IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 20-21 April 1999 **CASE NUMBER:** LCC126/98
before **Moloto and Dodson JJ**

In the case between:

ABRAM PHAKAT HLAPI Applicant

and

MARINDA GERTRUIDA LE GRANGE First Respondent

WILLEM HERMANUS CORNELIS GROBLER Second Respondent

CASE NUMBER : LCC 127/98

FRANK THEMBA MLAMBO Applicant

and

MALINDA GERTRUIDA LE GRANGE First Respondent

WILLEM HERMANUS CORNELIS GROBLER Second Respondent

JUDGMENT

DODSON J:

Factual background

[1] The applicants in these matters live on the farm Remaining Extent of Portion 17 of the farm Roodepoort 504, Registration Division JR, Transvaal. I will refer to it as "the farm". The applicant in the first application, Mr Hlapi, has lived there since 1992 and the applicant in the second application, Mr Mlambo, has lived there since 1991. Previously (since 1970) the farm was owned by the second respondent and his wife, who were married in community of property. On 28 October 1993, the second respondent's wife passed away. On 14 July 1994, in terms of the joint will of the second respondent and his wife, the property was transferred to the first respondent, subject to a usufruct in favour of the second respondent. The second respondent is an elderly person and now wishes to sell the farm (presumably with the consent of the first respondent). He wishes to have the applicants evicted from the farm in order to facilitate a sale.

[2] The applicants have brought separate applications for interim relief pending -

(i) proceedings aimed at reversing certain decisions of the Bronkhorstspruit Magistrate's Court which resulted in the issue of warrants for their eviction from the farm;

(ii) proceedings in terms of chapter III of the the Land Reform (Labour Tenants) Act[1] (I will refer to it as "the Labour Tenants Act") for awards of ownership rights in respect of the farm.

The applications were heard simultaneously. The facts giving rise to the applications and the relief sought in them are, in almost every material respect, identical. Where they are not, I will say so.

[3] The second respondent consented to the applicants' original occupation of the farm. However, there is a dispute as to the nature of the agreements between the applicants and the second respondent in terms of which he gave this consent. The second respondent says that the applicants occupied the farm as ordinary tenants in terms of agreements of lease, paying a rental of R50,00 each per month (at the time when the payments were still being made). The applicants, on the other hand, say that they provided labour to the second respondent in return for which they were promised a salary (which they say the second respondent failed to pay) and received cropping and grazing rights on the farm. They admit having paid the second respondent R50,00 per month but say this was a charge in respect of the provision of water. It is common cause that until March 1998, the second respondent supplied the applicants with water extracted from a borehole by means of a diesel pump. The second respondent disputes that the applicants ever provided him with labour. He admits that they performed certain duties on the farm but says that these were their duties as tenants in terms of the agreements of lease.

[4] Since 1993, the second respondent has ceased all of his own operations on the farm. It is common cause that, at least since then, the applicants have not provided him with any labour. They nonetheless continued to reside on the farm and use it for cropping and grazing and

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1 Act 3 of 1996.

continued to pay the monthly amount of R50,00. During January or February 1998, the second respondent requested the applicants and their families to vacate the farm. The applicants say that they refused to leave, whilst the second respondent says that they agreed to do so. It is common cause that the applicants have not paid the R50,00 per month since then. Second respondent contends that he allowed them to stop paying the R50,00 in order to enable them to use the money for relocating in terms of their agreement to do so. In March 1998, the second respondent removed the diesel pump, thereby bringing the applicants' water supply on the farm to an end. Since then they have had to make arrangements to fetch water on a neighbouring farm. The second respondent justifies his action on the basis of the applicants' alleged agreement to vacate the premises.

[5] On 14 April 1998, the second respondent issued summonses in the Bronkhorstspruit Magistrate's Court against the applicants for their eviction from the farm. The actions were defended. The second respondent brought applications for summary judgment which were opposed. The applicants' affidavits opposing the summary judgment applications referred to defences which were to be raised, based on the absence of reasonable notice and the protection afforded under the Extension of Security of Tenure Act[2] (I will refer it as "the ESTA"). The applicants also contend that the same affidavits can be read as alluding to a defence based on the Labour Tenants Act, which the second respondent disputes. Summary judgments were refused and leave was given to file pleas. Unfortunately, no pleas were filed within the time period prescribed in the Magistrates' Courts Rules in either action. On 9 June 1998, the second respondent issued notices of bar which were served on the applicants' attorney at that time, a Mr Maake. The 5 day period within which the applicants were required to file their pleas ended on 17 June 1998. On that day, Mr Maake faxed pleas to the second respondent's attorney and then served and filed them on the following day. He neither sought the consent of the second respondent, nor the condonation of the Bronkhorstspruit Magistrate's Court, for this form of service.

[6] The second respondent then brought applications for default judgment in both of the actions. Default judgments were granted on 22 June 1998. Mr Maake then lodged applications

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2 Act 62 of 1997.

for rescission of the default judgments. These themselves were lodged late. In the affidavits in support of the applications, the applicants adopted the attitude that the plea had been served timeously and that the second respondent had acted incorrectly in proceeding with the application for default judgment. (A reading of the rules and a calendar and some simple arithmetic would have revealed to Mr Maake that he was wrong in this regard.) As far as their defences to the claims were concerned, reference was made to the defences based on the ESTA which had been referred to expressly in the affidavits opposing summary judgment. Mr Maake set the applications for rescission down for 18 September 1998, but nobody attended court on that day to move the applications. The applications for rescission were accordingly either dismissed or removed from the roll,[3] in the absence of any appearance by the applicants.

[7] After that, the second respondent caused warrants of eviction to be issued by the Bronkhorstspruit Magistrate's Court and on 15 October 1998, the sheriff for Bronkhorstspruit began with the eviction. The applicants' current attorney, Mr Coertse (who appeared on behalf of the applicants in the proceedings before this Court), then contacted the second respondent's attorney, Mr Kilian. It was agreed between them that the execution of the warrants would be suspended, provided that certain proceedings were instituted within 7 days. On Mr Coertse's version, the proceedings to be instituted were these applications for interim relief which are before the Court. On Mr Kilian's version, the proceedings contemplated were the noting of appeals in relation to one or more of the decisions of the magistrate in the actions lodged in the Bronkhorstspruit Magistrate's Court.

[8] The applications for interim relief which are now before this Court were launched on 26 October 1998. Interim interdicts are sought against the second respondent preventing him from executing, or causing to be executed, the warrants for the eviction of the applicants issued by the Bronkhorstspruit Magistrate's Court, from interfering with the applicants in the exercise of their alleged rights in terms of the Labour Tenants Act, alternatively the ESTA, and requiring him to restore to the applicants their water supply. The latter prayer is accompanied by a conditional tender by each applicant to recommence payments in the sum of R50,00 per month upon re-

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3 The records in the files received from the Bronkhorstspruit Magistrate's Court are not entirely clear in this regard, but it is apparent that the applicants did not get rescission.

connection of the water supply. The relief is sought pending, firstly, appeals to be noted against the decisions in the Magistrate's Court pertaining to the eviction of the applicants and, secondly, the processing of applications by the applicants for the award of land in terms of chapter III of the Labour Tenants Act.[4] I will refer to them as the chapter III claims. The notices of motion also provide for the applicants to be required to commence these appeals and applications within 90 days of the Court's order in this matter. No relief is sought against the first respondent who was joined in the proceedings only by reason of her being the bare dominium owner of the farm. She has not opposed the applications. The parties have reached an agreement regarding the period between the launch and the conclusion of these applications as a result of which no further steps have been taken to evict the applicants.

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4 Section 16 of the Labour Tenants Act provides as follows:

> "Right to acquire land
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> (1) Subject to the provisions of this Act, a labour tenant or his or her successor may apply for an award of-
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> (a) the land which he or she is entitled to occupy or use in terms of section 3;
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> (b) the land which he or she or his or her family occupied or used during a period of five years immediately prior to the commencement of this Act, and of which he or she or his or her family was deprived contrary to the terms of an agreement between the parties;
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> (c) rights in land elsewhere on the farm or in the vicinity which may have been proposed by the owner of the farm; and
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> (d) such servitudes of right of access to water, rights of way or other servitudes as are reasonably necessary or are reasonably consistent with the rights which he or she enjoys or has previously enjoyed as a labour tenant,
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> or such other compensatory land or rights in land and servitudes as he or she may accept in terms of section 18 (5): Provided that the right to apply to be awarded such land, rights in land and servitudes shall lapse if no application is lodged with the Director-General in terms of section 17 within four years of the commencement of this Act."

The rest of Chapter III of the Labour Tenants Act sets out the procedure for dealing with such an application.

Requirements for interim relief

[9] The approach of the Land Claims Court to interim interdicts was set out in the case of *Chief Nchabeleng v Chief Phasha*.[5] It follows the approach adopted in the English case of *American Cyanamid Co v Ethicon Ltd*,[6] which this Court found to be reconcilable with the approach which Holmes JA followed in *Olympic Passenger Service (Pty) Ltd v Ramlagan*[7] and in *Eriksen Motors Ltd v Protea Motors and Another*.[8] This Court has also adopted this approach in the context of proceedings relating to the Labour Tenants Act.[9] On that approach, the applicant for an interim interdict must show that, in the proceedings for final relief to which the proceedings for interim relief relate, there is a serious question to be tried. In assessing whether or not there is a serious question to be tried, the Court will not tie itself to a particular degree of proof. Rather it will ensure that the issue raised in the proceedings for final relief is not frivolous or vexatious or devoid of any merit. It will enquire into the balance of convenience.[10] In coming to its decision regarding the grant or refusal of interim relief, and, if granted, the nature of that relief, the Court exercises a discretion. That process requires it primarily to weigh the apparent strength of the applicants' case in relation to the final relief, on the one hand, against the balance of convenience, on the other. If the balance of convenience strongly favours the second respondent, the applicant will have to show strong prospects of success in relation to the final relief before interim relief will be considered. If the balance of convenience strongly favours the applicants, their burden in relation to the "serious question to be tried" test is diminished.

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5 1998 (3) SA 578 (LCC) at 583D-588F; [1997] 4 All SA 158 (LCC) at 161e to 166c.

6 [1975] 1 All ER 504 (HL).

7 1957 (2) SA 382 (D).

8 1973 (3) SA 685 (A).

9 *Manana and Others v Johannes* 1999 (1) SA 181 (LCC) at 184H-185I; *Van der Walt and Others v Lang and Others* 1999 (1) SA 189 (LCC) at 196F-200D.

10 The approach of the Court to the balance of convenience is set out in the extract from the *Nchabeleng* case quoted in paragraph [24] below.

Stay of execution

[10] The interim interdicts which are sought preventing the second respondent from executing the warrants of eviction amount, in effect, to stays of execution. This raises two questions. The first is whether this Court has jurisdiction to stay the execution of a warrant issued out of a magistrate's court. The second is whether or not the test in regard to a stay differs from the test outlined above in relation to interim interdicts generally. As far as the first question is concerned, although the second respondent never challenged this Court's jurisdiction to stay the warrants of execution, it is not something which seemed to me to be self-evident. There is a line of authority which suggests that a stay of execution must be sought in the court where the warrant was issued.[11] However, more recent decisions of the high courts incline to the view that they have jurisdiction to stay a warrant of execution issued out of a magistrate's court in appropriate circumstances, even though the magistrate's court may have had jurisdiction to afford the same relief in terms of section 62(3) of the Magistrates' Courts Act.[12] Thus in *O'Sullivan v Mantel and Another*,[13] Vermooten J held as follows:

> "The final question is whether I have jurisdiction to grant that relief. She could have approached the magistrate under s 62 (3) of the Magistrates' Courts Act which I have already quoted. In *Swanepoel v Roelofz and Others* (supra at 526B) CLAYDEN J, sitting in this Division, said:
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> > 'The general practice in this Division, where the Supreme Court is not deprived of jurisdiction but there is another court which has jurisdiction, is to hear the litigant in this Court but to allow only the costs of a hearing in the other court - see *Hunt and Others v Campbell* 1945 WLD 1; *Mbelle v Mbelle* 1947 (1) SA 782 (W) . The type of stay of execution which is sought in this case is analogous to an application for an interdict where the applicant alleges that the property has been taken from him by fraud, and asks that it be preserved pending the establishment of his right to it. In such a case, provided the requisites for an interdict are shown, it cannot, I think, be said as a matter of law that the Court has no jurisdiction because another court has jurisdiction,... I should, I think, follow the Witwatersrand Local Division cases,...'
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> I respectfully agree with the learned Judge and hold that I have jurisdiction."[14]

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11 Erasmus and Van Loggerenberg *Jones and Buckle, The Civil Practice of the Magistrates' Courts in South Africa*, Volume 1 The Act, 9th ed (Juta, Cape Town 1996) at 253 and the cases referred to in footnote 7.

12 Act 32 of 1944.

13 1981 (1) SA 664 (W).

14 Ibid at 670C to F.

[11] In *Yekelo v Bodlani*,[15] the Supreme Court of Transkei adopted a variation on this approach. Davies J dealt with the matter as follows:

> "At 242 of Jones and Buckle (op cit) s 62 of the Magistrates' Courts Act is dealt with. Subsection (3) of that section provides that
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> > 'any court may, on good cause shewn, stay or set aside any warrant of execution or warrant issued by itself . . .'
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> and in commenting on this provision the learned authors state that whilst the Cape Courts 'appear to have held . . . that only the magistrate's court has jurisdiction to stay the execution of a warrant issued in the magistrate's court, the Transvaal Courts have held that both they and the magistrate's court have jurisdiction in the matter, subject to costs being awarded on the magistrates' courts scale'.
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> I have considered the cases cited in support of this proposition and it seems to me that the decisions of the Cape Courts referred to should not be regarded as laying it down as an inflexible rule that the Supreme Court will never entertain an application for the staying or setting aside of a warrant of execution issued out of the magistrate's court. Indeed, in *Ahmed v Van der Merwe* 1911 CPD 846 Maasdorp CJ qualified the 'general rule' by stating that
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> > 'there may be matters of urgency which would induce this Court to stop certain proceedings under a magistrate's writ, until the magistrate has had an opportunity of dealing with the matter'.
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> The Transvaal decisions, as Jones and Buckle state, seem to go further and to allow an application in the Supreme Court although the magistrate's court has jurisdiction but to limit the applicant to magistrate's court costs. A valid objection to adopting this approach here (and indeed it applies in all Divisions of the South African Supreme Courts as well) is that whilst such a would-be applicant would have to lodge security for costs in an application before the magistrate, as the Supreme Court Rules are presently framed there is no requirement for such security where the judgment sought to be rescinded emanates from the magistrate's court.
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> It is essentially a procedural matter, and as I see it the approach to be preferred is to regard the general rule as being that, whilst an application of this nature should be brought in the magistrate's court, this Court has a discretion to allow it to proceed in this Court if considerations of justice and convenience require it to proceed."[16]

[12] In my view these decisions are good authority for the proposition that the high courts have jurisdiction to stay a warrant issued out of a magistrate's court. But does that give this Court jurisdiction? Section 29 of the Labour Tenants Act[17] gives this Court all the powers of a high

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15 1990 (3) SA 970 (TkGD).

16 Ibid at 974G to 975D.

17 Section 29 reads:

> "The Court shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power to grant interlocutory orders and interdicts, and 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, including the powers of such a division in relation to any contempt of the Court."

court having jurisdiction in the area where the affected land is situated, but only "in relation to matters falling within its jurisdiction". Before this Court assumes powers of a high court, the matter or matters in which it intends to exercise those powers must fall within its jurisdiction. In this instance, the question of whether or not the proposed stay of the warrants relates to matters within this Court's jurisdiction must be tested in relation to its potential role in the proceedings before the Bronkhorstspruit Magistrate's Court. If this Court exercises no powers in respect of those proceedings, it cannot assume the powers of the high courts in relation to any stay of the warrants.

[13] It is clear that the applicants intend to take steps to secure the reversal of the decisions in the Bronkhorstspruit Magistrate's Court which gave rise to the warrants of eviction, so that they may have the opportunity of defending the actions. The applicants propose to do so by way of appeals to this Court. The decisions to be appealed against were the grant of the eviction orders by default (which I will refer to as "the first decision") and the dismissal of the applications to rescind the eviction orders (which I will refer to as "the second decision"), which were also decisions granted by default. Before there can be an appeal, the decision to be appealed against must be final. In *Sparks v David Polliack & Co (Pty) Ltd*,[18] Trollip J set out the criteria for deciding when a magistrate's court judgment is final as follows:

> "Mr. Sapire contended that the only case in which a default judgment becomes final is in terms of Rule 46(7); otherwise it always remains provisional and therefore not appealable, because the time limit prescribed under Rule 46(1) for having a default judgment rescinded may at any time be extended by consent or by order of the magistrate's court (Rule 53(5)).
>
> That contention cannot be accepted. According to the main proposition set out above and supported by the authorities mentioned, I think that a default judgment becomes final when it is no longer rescindable. That could occur either through lapse of time (cf. Voet, 42.1.2.) or by the defendant's waiving or perempting his right to rescind, or both. In regard to the former, because of the provisions of Rules 46(1) and 53(5), that would only happen when the six weeks' period prescribed by the former Rule had expired and the magistrate had refused to extend it under the latter Rule. In regard to waiver or peremption, it is clear law that the defendant can waive or perempt his right to rescind the judgment (*Hlatshwayo v Mare & Deas*, 1912 AD 232 at pp. 239, 240, 241 - 2, 246). In practice, if the defendant considered that, because of the particular circumstances, it would be preferable to appeal instead of trying to have the judgment rescinded by the same magistrate or court that granted it, he could, in noting his appeal, expressly waive or perempt his right of rescission, and that would, in my view, render the default judgment final for

18 1963 (2) SA 491 (T).

> appellate purposes. In appropriate cases the appeal Court would, if necessary, condone late noting of the appeal."[19]
> [my emphasis]

[14] In these matters, the time periods for applying to have the first and second decisions rescinded have expired. However, there has not been any application to the Bronkhorstspruit Magistrate's Court in terms of rule 60(5) to extend the periods for applying to rescind. Consequently, there is no refusal by that court to extend the periods. Such a refusal is one of the requirements for a decision to be appealable. If such applications were to be made and to succeed, that would open the way to having the first and second decisions rescinded. There is also no evidence to suggest that the applicants have waived their rights to have the first and second decisions rescinded. Nor would there appear to be any good reason for them to do so. The applicants are thus precluded from launching any appeals at this stage because the decisions which they wish to appeal against are not final.

[15] Thus, if the applicants wish to achieve the reversal of the first and second decisions, they will have to bring applications for extension of the relevant time period, and for rescission, as contemplated in the previous paragraph.[20] It is on the basis of such proceedings, rather than any appeals to this Court, that this application must be tested.[21] If they bring such proceedings, it is clear that the defences on which the applicants will rely are that they are labour tenants as contemplated in the Labour Tenants Act or, alternatively, occupiers as contemplated in the ESTA. If a defence based on the Labour Tenants Act is referred to in any applications for extension and rescission, then it seems to me that section 13(1A) would come into play. It provides:

> "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-

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19 Ibid at 496B to F.

20 I will assume for purposes of these proceedings that it is necessary to have both the first and the second decisions rescinded, if the applicants are to obtain leave to defend the actions for eviction. It may be that the second decision need not be attacked and that it is sufficient for the applicants to bring a fresh application for rescission in respect of the first decision, combined with an application for an extension of time in terms of rule 60(5) of the Rules of the Magistrates' Courts. I leave this for the applicants to resolve.

21 Such an approach is justified under the prayers for alternative relief in the notice of motion.

(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."

No evidence has been led in the cases. In assessing whether or not to grant extensions of the relevant time period and rescission, the magistrate would have to consider the applicants' prospects of success.[22] That would require him to apply the Labour Tenants Act. The result is that he would have to refer the matter to this Court to deal with further as a court of first instance. Even if I am wrong in this respect, this Court enjoys appellate and review powers over magistrates' courts where they are called on to interpret or apply the Labour Tenants Act[23] or to consider a defence raised under the ESTA.[24] It is therefore clear that in this instance, the Land Claims Court does potentially exercise powers in respect of the proceedings before the Bronkhorstspruit Magistrate's Court. Coming back to the question originally posed, I am therefore satisfied that this Court has the jurisdiction in terms of section 29 of the Labour Tenants Act to stay the warrants in this matter.

[16] The second question in regard to the stay relates to the test to be applied. It has been held in a number of cases that -

(i) the decision as to whether or not to grant a stay depends on the exercise by the court of a judicial discretion;

(ii) the test to be applied is whether "real and substantial justice requires such a stay or, put otherwise, [whether] injustice would otherwise be done."[25]

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22 See paragraph [17] below where the test is discussed in more detail.

23 Sections 13(2) and 30(2) of the Labour Tenants Act.

24 Sections 19(2), 19(3) and 20(1)(c). See also the judgment of this Court in *Skhosana and Others v Roos T/A Roos se Oord and Others* LCC 50/99, 10 May 1999, internet web site address: http://www.law.wits.ac.za/lcc/1999/skhosanasum.html at page 4 para [7] to page 11 para [18]. In this case the applicants intend raising defences in the alternative based on the ESTA.

25 *Strime v Strime* 1983 (4) SA 850 (C) at 852B. See also *Soja (Pty) Ltd v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (2) SA 407 (W) at 411E to F; *Bestbier v Jackson* 1986 (3) SA 482 (W) at 484I.

In my view, the exercise of this discretion is not materially different from the exercise of the discretion relating to the grant or withholding of an interim interdict. The latter exercise is also aimed at ensuring that an injustice is not done while proceedings for final relief are still pending. The only proviso is that in this particular instance, the Court will have to be further satisfied that it is convenient and just that this Court rather than the magistrate's court considers the applications for a stay. In regard to the latter issue, I believe that the approach in *Yekelo v Bodlani*,[26] as set out in paragraph [11] above, is the appropriate one to follow. Based as it is on considerations of justice and convenience, it dovetails neatly with the balance of convenience enquiry in relation to interim relief.

Is there a serious question to be tried?

[17] If the applicants are able to show that there is a serious question to be tried in relation to the proceedings aimed at reversing the first and second decisions, then they will have satisfied this component of the test. The applications for extensions of the relevant time period for bringing a rescission application will involve an exercise of judicial discretion which was described by Holmes JA as follows:

> "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."[27]

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26 Supra n 15 at 975D.

27 *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532B to F.

If the applications for extensions of the relevant time period succeed, the enquiry relating to the rescission of the default judgments will be similar,[28] although there the explanation sought by the court will relate to the failure to file pleas timeously (in the first instance) and the failure to attend court (in the second instance). In regard to this aspect, and the lateness, the applicants will have to explain the trail of gross neglect which their previous attorney, Mr Maake, appears to have left. It is likely that the only explanation that they will be able to give is that they were unaware of their attorney's conduct and cannot be debarred for that reason alone. As I read decisions such as *Saloojee and Another NNO v Minister of Community Development*[29] and *Mbutuma v Xhosa Development Corporation Ltd*,[30] there must be an element of complicity by the applicants in the neglect of their attorney, for example by failing to make enquiries of their attorney where there have been obvious delays. This aspect has not been explored thoroughly on the papers. However, what is apparent is that the applicants reacted diligently at the obvious times that they were called on to do so. When they received summonses, they ensured that they briefed an attorney in time for the actions to be defended. When the sheriff began to execute the warrants, they must have reacted immediately and seem to have decided to approach a different attorney. It is also so that the sequence of events which led to the issuing of the warrants took place over a relatively short period of time, so it may be difficult to lay blame for inaction at the door of the applicants themselves, who are unlikely to have been aware of the time limits provided for in the rules. A more detailed examination of this particular issue is not necessary at this stage. That is for the court which hears the applications for extension and rescission.

[18] Applying the dictum of Holmes JA quoted in paragraph [17] above,[31] the court considering the applications for extension and rescission will also have to consider the applicants' prospects of successfully defending the actions. As I have indicated, the applicants intend raising

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28 Rule 49 of the Magistrates' Court Rules, discussed in Erasmus and Van Loggerenberg *Jones and Buckle, The Civil Practice of the Magistrates' Courts in South Africa*, Volume 2, The Act, 9th ed (Juta, Cape Town 1997) at 49-1 ff; rules 58(6) and (7) of the Land Claims Court Rules; Van Winsen, Cilliers and Loots *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa*, 4th ed (Juta, Cape Town 1997) at 540 to 542.

29 1965 (2) SA 135 (A) at 141C to H.

30 1978 (1) SA 681 (A).

31 Supra n 27.

two defences. The first is that they are labour tenants as defined in the Labour Tenants Act and the required procedures for the eviction of labour tenants have not been followed. It is common cause that the procedures were not followed, but the second respondent disputes the applicants' contention that they are labour tenants. A labour tenant is defined in the Labour Tenants Act as follows:

> "'labour tenant' means a person-
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> (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
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> (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;"[32]

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
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> (b) he or she is obliged to perform his or her services personally;"[33]

[19] In order to qualify as a labour tenant, a person must qualify cumulatively with paragraphs (a), (b) and (c) of the definition of that term.[34] It is common cause that the applicants comply with paragraph (a) of the definition. They make the necessary averments to show compliance with

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32 Section 1.

33 Ibid.

34 *Ngcobo and Others v Salimba CC* and *Ngcobo v Van Rensburg*, as yet an unreported decision of the Supreme Court of Appeal in case numbers 50/98 and 631/97, 26 March 1999 at pages 6 to 30.

paragraph (c) of the definition.[35] These averments are not contested at this stage, the second respondent simply saying that he has no knowledge of them. None of the parties contends that the applicants were farmworkers as defined in the Labour Tenants Act. The only real dispute between the parties relates to compliance with paragraph (b) of the definition. More specifically, the issue is whether or not the applicants provided labour to the second respondent as contemplated by that paragraph or whether they were simply lessees.

[20] In attacking the case sought to be made out by the applicants in this regard, Mr Frantzen referred to certain contradictions to be found, particularly in the Hlapi application, between the versions contained in the affidavits filed at various stages of the proceedings before this Court and the Bronkhorstspruit Magistrate's Court. However, the extent to which these contradictions can be regarded as material is open to question. Certainly they do not go so far as to render the applicants' cases vexatious or frivolous or devoid of merit.[36] There are apparent weaknesses in the cases of both sides to the disputes. For example, if the relationship was one of landlord and tenant, then the rental of R50,00 per month per family was surprisingly low. It is also strange that a tenant of agricultural land would have needed permission of the second respondent to plant a small vegetable garden or to keep stock. On the other hand, it is perplexing that the applicants continued to work for the second respondent, despite his failure to pay the salaries he is alleged to have agreed to pay. It may well be that when the matter is finally dealt with, some of the parties will be able to explain these apparent weaknesses. The legal significance of the applicants' failure (on their own version) to provide labour since 1993 may also prove to be a difficult issue which needs careful consideration. In regard to this issue and the apparent weaknesses in the parties' cases, I am mindful of what Lord Diplock said in the *American Cyanamid* case:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial." [37]

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35 Based on the interpretation of paragraph (c) adopted by the Supreme Court of Appeal: ibid at pages 40 to 47.

36 See paragraph [9] above.

37 Supra n 6 at 510d-f.

[21] The second defence on which the applicants intend relying is raised in the alternative. They say that if they are not labour tenants, then they are occupiers as defined in the ESTA and the procedures prescribed for the eviction of an occupier have not been followed. In relation to this defence, Mr Frantzen conceded on behalf of the second respondent that there was merit in such a defence in respect of both applicants. This is important because it places the prospects of success side of the balancing act described by Holmes JA in paragraph [17] above at the strong end of the spectrum. This may go some way towards assisting the applicants in dealing with the apparent neglect of their previous attorney.

[22] In terms of the above dictum of Holmes JA, the second respondent's interest in finality must be considered. It is, however, clear from the applications before us that, even if we were to allow the warrants to stand, the second respondent still faces uncertainty in that the applicants have submitted claims for an award of full title to the farm, or parts of it, in terms of chapter III of the Labour Tenants Act. These have yet to be resolved. On the other hand, if the applicants are allowed to defend the actions, a defence based on labour tenancy is pursued and this Court decides to dismiss the defence, that would also dispense with the chapter III claims. Such an outcome would promote the second respondent's interest in finality.

[23] In the circumstances, I am satisfied that there is indeed a serious question to be tried in any proceedings brought for extension and rescission in the case of both applicants.

The balance of convenience

[24] The approach to this part of the enquiry was described in the *Nchabeleng* case as follows:

> "A further observation must be made regarding the remaining three requirements for the grant of an interim interdict. All of these can in fact be dealt with as part of the balance of convenience enquiry. Thus in weighing the prejudice to the applicant if the interdict is refused, one will have to consider whether his alleged right is threatened and whether he will suffer irreparable harm as a result of such refusal. If an alternative remedy is available to him, he may not be able to show that he is prejudiced by the refusal of an interim interdict. This approach also has the advantage that no one of the requirements

becomes another threshold test. All factors are weighed together in the exercise of the Court's equitable discretion and no single factor is decisive."[38]

[25] Unfortunately, the affidavits filed on behalf of both applicants and the second respondent do not deal adequately with the balance of convenience. Nonetheless, an assessment must be made from the information available. The prejudice to the second respondent, if the relief is granted, is primarily that he allegedly pays rates on the farm without receiving any revenue from the farm. The farm is not large and he is too old to use it productively. As a result, he and the first respondent apparently wish to sell the farm, so that he can earn an income from the investment of the proceeds. The applicants' continued presence on the farm is an obstacle to any sale. The prejudice is aggravated if this Court grants the further relief sought relating to the restoration of the water supply, which will require him to re-install a diesel pump at his own cost and recommence the supply of water. The following observations however need to be made regarding the second respondent's position:

(i) I am not sure that the applicants' continued presence on the farm can be said to be the obstacle to its sale. Even if the applicants were to be evicted, the second respondent will still be obliged to inform any prospective buyer of the farm of the pending chapter III claims or that there are persons who assert an entitlement to an award of rights in the land on the basis of chapter III of the Labour Tenants Act.[39] That is likely to present just as much of an obstacle to the sale.

(ii) Upon reinstatement of the water supply, the applicants each tender to recommence payment of the R50,00 per month, which would diminish the prejudice he would suffer.

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38 Supra n 5 at 588D to E and 166a to b. The last three requirements referred to are:

> "(b) . . . . there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
>
> (c) that the balance of convenience favours the granting of interim relief; and
>
> (d) that the applicant has no other remedy."

LF Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969(2) SA 256 (C) at 267A - D.

39 *Mayes and Another v Noordhof* 1992 (4) SA 233 (C).

His prejudice would also be diminished if this Court were, in granting interim relief, to refuse the relief relating to the reconnecting of the water supply.

(iii) The circumstances he finds himself in have been little-changed for some time. From 1993 until early 1998, the only income he derived from the farm was a very small amount of rental (on his version). Since early 1998, the applicants have not paid the alleged rental. It is not apparent from the affidavits how rates have increased over time, but it is quite possible that throughout that time he made a net loss on the property.

[26] The prejudice to the applicants if relief is refused is that they are then faced with a warrant of eviction which may be executed. If it is, they and their families will be evicted from their homes. Whether or not they originally agreed to move (as the second respondent alleges), they do not wish to do so now and an eviction will no doubt cause prejudice and trauma to them and their families. Their allegations that they have nowhere else to go to are disputed in the case of Hlapi, but not expressly disputed in the case of Mlambo. Even if they do have somewhere else to go to, it can be inferred that they would lose the vegetables which they have planted. It is likely also be a costly exercise to move their families and livestock and to set up new homes. In their absence, the homes which they have built on the farm may be demolished. Mlambo has started building a brick house on the farm and he may lose that too, even if the second respondent's allegation is correct that he started building after he had allegedly agreed to move. If the applicants ultimately succeed in their chapter III claims and are able to acquire the farm or the parts of it which they occupy, they will have to incur the inconvenience and cost of moving back. All these costs may be avoided by the grant of interim relief.

[27] It is so that the applicants have an alternative remedy. They are entitled to apply in the magistrate's court for interim relief pending the applications for extension and rescission. I am not sure though that this is an adequate alternative remedy. Firstly, the eviction could conceivably be carried out before such an application is brought. Secondly, the effect of section 13(1A) of the Labour Tenants Act may be that such an application for interim relief would in any event have to be transferred to this Court if reliance is placed on the Labour Tenants Act.[40] Even if it is an

40 See paragraph [15] above.

adequate alternative remedy, on the approach adopted by this Court,[41] the existence of an adequate alternative remedy is not fatal to the application, as the absence of such a remedy is not treated as a threshold requirement. Rather it is weighed as part of the balance of convenience enquiry. In this regard it would seem to me to be more cost effective and convenient to both parties for the matter of interim relief to be sorted out in these proceedings, rather than for the applicants to have to bring fresh proceedings for urgent interim relief in the magistrate's court (which might in any event find their way straight back to this Court because of section 13(1A) of the Labour Tenants Act). This also justifies the award of a stay in this Court as opposed to the court where the warrants were issued.

Exercise of Court's discretion

[28] At the end of the day, the grant of interim relief is a discretionary remedy.[42] In exercising that discretion, the Court must weigh the strength of the case in respect of the question to be tried and the balance of convenience. Having regard to the analysis set out above, I am satisfied that the balance of convenience substantially favours the applicants. The applicants have shown that there is a serious question to be tried and their prospects of success on the labour tenancy defence are reasonable. If that defence fails, the second respondent concedes there is merit in the alternative defence. The alternative defence is sufficient to resist an order of eviction. In the circumstances, I am satisfied that the applicants are entitled to interim relief, pending applications for extension and rescission.

Interim relief pending the chapter III claims

[29] Thus far I have considered the applicants' application for interim relief pending applications for extension and rescission in relation to the proceedings before the Bronkhorstspruit Magistrate's Court. Interim relief was also sought pending the chapter III claims. An issue which would need to be considered in relation to this prayer is whether or not this Court has jurisdiction to grant interim relief of this sort pending a chapter III claim. In *Van*

41 See paragraph [24] above.

42 *Chief Nchabeleng v Chief Phasha* supra n 5 at 600C to G and 176g to 177b.

der Walt and Others v Lang and Others[43] this Court granted interim relief of a different sort pending chapter III claims and relied, amongst others, on section 29 of the Labour Tenants Act in finding that it had jurisdiction to grant interim relief.

[30] However, in these proceedings, the only threat which the applicants have shown to their occupation of the farm is the warrants of eviction issued out of the magistrate's court. The effect of granting relief, including a stay, pending applications for extension and rescission, will also protect the applicants while their chapter III claims are processed, at least until the proceedings before the Bronkhorstspruit Magistrate's Court have been concluded. For this reason they are not, at least at this stage, entitled to relief on that prayer.

Formulation of the order

[31] The Court has a wide discretion in formulating an appropriate and just order when granting interim relief.[44] Three issues require mention. The first is that the applicants are not entitled to the interim relief relating to the water supply. This was cut off in February or March 1998. If they wanted urgent relief in relation to that action on the part of second respondent it should have been sought then. They do have access to water at the moment on a neighbouring farm, even if it is an awkward arrangement. The effect of the order which I intend making will simply be to preserve the status quo.[45] The second issue is that the interim relief should only persist for as long as the applicants continue actively and punctually to pursue the applications for extension and rescission (unless the parties reach a different arrangement by agreement). The third issue is costs. In this regard there has been conduct on both sides which might be relevant to a possible costs order, notwithstanding the tendency of this Court not to award costs in matters arising under the Labour Tenants Act and the ESTA. That is something which in my view must be dealt with in the applications for extension and rescission.

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43 Supra n 9 at 197H to 198F.

44 Prest *The Law and Practice of Interdicts* (Juta, Cape Town 1996) at 237.

45 The desirability of such a course of action is referred to in *Chief Nchabeleng v Chief Phasha* supra n 5 at 600I to 601B and 177d to f.

Order

[32] I make the following order in the application of Mr Hlapi (case no LCC 126/98):

(i) The second respondent is interdicted from executing or causing to be executed the warrant of ejectment issued out of the Bronkhorstspruit Magistrate's Court under case number 432/98.

(ii) The applicant must, within 15 court days of this order, launch such proceedings as may be necessary to secure the rescission of the order of eviction granted by default in case number 432/98 in the Bronkhorstspruit Magistrate's Court.

(iii) The order referred to in paragraph (i) -

a lapses if the applicant does not comply with paragraph (ii);

b endures until the final determination of the proceedings referred to in paragraph (ii), if the applicant complies with paragraph (ii).

(iv) A decision in respect of costs will stand over for determination by this Court -

a either at a hearing pursuant to a referral of case number 432/98 in the Bronkhorstspruit Magistrate's Court to this Court in terms of section 13(1A) of the Land Reform (Labour Tenants) Act; or,

b failing such a referral, at a hearing, the date of which is determined in terms of rule 55 of the Land Claims Court Rules.

(v) No order is made in respect of the application for interim relief pending the application in terms of chapter III of the Land Reform (Labour Tenants) Act, but the applicant is given

leave to renew the application for such interim relief on the same papers, supplemented by such further affidavits as the case may require.

[33] I make the following order in the application of Mr Mlambo (case no LCC 127/98):

(i) The second respondent is interdicted from executing or causing to be executed the warrant of ejectment issued out of the Bronkhorstspruit Magistrate's Court under case number 431/98.

(ii) The applicant must, within 15 court days of this order, launch such proceedings as may be necessary to secure the rescission of the order of eviction granted by default in case number 431/98 in the Bronkhorstspruit Magistrate's Court.

(iii) The order referred to in paragraph (i) -

a lapses if the applicant does not comply with paragraph (ii);

b endures until the final determination of the proceedings referred to in paragraph (ii), if the applicant complies with paragraph (ii).

(iv) A decision in respect of costs will stand over for determination by this Court -

a either at a hearing pursuant to a referral of case number 431/98 in the Bronkhorstspruit Magistrate's Court to this Court in terms of section 13(1A) of the Land Reform (Labour Tenants) Act; or,

b failing such a referral, at a hearing, the date of which is determined in terms of rule 55 of the Land Claims Court Rules

(v) No order is made in respect of the application for interim relief pending the application in terms of chapter III of the Land Reform (Labour Tenants) Act, but the applicant is given

leave to renew the application for such interim relief on the same papers, supplemented by such further affidavits as the case may require.

_____
JUDGE A DODSON

I agree

_____
JUDGE J MOLOTO

Heard on: 20-21 April 1999 **Handed down:** 28 May 1999

For the applicants:
Attorney, Mr CJ Coertse, Randburg

For the respondents:
Mr MAL Frantzen instructed by *Geo Kilian & Vennote,* Bronkhorstspruit