appeal must lie to the Land Claims Court. The President of the Land Claims Court would decide on the constitution of the appellate Court. I say so because a reviewed decision by a Land Claims Court judge is either a *confirmation*, a *setting aside* or a *substitution* of a magistrate's order. Following an alternative approach, it might be argued that none of that is a *judgment* or *order* by the Land Claims Court as contemplated in the Restitution **[of Land Rights] Act [22 of 1994]**, but a *sui generis* function which the Court performs. Only *judgments* and *orders* of the Land Claims Court are subject to

appeal to the Supreme Court of Appeal. The confirmed or substituted order of the magistrate remains a magistrate's order, and an appeal against it must therefore be to the Land Claims Court.<sup>3</sup>

Consequent upon the above reasoning, Moloto AJ made the following order on 6 July 2001:

- A(i) The application for leave to appeal to the Supreme Court of Appeal is refused.
- (ii) The period within which to note an appeal to the Land Claims Court is extended by 30 (thirty) days from the date of this order.
- (iii) The applicants may, if they so wish, appeal to this Court within the period stipulated in paragraph (ii) above.<sup>4</sup>

[6] On 6 August 2001, the appellants noted an appeal:

A . . . to the full bench of the Land Claims Court of South Africa against the order of eviction granted by the Magistrate Louis Trichardt on the 19<sup>th</sup> January 2001 which was confirmed by Judge Moloto on automatic review on the 1<sup>st</sup> March 2001 in respect of First, Second and Third appellants, and on the 25<sup>th</sup> April 2001 in respect of the Fourth Appellant.<sup>5</sup>

I am satisfied that we have jurisdiction to hear an appeal against the orders made by the magistrate. None of the parties questioned our jurisdiction to do so. The confirmation of the orders by Moloto AJ<sup>4</sup> does not oust our jurisdiction.<sup>5</sup> The grounds of appeal are set out in some detail. I will deal with the various grounds, insofar as they relate to the eviction orders made by the magistrate, separately in respect of each appellant. Thereafter I will consider the confirmation of the orders by Moloto AJ.

[7] There is one further aspect of the case that calls for comment. Neither the affidavits of the appellants nor the affidavits of the respondent deal adequately with the circumstances which the court must consider when deciding whether an eviction order would be just and equitable. Most of that information came from the comprehensive reports filed by the probation officer,<sup>6</sup> which were of great assistance to the Court. The reports were filed after all the affidavits in the eviction proceedings had already been delivered. It will be good practice for a court to give the parties an opportunity to respond to such reports, should they wish to do so. Such responses should, in the case of motion proceedings, take the form of supplementary affidavits. It is not fitting to respond by way of argument and to introduce into the argument new factual allegations not supported by any evidence, as has happened when this case was heard by the magistrate.

First appellant

[8] The first ground of appeal relates to the first appellant only. It is formulated as follows:

**A**The Learned Magistrate erred in accepting, without further ado,

- 1.1 That the right of residence of First Appellant arose solely from his contract of employment and failing to take into account the fact that he was born in Respondent's farm.
- 1.2 That the eviction of First Appellant could only be dealt with in terms of section 8 (2) of Act 62 of 1997, as amended.
- 1.3 That there has been a valid termination of First Appellant's right of residence.@

[9] The first appellant deposed as follows in his answering affidavit:

**A7.**

I was born on the farm in 1961. Both my parents were also born on the farm. My father passed away on the farm and he was buried here on the farm. My mother is still alive and is still residing on the farm with me and she is in the employment of the deponent of founding affidavit HERMAN JOHANNES JANSEN VAN RENSBURG (Applicant **in case before the magistrate**). I had continuously lived on the farm until to date irrespective of where I was working.

10.

I started working on the farm while I was still at school. At that time the farm was ran by its owner, HANS JURGENS LOMBARD (Lombard). I used to work on the farm during school holidays. Also after I left school I worked on the farm for 8 years before I went to work at the neighbouring farm.

11.

I worked at the neighbouring farm for 5 years. During the said 5 years I was residing on the farm with my mother and sister and nobody raised any complaint. In January 1992 I was re-employed on the farm by the Applicant since he was the one running the farm by then as a supervisor. I worked on the farm continuously until my dismissal in October 1998. At all material times from my birth until today I had never had any other home besides the farm.®

[10] According to the probation report, the first appellant lives in a single room in a compound provided by the respondent on the farm. The report contains the following statements:

ADie respondent [**first appellant**] is op die plaas Sandfontein gebore en het ook daar grootgeword. Sy vader is ook op die genoemde plaas gebore en is na sy afsterwe daar begrawe. Sy moeder is op ʼn naburige plaas gebore en het haar, nadat sy in die huwelik getree het, op die plaas Sandfontein gevestig waar sy steed woon.

Die respondent het, nadat hy die skool verlaat het, in Johannesburg sowel as op ʼn ander plaas in die omgewing gewerk terwyl hy op die plaas Sandfontein gewoon het. Gedurende Februarie 1991 het hy egter op die genoemde plaas begin werk tot en met Oktober 1998 toe sy diens beëindig is weens werkverskraling van die boerdery. Sy verblyfreg is op 2 Desember 1998 beëindig. Die respondent was egter nie bereid om die genoemde plaas te verlaat nie en is op 1 Oktober 1999 in kennis gestel dat die applikant ʼn uitsettingsaansoek gaan bring.®

[11] The fact that the first appellant was born on the farm, and during all his life might have regarded the farm as his home, does not make him an **Occupier**® as defined in the Act.<sup>7</sup> He achieved a right of residence as **Occupier**® on the farm when he was re-employed on the farm.<sup>8</sup> According to the respondent, that right was dependent on the first appellant's employment agreement.<sup>9</sup> His employment on the farm is obviously the reason why he had consent to occupy his room on the farm.<sup>10</sup> The respondent denied that the first appellant lived continuously on the farm, and pointed out that he lived and worked in Johannesburg for at least a year. The first appellant declared that when he worked on a neighbouring farm before his re-employment on the farm, he was residing on the farm with his mother and sister, and that nobody raised any complaint.<sup>11</sup> Such residence would be by virtue of his family relationship with his mother and sister, and would not make him an **Occupier**® (as defined).<sup>12</sup>

[12] The next ground of appeal raised by the first appellant is that the magistrate misdirected himself by accepting that the eviction of the first appellant could only be dealt with in terms of section 8(2) of the Act. Section 8(2) reads as follows:

(2) The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.

It is clear from the papers that there are no longer any mechanisms under the Labour Relations Act<sup>13</sup> available to the first appellant to have his dismissal set aside. It must therefore be accepted that the dismissal accords with the Labour Relations Act.<sup>14</sup> In such circumstances, section 8(2) of the Act is clearly applicable.

[13] Finally, the first appellant submitted that there was no valid termination of his right of residence. This aspect was dealt with by the respondent in paragraph 3.3 of his founding affidavit as follows:

Die Eerste Respondent [first appellant] se diens is in Oktober 1998 beëindig weens werkverskraling van die boerdery soos meer volledig blyk uit Aanhangsel HR-2 hiertoe en is sy verblyfreg op 2 Desember 1998 beëindig soos meer volledig blyk uit Aanhangsel HR-3 hiertoe. Op 1 Oktober 1999 is die Eerste Respondent skriftelik in kennis gestel dat ek van voorneme is om 'n uitsettingsaansoek te bring soos meer volledig blyk uit Aanhangsel HR-4 hiertoe.

Annexure HR-3 is a notice whereby the right of residence is cancelled. The respondent alleges that it was delivered to the first appellant. The first appellant answered the whole of paragraph 3 as follows:

Except to admit that I reside on the farm and I am married with children, I categorically deny and dispute the contents hereof and put the applicant to proof thereof.<sup>15</sup>

An affidavit is not a pleading. Bare or unsubstantiated denials in an answering affidavit are insufficient to rebut otherwise credible assertions.<sup>16</sup> I must conclude that the right of residence was properly cancelled.

[14] The first appellant described his living arrangements and circumstances of employment in his answering affidavit as follows:

I had been forced to live separately from my wife and children. This is so because Applicant [**in case before the magistrate**] said he does not want children on the farm. Hence I was forced to get my children and wife from the farm. Now they are staying with my in-laws at Maelula. They are not allowed to visit me and their grandmother on the farm. At all times when I need to see them I had to go to them, they cannot come to the farm.

29.

Since I lost my job on the farm, I had never had any permanent work. It is tough for me to support my wife and children. All these times I just rely on the temporary jobs that I get, some for a day or two. It is also not easy for me to get work at other places because I only know farm work and nothing else because this is what I had been doing all my life.

30.

Now if I had to move out of the farm, I do not know where I have to go because my home is and has always been the farm. I will also have to move away and leave my mother whom I lived with since my birth.®

[15] The first appellant's present circumstances are relevant. The probation officer reported thereon contractively as follows:

ADie respondent [**first appellant**] werk sedert Augustus 2000 as 'n kontrakwerker en verdien R500-00 per maand. Dit is egter nie bekend waar hy werk en wat die omstandighede by sy werksplek is nie aangesien die respondent geen besonderhede omtrent sy werkgewer kon verskaf nie. Sy vrou en moeder weet ook net dat hy iewers werk maar weet nie waar nie.®

Under the heading AALTERNATIEWE AKKOMMODASIE®, she gave the following additional particulars:

AVolgens die respondent woon hy gedurende die week in die kampong by sy nuwe werksplek. Oor naweke keer hy terug na die plaas Sandfontein of na Maelula. Sy vrou en kinders woon in Maelula. Die erf waarop hulle woon, behoort aan die respondent se skoonmoeder. Sy woon egter by Joubert Saagmeule en volgens haar sal sy nie na Maelula terug keer nie. Die respondent se skoonmoeder is bereid om die erf waarop haar dogter tans woon, aan haar dogter en die respondent oor te dra. Dit is al baie jare dat slegs die respondent se vrou en kinders die erf bewoon en volgens sy vrou, het sy volle verantwoordelikheid vir die instandhouding van die erf aanvaar aangesien haar moeder selde daar kom.

Die woning op die erf bestaan uit 'n (*sic*) twee losstaande vertrekke. Die een is 'n rondawel van modderstene met 'n rietdak wat as 'n kombuis gebruik word. Die ander deel van die woning bestaan uit twee kamers, ook van modderstene met 'n sinkdak. Hierdie twee vertrekke dien as slaapkamers. Die slaapkamers beskik oor elektrisiteit, maar nie die kombuis nie. Daar is ook nie lopende water op die erf nie en water moet aangedra word vanaf 'n punt ongeveer 300 meter ver. Die woning is nie omhein nie.®

[16] Although it was not raised as a ground of appeal, Ms Makhubele, on behalf of the first appellant, argued that the culture of the first appellant and his people militates against a husband relying on his in-laws for accommodation. Therefore, so the argument went, he cannot return to Maelula. This consideration was not advanced by the first appellant in his answering affidavit, although it was put

forward by the first appellant's attorney in his heads of argument in the magistrate's court. It would seem to me that the first appellant had been using his mother-in-law's property for a long time to accommodate his wife and children, and that the argument does not carry much weight.

[17] It was not challenged on appeal that the first appellant had suitable alternative accommodation available to him.<sup>17</sup> Judging from the description of the accommodation given by the probation officer, it is very likely that the accommodation is suitable as defined. The first appellant did not show otherwise. An eviction order under either section 10(2) or section 10(3) would in my view be possible.<sup>18</sup> The equities in the case favour the granting of an eviction order. The first appellant's right of residence was terminated almost three years ago. Since then he has not vacated his room on Sandfontein, nor did he pay for the use of the room. He would not consider alternative work opportunities arranged for him by the respondent.<sup>19</sup> He has alternative accommodation available to him. The respondent needs the room on Sandfontein in which the first appellant lives, in order to house seasonal contract workers.<sup>20</sup> The first appellant's reluctance to be dependent upon his mother-in-law's accommodation at Maelula is insufficient reason to allow him to intrude further on the respondent's property rights by remaining on the farm.<sup>21</sup>

### Second and third appellants

[18] I now turn to the second and third appellants. Their grounds of appeal read:

The Learned Magistrate misdirected himself by accepting evidence to the effect that alternative accommodation is available for Second, Third and Fourth appellant, but failed to take into account whether accommodation was suitable or not based on their personal circumstances:

- 2.1 That there was no accommodation for married people at second appellant's new place of employment.
- 2.2 ...@

The second and third appellants live together as husband and wife in a single room on Sandfontein. Both of them were already occupiers on Sandfontein on 4 February 1997. If suitable alternative accommodation is available to them, section 10(2) of the Act will apply to the eviction application. Otherwise section 10(3) will apply.<sup>22</sup>

[19] The probation officer reported as follows on the present living circumstances of the second and third appellants.

ADie respondent [**third appellant**] en Ernest Mahungela, haar saamleefmaat [**second appellant**], deel ʘ drieslaapkamer woning met twee ander families. Hulle het dus slegs een kamer tot hulle beskikking. Die woning is gebou met sementstene en het ʘ sinkdak. Buitekant is ʘ sinkstruktuur opgerig wat as kombuis dien en deur al drie die families gebruik word.

Daar is water na die woning aangelê, maar daar is geen elektrisiteit nie. Die woning is omhein en word netjies versorg.@

[20] According to the probation officer's report, the second appellant is permanently employed on a neighbouring farm, about a half kilometre away from where he and the third appellant presently live on Sandfontein. He earns R345,00 per month. There is accommodation available for the second appellant in a compound on the farm where he now works, but his family is not permitted. His partner (the third appellant) cannot join him there.

[21] The probation officer sets out the present circumstances of the third appellant in her report as follows:

ADie respondent [**third appellant**] werk tans by Joubert Saagmeule . . .

Die respondent se kinders [**who are not born from her relationship with second appellant**] sowel as haar moeder en ander familie woon almal in Maelula. Die erf waarop haar moeder woon, behoort egter skynbaar aan haar getroude broer wat saam met sy vrou, moeder en broer in die vyf vertrek woning woon. . . .

Die drie kinders van die respondent woon op ʘ aparte erf in twee vertrekke bestaande uit hout met sinkdakke. Die een struktuur het nie ʘ deur nie en word as ʘ kombuis gebruik terwyl die ander struktuur as ʘ slaapkamer dien. Daar bestaan nie duidelikheid oor wie die eienaar van hierdie erf is nie. Die respondent en haar moeder beweer dat die erf nie amptelik aan iemand toegeken is nie en dat hulle sommer uit hulle eie die stuk grond skoongemaak het en die vertrekke daar opgerig het. Ernest Mahungela, saamleefmaat van die respondent beweer egter dat die erf die eiendom van die respondent se moeder is.

Daar is geen elektrisiteit of lopende water by hierdie woning nie en water moet aangedra word vanaf ʘ punt ongeveer 100 meter vanaf die woning. Die woning is nie omhein nie.

Die respondent en haar saamleefmaat besoek Maelula gewoonlik oor naweke en woon dan saam met die respondent se kinders in die genoemde woning.@

[22] The third appellant described her present circumstances in her answering affidavit, signed on 16 April 2000:

A9.

My children are presently staying at Maelula with my mother at her place and are not allowed to visit us on the farm . . . .

10.

Since my dismissal in October 1998, I had never been able to get any work anywhere . . . .@

In his heads of argument used at the magistrate's court hearing, the third appellant's attorney conceded that the third appellant did in fact work at Joubert Saagmeule (as stated by the probation officer), but only from May 2000 to November 2000, on a contract basis. The respondent alleged that he had arranged work for the third appellant with three potential employers, but that she was not interested, not even in going for a work interview.<sup>23</sup>

[23] I will, in favour of the second and third appellants, accept that the alternative accommodation available to them does not comply with the definition of **suitable alternative accommodation** contained in section 1(1) of the Act.<sup>24</sup> The eviction application therefore has to be considered in terms of section 10(3) of the Act.<sup>25</sup> The rights of residence of the two appellants were cancelled much more than nine months before commencement of the litigation in the magistrates court. The dwelling in which they live was provided to them by the respondent, and he needs the accommodation for seasonal contract workers. I am satisfied that the threshold requirements of section 10(3)(a), (b) and (c) have been complied with, and that an eviction order can be granted under section 10(3), if it is just and equitable to do so.

[24] A court must have regard to the considerations set out in section 10(3)(i) and (ii) of the Act and also to all other relevant considerations when deciding whether it would be just and equitable to grant an eviction order under section 10(3). The parties have a duty to bring considerations which they consider to be relevant, to the attention of the court.<sup>26</sup> In this matter, none of the parties gave particulars of any efforts they made to secure suitable alternative accommodation. The respondent was deprived of the use of the room which the two appellants occupied on Sandfontein for almost three years.<sup>27</sup> There is no indication that the two appellants paid for their use of the room after their rights of residence were terminated.<sup>28</sup> The second appellant is employed on another farm, where there is accommodation for him. The third appellant did not pursue work opportunities arranged for her by the respondent. There is accommodation for her at Maelula, which the second appellant can also use, and which both of them

had been using over weekends. Neither of the two appellants have lived on Sandfontein for a very long period when their rights of residence were terminated. The second appellant lived there since April 1993, and the third appellant since January 1992. There is no indication in the papers that either of them has family living on Sandfontein. It cannot be expected from farm owners to continue providing accommodation for erstwhile farm workers indefinitely, particularly where they made no attempt to pay for the accommodation,<sup>29</sup> and where other accommodation, albeit not of the same standard, is available to them. In my view the eviction order made against them by the magistrate is just and equitable, taking into account the interests of all parties.

#### Fourth appellant

[25] The fourth appellant was born on a farm close to Sandfontein. She lived and worked on Sandfontein since 1981. She was dismissed from her employment by the respondent, and her right of residence was cancelled on 2 December 1998. She relies on the same grounds of appeal as the second and third appellants,<sup>30</sup> together with one additional ground, formulated as follows:

A2.2 That Fourth appellant was a 59 year old woman who has worked and lived in the farm in question for eighteen (18) years and did not have a home outside the farm.@

The fourth appellant was born on 11 February 1941.

[26] Ms Makhubele argued on behalf of the fourth appellant that the respondent terminated her right of residence in order to prevent her from obtaining a permanent right under section 8(4) of the Act.<sup>31</sup> If that is established, the termination would be void.<sup>32</sup> The assertion is not set out explicitly in the notice of appeal. I will, however, deal with it. The fourth appellant made the following allegation in her answering affidavit:

AI had been advised and I verily believe that I am a long term occupier in terms of the Extension of Security of Tenure Act no 62 of 1997, also that since I am now 59 years of age, anyone who attempts to evict me at this age is just doing so because he is aware that I will be 60 years old soon, and no one can evict me as soon as I reach that stage.@

The allegation is not motivated. In his replying affidavit the respondent denied the allegation. I must accept that the fourth appellant was dismissed during October 1998 pursuant to a general retrenchment programme, and that the dismissal was not successfully attacked under the applicable labour laws. The fourth appellant was 57 years and 9 months old at the time. Her right of residence was terminated by the respondent two months later, as is to be expected, since she was no longer an employee. In my view, there are insufficient grounds for concluding that one of the purposes of the intended eviction was to prevent the fourth appellant from acquiring rights under section 8(4) of the Act.<sup>33</sup>

[27] The fourth appellant lives in a room in a house on Sandfontein. She also has the joint use of a kitchen. In her answering affidavit she stated:

**A8.**

Should I be forced to leave the farm where I am staying now with my nephew who is working for the applicant, I do not know where I would go since I have no other home except the farm. I am also old to get another work anywhere and to start building a home for myself. No one had given me work since I was dismissed on the farm because of my age.

9.

I do have a son staying at Maelula. He is staying with his wife, his children and my two other children. My son and his wife are the ones helping me with food.@

The probation officer reported that the fourth appellant does contract work, earning R300,00 per month. Her attorney, in heads of argument submitted during the magistrate's court hearing, made the allegation, unsupported by any evidence, that such employment endured for only one month, and that she is presently unemployed.

[28] The accommodation situation at Maelula is described by the probation officer as follows:

**A7** ALTERNATIEWE AKKOMMODASIE

...

Daar is wel 'n familie-erf in Maelula maar dit behoort aan die respondent [**fourth appellant**] se seun. Drie van die respondent se kinders sowel as vier kleinkinders woon op die erf. Daar is drie losstaande vertrekke op die erf bestaande uit modderstene met sinkdakke. Een vertrek word as kombuis gebruik terwyl die ander twee as slaapkamers dien.

Die woning is van elektrisiteit voorsien maar daar is geen lopende water op die erf nie. Water moet aangedra word vanaf 'n punt ongeveer 500 meter ver. Die woning is nie omhein nie.

Die respondent se suster het 'n erf net langsaaan wat deur haar suster en dié se seun bewoon word. Die woning bestaan uit twee losstaande vertrekke waarvan een vertrek uit hout bestaan en die ander een van modderstene. Beide het sinkdakke. Wanneer die respondent Maelula besoek, woon sy gewoonlik by haar suster op dié se erf. Dit blyk dat die respondent geen erf of huis van haar eie het nie en sy beskik nie oor die finansies om 'n huis te bou nie.

Huidiglik is daar geen behuisingsprojek in Maelula nie en die staatsubsidie van R15 000 is nie op landelike gebiede van toepassing nie. Daar is dus tans geen finansiële hulp van die staat beskikbaar vir die bou van 'n huis in Maelula nie.

#### 8. AFHANKLIKES

Die respondent het slegs een kind wat nog skoolgaande is. Hy woon egter in Maelula waar hy skoolgaan en het nog nooit by sy moeder op die genoemde plaas gewoon nie. . . .@

[29] Section 10(1) and (2) of the Act will clearly not support an eviction order against the fourth appellant. The matter must be considered under section 10(3).<sup>34</sup> The threshold requirements of section 10(3)(a), (b) and (c) have been met, in that suitable alternative accommodation (as defined in the Act) was not available for nine months from the termination of her right of residence, the dwelling where she lived was provided by the respondent, and he needs it to accommodate seasonal contract workers. There is no comparison of efforts (if any) made by the parties to secure alternative accommodation.<sup>35</sup> According to the probation officer, it will be difficult for the fourth appellant to start a new life elsewhere if she is ordered to leave Sandfontein. She has lived on Sandfontein for more than 20 years, and presently lives there with her nephew.<sup>36</sup> She is no longer young and might not readily secure other employment. The respondent, on the other hand, is entitled to full usage of the property which he leases, and should not be compelled to accommodate erstwhile workers, unless the hardship, conflict or social instability which their eviction might lead to, outweighs his right to unrestricted tenancy. It is also important to bear in mind that the respondent has by this time been deprived of the use of the room for about three years, without any compensation whatsoever. The fourth appellant's answering affidavit gives the impression that she considers herself entitled to remain living on Sandfontein for the rest of her life, which is fallacious.

[30] The magistrate considered the question of equity and fairness, and came to the following conclusion:

As far as equity and fairness is concerned, I have judicially applied my mind and came to the conclusion that it will be more fair and equitable if the Fourth Respondent [**fourth appellant**] move to Maelula to stay amongst her family, who are all located and situated there. She is used to visiting them during week-ends and it will be easy for her to establish herself amongst her family. Currently the Fourth Respondent is unemployed and non (*sic*) of her family is staying on the farm to look after her once she reaches a stage where she will not be able to look after herself. Her family at Maelula will be able to take care of her.<sup>37</sup>@

Although the magistrate might have overlooked the presence of the fourth appellant's nephew on Sandfontein, it is correct that most of her family, including three of her own children, four grandchildren and her sister, live in Maelula. In my view, it is more befitting for them to accept responsibility for the accommodation of the fourth appellant, rather than casting the burden onto the respondent.<sup>38</sup>

[31] The right to property is protected under the Constitution of the Republic of South Africa.<sup>39</sup> Although inroads into that right are permissible under limited circumstances, such inroads must not go further than is reasonable and justifiable. The purpose of the Extension of Security of Tenure Act is not only to prevent unfair evictions which could lead to great hardship, conflict and social instability, but also to give due recognition to the legitimate interests of owners.<sup>40</sup> The prerequisites for eviction orders which are contained in the Act must be interpreted and applied, taking into account not only the considerations set forth in the Act itself, but also the above general principles, and any other factor which may be relevant. In my view the hardship which the fourth appellant will suffer if she is evicted from Sandfontein will be greater than that of any of the other appellants, but it will not be so great that it must continue to override the property rights of the respondent.

#### The automatic review

[32] The appeal in this matter was noted against the orders of eviction granted by the magistrate, which were confirmed by Judge Moloto on automatic review. The orders made by Moloto AJ pursuant to the automatic review of the magistrate's orders do no more than confirm those orders. Strictly interpreted, the appeal is not noted against their confirmation. Yet the grounds of appeal include the following:

The Honourable reviewing Judges erred by:

- 3.1 Confirming an order which was hardly legible in as far as the reasons for judgement were concerned.
- 3.2 Not calling on the Magistrate to provide written reasons for judgement.
- 3.3 Not exercising his discretion to call on the parties to make written submissions on the matter.

[33] At the hearing of the appeal, Mr Krüger, acting for the respondent, submitted that the Land Claims Court has no jurisdiction to hear an appeal against the confirmation on automatic review by a Land Claims Court judge of an eviction order given by a magistrate. It was accepted by the legal representatives during argument that the merits of the appeal against the order of the magistrate would be determinative of the outcome of the appeal presently before us, irrespective of whether Moloto AJ erred or not in confirming the orders. Consequently, it was agreed by the parties that if we can disentangle any appeal against the eviction orders made by the magistrate from an appeal against their confirmation by Moloto AJ (if the appellants did in fact appeal against their confirmation), we should do so. I had no difficulty in disentangling the confirmation by Moloto AJ from the appeal against the orders made by the magistrate.<sup>41</sup> It is therefore not necessary for us to consider the appeal (if such an appeal was in fact noted) against the confirmation by Moloto AJ, and I refrain from doing so. I also refrain from commenting on whether we have jurisdiction to hear such an appeal.

### Conclusion

[34] For the reasons set out above, it follows that the appeals against the eviction orders made against the four appellants cannot succeed. The dates as determined by the magistrate on which the appellants must vacate the land, and on which the eviction orders may be carried out,<sup>42</sup> have now expired. Rather than sending the matter back to the magistrate to determine new dates, it is preferable for this Court to do so. I have determined a later vacation date for the fourth appellant than for the other three appellants because it may be necessary to build a new room for the fourth appellant at Maelula, and also because she has lived on Sandfontein for a very long time.<sup>43</sup>

[35] This Court will, in the absence of special circumstances, not make costs orders in eviction cases.<sup>44</sup> There is no reason why that approach should not also apply to an appeal. There are no special circumstances in this case which would justify a costs order.

Order

[36] It is ordered as follows:

- (1) The appeals by the first, second, third and fourth appellants against the eviction orders made in the magistrate's court of Louis Trichardt, are dismissed.
- (2) The date on which the first, second and third appellants must vacate the dwellings occupied by them on Sandfontein, is changed to 11 January 2002, and the date on which the eviction orders against them may be carried out if the any of the dwellings have not been vacated, is changed to 18 January 2002.
- (3) The date on which the fourth appellant must vacate the dwelling occupied by her on Sandfontein is changed to 22 March 2002, and the date on which the eviction order against her may be carried out if the dwelling has not been vacated, is changed to 29 March 2002.
- (4) No order is made as to costs.

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**ACTING JUDGE A GILDENHUYS**

I agree

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**ACTING JUDGE Y S MEER**

For the appellants:

*Adv T A N Makhubele* instructed by *Nkuzi Land Rights Legal Center, Pietersburg.*

For the respondent:

*Adv T P Krüger instructed by Coxwell, Steyn, Vise & Naudé Attorneys, Louis Trichardt.*