IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** **CASE NUMBER** 31\96

In the matter between

ABEL MQINISENI HLATSHWAYO	Appellant no1
KAMNTAMBO HLATSHWAYO	Appellant no 2
MBONGISENI HLATSHWAYO	Appellant no 3
STHULI HLATSHWAYO	Appellant no 4
NONOX HLATSHWAYO	Appellant no 5
MKOKO HLATSHWAYO	Appellant no 6
MBHEKISENI MILTON HLATSHWAYO	Appellant no 7
KAMKHANYA HLATSHWAYO	Appellant no 8
SENZANI HLATSHWAYO	Appellant no 9
ABEL MQINISENI HLATSHWAYO	Appellant no 10
NICHOLAS HLATSHWAYO	Appellant no 11
DUMEZWENI HLATSHWAYO	Appellant no 12
MBUSO HLATSHWAYO	Appellant no 13
SIBONGILE HLATSHWAYO	Appellant no 14
SIZAKELE HLATSHWAYO	Appellant no 15

and

W E HEIN	Respondent

JUDGMENT

MEER J:

[1] This is an appeal to the Land Claims Court against a summary judgment granted in the Vryheid Magistrate's Court for the eviction of the Appellants (Defendants) from the Respondent's

(Plaintiff's) farm. The Respondent disputed the Land Claims Court's jurisdiction to entertain this appeal on the grounds that:

1 Section 13 of the Land Reform (Labour Tenants) Act No 3 of 1996 (hereinafter referred to as "the Act"), only grants appellate jurisdiction to the Land Claims Court in respect of proceedings that were pending at the commencement of the Act on 22 March 1996, thereby excluding the present case, which commenced on 29 May 1996.

2 It has not been found that the defendants were labour tenants.

[2] At the hearing on 5 August 1997 we called for oral argument on the threshold issue of jurisdiction first. We came to the conclusion that the Land Claims Court does not have jurisdiction to entertain an appeal in the present case. I undertook to furnish reasons later. The reasons for the decision are as set out below.

[3] On 29 May 1996 (after the commencement of the Act on 22 March 1996) the Respondent, a farmer in the Vryheid district, issued a summons, out of the Vryheid Magistrates Court, for the eviction of the 15 Appellants together with their families and livestock from his farm, alleging that they were in unlawful occupation.

[4] The Appellants entered an appearance to defend, whereupon the Respondent applied for summary judgment. The Appellants' attorney filed a replying affidavit opposing the summary judgment application in which he:

1 Set out as the Defendants' *bona fide* defence the fact that they fulfilled the requirements for labour tenants as set out at s 1(xi) of the Act.[1]

2 Stated that because the Act accords exclusive jurisdiction to the Land Claims Court to evict labour tenants, the Magistrate's Court did not have jurisdiction;

[5] In his judgment granting the application for summary judgment and costs, the Magistrate found that the Defendants had not established a bona fide defence. Specifically, they had not set out facts which, if proven at trial, would establish that they were labour tenants. The Magistrate moreover found it to be a serious omission that the Defendants themselves had not attested to the facts, that their attorney's affidavit was hearsay and not sufficient to successfully oppose the application.

[6] The Defendants subsequently noted an appeal against the whole of the judgement.

Jurisdiction

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[1] "(xi) 'Labour tenant' means a person—
(a) who is residing or has the right to reside on a farm;
(b) who has or who 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 provides or has provided 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 farm worker;"

[7] As a threshold issue, I must first determine whether the Act gives the Land Claims Court jurisdiction over this matter. Section 13 of the Act, entitled "[p]ending proceedings," reads as follows:

> "13. (1) The provisions of sections 7 to 10 [dealing with evictions] shall apply to proceedings pending in any court at the commencement of this Act.
> (2) Any decision or order made by a court in proceedings referred to in subsection (1), shall be subject to appeal to the [Land Claims] Court in the manner provided in the rules.
> (3) The Court shall have exclusive jurisdiction to hear any appeal against any such decision or order.
> (4) The Court may, on the hearing of an appeal in terms of this section, confirm the decision or order or allow the appeal in whole or in part."

It is clear from the wording of the section that the legislature granted appellate powers to the Land Claims Court expressly. The maxim *expressio unius est exclusio alterius*[2] suggests that the framers of s 13 intended to give this Court appellate jurisdiction only in respect of eviction cases which were pending when the Act came into effect (by expressly providing therefor at s 13), and intended to exclude appellate jurisdiction over all eviction cases, pending or not, in references to jurisdiction elsewhere in the Act.

[8] The proceedings in the present case were not pending as of 22 March 1996. This fact alone excludes the matter from the operation of section 13. Of significance also is that the summons sought to evict not labour tenants, but ordinary persons unlawfully occupying the farm, and the Magistrate did not make a finding that they were labour tenants. The requirements of s 13 not having been met, I am of the view that this section does not confer jurisdiction on the Land Claims Court to hear the present appeal.

[9] The Appellants further argued that s 33(2) of the Act comes to their assistance in that it grants the Court appellate jurisdiction despite the provisions of s 13. That subsection provides as follows:

> "33(2) The Court shall have jurisdiction and the necessary or reasonably incidental powers to determine any justiciable dispute which arises from the provisions of this Act."

While it might be argued that this appeal concerns a dispute over the eviction of labour tenants which arises from the provisions of the Act as contemplated at s 33(2), it does not simply follow therefrom that the jurisdiction referred to in s 33(2) includes also appellate jurisdiction.

[10] I am of the view that where appellate jurisdiction over eviction proceedings is expressly conferred by a specific section of the Act, reference to jurisdiction elsewhere in the Act must exclude appellate jurisdiction in such cases, and is a reference to ordinary jurisdiction as a court of first instance. I do not believe that one can simply read "appellate" jurisdiction into section 33(2) or any other section of the Act where such jurisdiction is not expressly provided for, as the appellant's legal representative would have us do. This proposition accords also with the maxim *expressio unius est exclusio alterius*.[3]

[11] Likewise, neither the jurisdiction conferred at s 29 of the Land Reform (Labour Tenants) Act

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2 "The expression of one thing implies the exclusion of another." For cases, see Classen, *Dictionary of Legal Words and Phrases* (Butterworths, Durban 1976).

3 See supra n 2.

and the ancillary powers referred to therein, nor the jurisdiction referred to at s 28N of the Restitution of Land Rights Act,[4] which sets out the Court's powers at the hearing of appeals, (both of which were referred to by Appellants' counsel) takes their case any further, appellate jurisdiction not being granted in either section.

[12] In oral argument, the Appellants' legal representative suggested that s 29 confers jurisdiction on this Court because the power to hear appeals is an ancillary power. I do not agree. As Dodson J found in *Zulu v Van Rensburg*, "s 29 requires that the functions expressly conferred on the Court must first be identified and it is only in relation to those functions that one can then apply the broad provisions conferring ancillary and incidental powers on the Court."[5] The Appellants have identified no clear function to which appellate jurisdiction could be incidental. It is my view that appellate jurisdiction is primary in nature and cannot be considered incidental.

[13] Section 28N of the Restitution of Land Rights Act merely sets out what powers the Court has when hearing an appeal and for that reason cannot possibly confer appellate jurisdiction in the present case.

Conclusion

[14] It is indeed an anomalous situation that the Land Claims Court does not have appellate jurisdiction in this particular matter inter alia because the proceedings were not pending when the Act commenced, given that the Land Claims Court is the obvious forum to decide whether defendants are labour tenants or not. One can only suppose that the legislature in enacting s 13 optimistically envisaged that after the Act came into force subsequent evictions of labour tenants would be brought directly to the Land Claims Court as required by s 5. This has not happened. Even where persons facing evictions may well be labour tenants, plaintiff landowners are unlikely to concede that the persons they seek to evict are labour tenants, since this would trigger the significant protections afforded to labour tenants under the Act. Indeed to bring an eviction claim in the Land Claims Court they will have to allege and prove that defendents are labour tenants. They are far more likely to bring their actions as ordinary eviction proceedings in the Magistrate's Courts. This is regrettable, but it is up to the legislature to amend the Act so as to give the Land Claims Court power consistent with its purposes. Without such amendment, s 13 does not grant the Court power to hear an appeal like the present one.

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MEER J

I agree

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DODSON J

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[4] Act 22 of 1994.

[5] 1996 (4) SA 1236 (LCC) at 1245.

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and

W E HEIN	Respondent

JUDGMENT

Dodson J:

[15] I agreed with my colleague, Meer J, that the appellants' appeal should be dismissed. My reasons for dismissing the appeal follow. The facts are set out in her judgment and need not be repeated.

Jurisdiction to hear the appeal

[16] In deciding whether or not the Land Reform (Labour Tenants) Act[6] (referred to in this judgment as "the Act") confers jurisdiction on the Land Claims Court to hear this appeal, one must bear in mind a presumption which is of fundamental importance in the law of statutory interpretation.[7] That is the presumption that an enactment does not alter the existing law more than is necessary. In *Kent NO v South African Railways and Another*, Watermeyer CJ put it this way:

> "[I]t is necessary to bear in mind a well-known principle of statutory construction, viz., that Statutes must be read together and the later one must not be so construed as to repeal the provisions of an earlier one, or to take away rights conferred by an earlier one unless the later Statute expressly alters the provisions of the earlier one in that respect or such alteration is a necessary inference from the terms of the later Statute. *The inference must be a necessary one and not merely a possible one."* [8] (my emphasis)

One of the rationales behind the presumption is that there should be legal certainty which assists in the proper administration of justice.[9] If regard is had to that rationale, it seems to me that Watermeyer CJ's dictum is of equal application notwithstanding that the alteration of the law contended for does not have the effect of taking away rights.

[17] Now in the context of this matter, the existing law is contained in section 83 of the Magistrates' Courts Act.[10] It provides that appeals from the magistrates' courts lie to the High Courts. On the appellants' argument, the existing law is altered by the Act so as to give parties to a dispute such as the present one a choice of appeal courts. They can choose to appeal to a High Court having jurisdiction or they can come to this Court. For this interpretation to prevail, it must be "a necessary [inference from the Act] and not merely a possible one."[11] Against this background, I turn to the specific provisions which the appellants rely on to infer jurisdiction in this matter.

[18] Mr Loots referred to s 13. That confers exclusive appeal jurisdiction on this Court in certain matters pending on 22 March 1996 when the Act commenced. As is pointed out in my colleague's judgment, that section doesn't assist the appellants directly, inter alia because this case was commenced after 22 March 1996. However Mr Loots suggested that a non-exclusive appeal jurisdiction could be inferred from this section in respect of cases commenced after 22 March 1996 in a magistrate's court where the question of that court's jurisdiction was challenged on the basis of the Act. Such an inference is, in my view, neither necessary nor possible. The inference

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6 Act 3 of 1996.

7 Devenish *Interpretation of Statutes* 1 ed (Juta, Cape Town 1992) at 159.

8 1946 AD 398 at 405.

9 Devenish supra n 2 at 159

10 Act 32 of 1944.

11 *Kent NO v SAR* supra n 3 at 405.

which I draw from s 13 (and from s 33(5))[12] is that where it is intended that the Court should exercise an appellate jurisdiction, the statute provides for this expressly.

[19] Mr Loots also referred to a number of provisions in the Act and the Restitution of Land Rights Act[13] which in general terms confer on the Court ancillary and incidental powers in the performance of its functions[14] including those provisions conferring -

> ". . . all such powers *in relation to matters falling within its jurisdiction* as are possessed by a provincial division of the Supreme Court having jurisdiction in civil proceedings at the place where the affected land is situated . . . ."[15] (my emphasis)

His argument was that this Court performs a broad, supervisory, adjudicative function in terms of the Act and the jurisdiction to hear all appeals which arise in relation to the Act is a power ancillary or incidental to this function. I do not consider an appellate jurisdiction to be a power which can necessarily be inferred from general provisions conferring ancillary powers. The correct approach in determining what are ancillary or incidental powers is set out in the decision of this Court in *Zulu and Others v Van Rensburg and Others*:

> "It was suggested on behalf of the respondents that the wording in the first part of section 29 requires that the functions expressly conferred on the Court must first be identified and it is only in relation to those functions that one can then apply the broad provisions conferring ancillary and incidental powers on the Court. This approach would seem to be correct and finds support in the second part of that section which confers on the Court the powers of a provincial division of the Supreme Court in civil proceedings 'in relation to matters falling within its jurisdiction'."[16]

[20] An appellate jurisdiction would be one of those primary functions to be identified as expressly (or by necessary implication) conferred on the Court. Ancillary powers would be those that made the performance of that appellate function by the Court possible. In this regard it is significant that the Appellate Division held in the cases of *S v Absalom*[17] and *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*[18] that the inherent power of the Supreme Court to regulate its own procedures did not confer the appellate powers contended for in those cases. In both cases it confirmed that such powers must specifically be conferred by statute.

[21] The other provision on which the appellants relied, and the only one which created some difficulty for the respondent, was s 33(2) of the Act. It gives the Court the jurisdiction "to determine any justiciable dispute which arises from the provisions of the Act". The problems of

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12 This gives the Court appeal powers in respect of decisions of arbitrators under the Act.

13 Act 22 of 1994.

14 See s 22(2) (b) of Act 22 of 1994 and ss 29 and 33(2) of the Act.

15 See s 22(2)(a) of Act 22 of 1994 and s 29 of the Act.

16 1996 (4) SA 1236 (LCC) at 1245 B-C.

17 1989 (3) SA 154 (A) at 163I-164D.

18 1996 (3) SA 1 (A) at 7D- I.

interpretation which arise from the divergence between the English and Afrikaans versions of this subsection were dealt with in the *Zulu* case and need not be revisited.[19] There is no doubt that this provision confers broad powers on the Court.[20] None the less it does not, in my view, provide a basis for a *necessary* inference of an appellate jurisdiction in this matter. My reasons for this view are as follows.

(a) As Mr Roberts pointed out, the Act retains an inherent logic without such a jurisdiction. The Act gives this Court jurisdiction over labour tenants (as defined) only. At the commencement of the Act it was conceivable that there were matters pending in magistrates' courts involving labour tenants. To bring them within this Court's jurisdiction, section 13 had to be promulgated. That made the relevant provisions of the Act applicable to such cases and steered any appeals in respect of labour tenants in the direction of this Court. Any proceedings for the eviction of labour tenants started *after* the commencement of the Act have to be brought in this Court *as a court of first instance*. No appeal powers were necessary. If a claim for the eviction of labour tenants is brought in another court, that court must simply decline jurisdiction. If it wrongly assumes jurisdiction, the aggrieved defendants can appeal to a High Court or the Supreme Court of Appeal in the normal manner.[21]

(b) There are instances of jurisdiction contemplated by s 33(2) which are clearly necessary for the proper functioning of the Court. This very enquiry into jurisdiction is in my view an example. The power to grant a final interdict where a breach of section 5 of the Act is involved is another example. The *Zulu* case illustrates that.[22] Section 33(2) therefore has meaning without ascribing to it the meaning for which the appellants contend.

(c) The concept of an implied, concurrent, appellate jurisdiction with the High Courts over magistrates' courts (which would be the case on the appellants' version) is a most unusual one and is not likely to have been intended. There is also no logic in giving the Court exclusive appellate jurisdiction in relation to the type of case contemplated in s 13 and

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19 Supra n 11 at 1245D-1246I.

20 Ibid at 1245D.

21 This does mean that the High Courts are also required to interpret the Act and this has given rise to problems where differing interpretations are adopted by this Court on the one hand and the High Courts on the other. See for example the unreported decisions of the Natal High Court in *HB Klopper and Others v BE Mkhize and Others* NPD 2169/96, 3 March 1997 and *Tselentis Mining (Pty) (Ltd) and Another v Mdlalose and Others* NPD 579/97, 15 July 1997 which interpret the definition of labour tenant differently to the interpretation adopted in the decisions of this court to date. As is pointed out in my colleague's judgment, there is also a disincentive for cases involving the eviction of persons who may be labour tenants to be brought to the Land Claims Court. However the appellants' argument does not resolve either of these problems as they argue that this Court enjoys a concurrent appellate jurisdiction with the High Courts in matters such as this one. Thus land owners would, on the appellants' interpretation, still be able to pursue cases of this nature in the ordinary courts. Parliament is the only body which can resolve the problem.

22 Supra n 11 at 1246I-1247F

then concurrent appellate jurisdiction in respect of matters such as the present one.[23]

(d) If the Court had a broad appellate jurisdiction, the Act would in all likelihood have provided for the powers in s 13(4) to apply to all appeals and not just those in terms of the section.[24]

[22] For the reasons set out above, I agreed that the appeal should be dismissed.

[23] The question of costs was reserved. Two issues must be determined. Firstly, where the Court has concluded that it lacks the jurisdiction to hear an appeal, does it none the less have the jurisdiction to make a costs order? If it does, the second question which arises is what the appropriate costs order is, if any, in this case?

Jurisdiction to make a costs order

[24] From my research, it appears that the approach of the Supreme Court has been to accept without question that it has the jurisdiction to make a costs order notwithstanding a finding that it lacks the jurisdiction to entertain a matter.[25] This did not seem self-evident to us. Were the Court wrongly to have entertained the appeal, the entire proceedings would have been a nullity including any costs order that might have followed.[26] Where the Court properly recognises that it has no power to entertain proceedings commenced before it, is it not precluded from entering into any further enquiries or making any further orders? The Court raised this matter with the parties' legal representatives at the hearing and gave them the opportunity of submitting further heads of argument on the issue.

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[23] On Appellants' version this would include an implied appellate jurisdiction over a High Court acting as a court of first instance where its jurisdiction in eviction proceedings was challenged on the basis that the defendants were labour tenants. This is even less likely to have been contemplated.

[24] Section 13(4) provides:

> "The Court may, on the hearing of an appeal in terms of this section, confirm the decision or order or allow the appeal in whole or in part."

[25] This is apparent from the fact that the courts have invariably awarded costs to the party successfully raising the point of lack of jurisdiction. See Van Winsen Cilliers and Loots *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa* 4 ed (Juta, Cape Town 1997) at 701 -702 and the authorities cited at footnote 6. See also *Carroll v Menzies* 1961(4) SA 672 (D) at 674 D; *Sibiya v Minister of Police* 1979(1) SA 333 (T) at 338A-B. The only possible exception which I could find was the case of *Wells v Dean-Willcocks* 1924 CPD 89 which was not an entirely analogous situation. There the Court found that it had the jurisdiction to make an order affecting the status of the plaintiff but lacked the jurisdiction to make a costs order against the peregrine defendant without an attachment to found jurisdiction. The decision is criticised on the basis that it is contrary to the causae continentia principle. See Pistorius *Pollak on Jurisdiction* 2ed (Juta, Cape Town 1993) at 180.

[26] *S v Absalom* 1989 (3) SA 154 (A) at 164D - G; *Minister of Agricultural Economics and Marketing v Virginia Cheese and Food Co* 1961(4) SA 415 (A) at 422F- 423H.

[25] I am satisfied on at least two separate grounds that the Court has implied authority to make a costs order in these circumstances. A statutory body has the power and the duty to enquire into whether or not it has authority in respect of any matter. Baxter says:

> "Whenever it acts, a public authority must determine the scope of its own powers. It must ascertain whether the prescribed preconditions for acting exist and it must determine the permissible limits of its authority in the circumstances. This enquiry will involve an investigation into questions of fact and law."[27]

[26] As is pointed out by Wade, the same principle applies just as much to a court.[28] Its enquiry into whether or not it has jurisdiction is a legitimate exercise of its powers and is clothed with legal validity.[29] This is so notwithstanding that it may ultimately decide that it lacks jurisdiction. This Court is given a wide discretion in the Act to make costs awards in the exercise of its various powers.[30] It is also given "all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act".[31] On the basis of these provisions, I am satisfied that the Court has the authority to make a costs order in the exercise of this particular power (ie an inquiry into jurisdiction). This approach is also in accordance with the principle of causae continentia which requires that the same court deal with all the inter-related components of a claim, notwithstanding that the jurisdiction in respect of some components would be questionable if they stood alone.[32]

[27] The second ground is this. That a High Court may make a costs order on finding that it lacks jurisdiction is well established by the various decisions where it has been done without question.[33]

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27 Baxter *Administrative Law* 1 ed (Juta, Cape Town 1984) at 452.

28 Wade *Administrative Law* 6 ed (Clarendon Press, Oxford 1988) at 284.

29 There is authority for this view in the decisions of English courts dealing with the analogous question whether they can consider an appeal against a decision of an administrative tribunal which is held to be a nullity. Wade explains these decisions as follows:

> "One ingenious answer is that the tribunal's decision implies a decision that it has jurisdiction, that this is a question of law which the tribunal necessarily has jurisdiction to determine . . . and that an appeal therefore lies against the determination."

See Wade supra n 23 at 946- 7 and the authorities referred to there. As indicated above (para 7), s 33(2) in my view also provides statutory authority for an enquiry into jurisdiction.

30 S 33(1) of the Act provides:

> "[T]he Court may, in addition to the power to make other orders in terms of this Act—
>
> . . . .
>
> (f) make such orders for costs as it deems just."

31 S 29 of the Act.

32 *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd* 1962 (4) SA 326 A.

33 See the authorities cited at n 20.

These include decisions which have been confirmed by the Appellate Division[34] and decisions where the Appellate Division itself found that it lacked jurisdiction.[35] Section 29 of the Act provides as follows:

> "The Court . . . shall have all such powers in relation to matters falling within its jurisdiction as are possessed by a provincial division of the Supreme Court having jurisdiction in civil proceedings at the place where the affected land is situated . . . ."

[28] For the reasons which I have given, an enquiry into jurisdiction is itself a matter "falling within [the Court's] jurisdiction." It accordingly has the same power as a High Court to make a costs order in such circumstances.

Appropriate costs order

[29] Having established that the Court has the jurisdiction to make a costs order in this matter, what is the appropriate award, if any? Mr Loots, on behalf of the appellants, argued that the Court should exercise its discretion not to make an order for costs against his clients. Mr Roberts on behalf of the respondent contended that the appellants should be ordered to pay the respondent's costs.

[30] There is one aspect of Mr Robert's argument which needs to be dealt with first. He suggested that the Court should, in deciding costs, take into account aspects of the manner in which the appellants' case had been conducted in the magistrate's court. However in this matter the Court has found that it lacks jurisdiction. That prevents it from venturing into any enquiry whatsoever regarding the merits of the appeal purportedly brought before it. The facts which the respondent wants the Court to consider can only be decided by going into the merits. To allow facts, the determination of which requires an enquiry beyond its jurisdiction, to influence the decision regarding costs, would in my view result in this Court exceeding its jurisdiction. The manner in which appellants conducted their case would only be relevant here if the mistaken direction of their appeal to this Court had been negligent or unreasonable in some way. In my view it was not, for reasons which will become apparent below.

[31] The general rule in the practice of the High Courts and the Supreme Court of Appeal is that costs should follow the result. Thus in both *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa*[36] and the section on costs in *The Law of South Africa*,[37] the view is expressed that a party who successfully raises lack of jurisdiction should be entitled to his or her costs. However, the interpretation of s 33(1)(f) of the Act, which is the basis of this Court's

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[34] See, for example, *Jansen van Vuuren v Van der Merwe* 1992 (1) SA 124 (A).

[35] See, for example, *Charugo Development Company (Pty) (Ltd) v Maree NO* 1973 (3) SA 759 (A) at 764G-H; *Kett v Afro Adventures (Pty) (Ltd) and Another* 1997(1) SA 62 (A) at 65I-67G.

[36] Van Winsen Cilliers and Loots supra n 20, 701-702.

[37] Cilliers "Costs" in Joubert et al (eds) 3 Lawsa (Butterworths, Durban 1985) para 771.

power to award costs in this case, is a new issue.[38] For that reason I do not consider this Court bound to follow the usual approach of the High Courts and the Supreme Court of Appeal in awarding costs.

[32] I am of the view that this Court must adapt its approach on costs orders to take into account certain factors which are peculiar to it. I am reinforced in my view by the decision of Ackerman J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (No.2).*[39] He refers to the basic rules regarding costs developed by the Supreme Court, including the exceptions to the rules, and goes on to say:

> "I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted . . . "[40]

Although this was said in the context of constitutional litigation, this case can in my view be described as falling under a new area of public interest litigation. This tends to set it apart from conventional litigation.

[33] I referred in the case of *Mahlangu v De Jager* to instances where courts had not followed the "general rule" that costs follow the result.[41] One of these instances is the approach of the labour courts to the question of costs. In *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd*[42] Goldstone JA (as he then was) considered the following relevant to the

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38 Save to the extent that it was dealt with in *Mahlangu v De Jager* 1996 (3) SA 235 (LCC) at 246B-247H.

39 1996(4) BCLR 441 (CC).

40 Ibid at 443 para 3. Similar views were expressed by Mahomed DP (as he then was) in *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) at 182 para 36.

41 Supra n 33 at 246F-247D.

42 1992(1) SA 700 (A) at 738A - 739G. That decision pertained to the labour courts established under the Labour Relations Act 28 of 1956. Save in respect of pending cases, those courts have since been abolished in terms of the Labour Relations Act 66 of 1995 which repealed the Labour Relations Act 28 of 1956 when it came into force on 11 November 1996. The wording of the provisions dealing with costs in the newly created Labour Court and the Labour Appeal Court under Act 66 of 1995 (ie ss 162 and 179) is however essentially the same as that in Act 28 of 1956, save that the courts are expressly authorised to take into account additional considerations relating to the conduct of the parties. Both courts may, in terms of the sections referred to, "make an order for the payment of costs, according to the requirements of the law and fairness." The new Labour Court continues to follow the approach to costs established by its predecessor. In the unreported case of *Callguard Security Services (Pty) Ltd v Transport and General Workers Union* (J11/97, 21 February 1997) Exeunt J held that " The approach of the Appellate Division on the issue of costs under the old Act as can be found in the matter of *NUM v East Rand Gold and Uranium Co* holds good as an approach which this Court should also adopt on costs." Recent Labour Court decisions have consistently endorsed this view. See for example the unreported judgments of *NUM and Others v Comark Holdings (Pty) Ltd*

determination of costs in the labour courts:

> "1. The provision that 'the requirements of the law and fairness' are to be taken into account is consistent with the role of the industrial court as one in which both law and fairness are to be applied.
>
> 2. The general rule of our law that, in the absence of special circumstances costs follow the event, is a relevant consideration. However, it will yield where considerations of fairness require it.
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> 3. Proceedings in the industrial court may not infrequently be part of the conciliation process. That is a role which is designedly given to it. Parties, and particularly individual employees, should not be discouraged from approaching the industrial court in such circumstances. Orders for costs may have such a result and consideration should be given to avoiding it, especially where there is a genuine dispute and the approach to the court was not unreasonable. With regard to unfair labour practices, the following passage from the judgment in the *Chamber of Mines* case . . . commends itself to me:
>
> > 'In this regard public policy demands that the industrial court takes into account considerations such as the fact that justice may be denied to parties (especially individual applicant employees) who cannot afford to run the risk of having to pay the other side's costs. The industrial court should be easily accessible to litigants who suffer the effects of unfair labour practices, after all, every man or woman has the right to bring his or her complaints or alleged wrongs before the court and should not be penalised unnecessarily even if the litigant is misguided in bringing his or her application for relief, provided the litigant is *bona fide*....'
>
> 4. Frequently the parties before the industrial court will have an ongoing relationship that will survive after the dispute has been resolved by the court. A costs order, especially where the dispute has been a *bona fide* one, may damage that relationship and thereby detrimentally affect industrial peace and the conciliation process.
>
> 5. The conduct of the respective parties is obviously relevant, especially when considerations of fairness are concerned.
>
> The aforegoing considerations are in no way intended to be a *numerus clausus*. A very wide discretion is given by the Act to the three courts with regard to the exercise of their powers and no less in respect of orders for costs. Such a discretion must be exercised with proper regard to all of the facts and circumstances of each case."

[34] There are, in my view, a number of points which this Court, acting under the Act, has in common with courts dealing with labour disputes.

(a) In both instances the courts deal with legislation which regulates (although in very different ways) the consequences of an employment relationship.

(b) Both this court and the labour courts are expressly required in the performance of many of their functions to take into account both the law and considerations of equity.[43]

(J74/97, 26 March 1997) and *Schoeman and Rossouw v Samsung Electronics SA (Pty) Ltd* (J154/97, 10 June 1997).

[43] See, for example, ss 68(1)(b), 68(1)(b)(i)(cc), 167(1), 194(2) and (3) and Chapter 8 (dealing with unfair dismissals) of the Labour Relations Act and ss2(2), 7(2) and (4), 8(3) and (6), 9(3),

(c) There is usually social and economic inequality inherent in the relationship between the disputants.

(d) This Act, like the Labour Relations Act,[44] is aimed at the negotiation, mediation, arbitration and peaceful settlement of disputes (in this case relating to land tenure)[45] and this Court occupies a central position in that process. Such disputes will often be in the context of an ongoing relationship between the parties.

[35] This Court also shares the concern, expressed in Goldstone JA's judgment, that the risk of an adverse costs order might deter legitimate litigants from approaching the Court, thereby undermining the entire object of the Act. The Court can in my view take judicial notice of the fact that most rural black people have, by reason of a barrage of discriminatory laws applied to them over the years, in most instances been prevented from accumulating any substantial wealth. Given the current costs of litigation, potential applicants will always be faced with the risk of losing what few capital assets they might have managed to accumulate when approaching the court if the "costs follow the result" rule is generally applied. Those assets may be their sole means of pursuing a livelihood, such as livestock or farming equipment.

[36] In dealing with the potential deterrent effect of the general rule, Mr Loots referred to the constitutional right of access to court.[46] In my view this is a relevant matter in so far as this Court has a constitutional obligation—

> "[i]n the interpretation of any law and the application and development of the common law and customary law . . . [to] have due regard to the spirit, purport and objects of . . . [the chapter on fundamental rights]"[47]

An interpretation of the provisions of the Act which deals with costs in a way that would not deter legitimate litigants from having their justiciable disputes settled by this Court would reflect a proper application of these constitutional provisions.

[37] Having regard to the similarities with the labour courts which I have enumerated, I believe

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10(1)(a) and (b), 10(2), 12(2)(b), 12(3)(b), 14, 20(3)(j), 22(5)(c), 23(1) and (3) and 24(3) of the Land Reform (Labour Tenants) Act.

44 Act 66 of 1995.

40 See for example sections 11(3), 18(1), 18(3), 36 and the various provisions dealing with arbitration.

46 Section 22 of the Constitution of the Republic of South Africa Act 200 of 1993 provides:

> "Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum."

Act 200 of 1993 is applicable because this matter was pending at the commencement of The Constitution of the Republic of South Africa Act 108 of 1996. See s17 of schedule 6 to the latter Act.

47 S35(3) of Act 200 of 1993. Ss 34 and 39(2) of Act 108 of 1996 contain provisions similar to ss22 and 35(3) of Act 200 of 1993.

that the approach of Goldstone JA can usefully be applied to the determination of costs in disputes arising under the Act. The fact that the wording of the section under which the labour courts make a costs order is different to that in the Act is not of any great significance, particularly if regard is had to the similarities which I have listed above. Like the provision on which Goldstone JA's judgment[48] was based, the wording of s 33(1)(f) of the Act embraces considerations of equity and fairness. It must however be emphasized that the application of the criteria mentioned by Goldstone JA should not be slavish and the discretion remains a wide one to be exercised on the facts of each case.

[38] I am also influenced in deciding this matter by the public interest nature of the litigation. The Act was passed specifically to deal with the legitimate demands for remedial action to deal with past, large-scale breaches of the human rights of a class of rural, black people.[49] In my view that places this matter squarely in the sphere of public interest litigation, notwithstanding that the parties to litigation under the Act will usually be private persons. In the United States[50] and, more importantly, in Canada[51] the question of costs may, in certain circumstances, be approached differently in matters of public interest. I say more importantly in respect of Canada because it, unlike the United States,[52] shares our general rule that costs follow the result. Thus in *Mahar v Rogers Cable Systems Ltd*[53] Sharpe J held as follows:

> "[I]t is fair to characterise this proceeding as a public interest suit. While the ordinary cost rules apply in public interest litigation, those rules do include a discretion to relieve the loser of the burden of paying the winner's costs and that discretion has on occasion been exercised in favour of public interest litigants.
> . . .
> In my view, it is appropriate in this case to exercise my discretion in favour of the applicant and to make no order as to costs. The issue raised was novel and certainly involved a matter of public interest. While I decided the jurisdictional point against the applicant, I am satisfied that the application was brought in good faith for the genuine purpose of having a point of law of general public interest resolved."

Our law recognises that in the exercise of its discretion relating to costs a court may deprive a successful party of his or her costs[54] and the trend in the Constitutional Court at least appears to be in the direction of recognising public interest cases as one of those circumstances where it may be appropriate to do so. Such an order is clearly contemplated by rule 61(1) of the Land Claims

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48 Supra n 37.

49 See the preamble to the Act.

50 Percival and Miller "The Role of Attorney Fee Shifting in Public Interest Litigation." 47 *Law and Contemporary Problems* (1984) 233ff.

51 McCool "Costs in Public Interest Litigation: A Comment on Professor Tollefson's Article, 'When the Public Interest Loses: The Liability of Public Interest Litigants for Adverse Costs Awards.'" 30 *University of British Columbia Law Review* (1996) 309ff.

52 See in this regard Schlesinger Baade Damaska and Herzog *Comparative Law* 5 ed (Foundation Press, New York 1988) 352ff

53 *Quicklaw* database at pages 35 and 38-9 of the version of the judgment recorded there.

54 *Lawsa* supra n 32 at paras 782 - 793.

Court Rules[55] which provides:

> "The Court may make orders in relation to costs which it considers just, and it may, in exercising that discretion -
>
> (a) elect not to award costs against an unsuccessful party -
>
> (i) who has put a case or made submissions to the Court in good faith in order to protect or advance his or her legitimate interest; or
>
> (ii) for any other sufficient reason."

[39] In coming to my view, I have given careful consideration to its possible negative impact. Amongst other things there is a risk that this approach to costs may encourage ill-founded claims and defenses. However the fact that the Court has a wide discretion means that the risk of an adverse costs order most certainly remains intact. The costs order in the *Mahlangu* case[56] serves as an illustration.

[40] In my view this is a case where the general rule must yield to considerations of equity and fairness. The pursuit of the appeal in this Court, while mistaken, was not unreasonable. There were no decided cases of this Court dealing with its appellate jurisdiction to which the appellants could refer. The broad wording of some of the provisions of the Act, particularly s 33(2), is such as might reasonably have given rise to the mistaken belief that the Court had jurisdiction to entertain this appeal. The appellants approached the Court in good faith and there was a genuine dispute as to whether or not this Court had the necessary jurisdiction. The issue raised, namely the extent of this Court's appellate jurisdiction, is an issue of fundamental importance to all affected by the Act and not just the parties in this matter. In the circumstances, no order is made as to the costs of this appeal. It goes without saying that this ruling does not in any way affect the costs order in the magistrate's court.

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JUDGE A C DODSON

Dated: 23 September 1997

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55 Government Gazette No 17804 at 106.

56 Supra n33 at 247F - H.