IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on **17 to 18 November 1998** and **13 January 1999**
before **MOLOTO and MEER JJ**

CASE NUMBER: LCC 1/96

M E MAHLANGU Applicant

and

B E DE JAGER Respondent

JUDGMENT

MOLOTO J:

Introduction

[1] This case has had a long and unfortunate history. It commenced before a differently constituted Court with applicant then represented by a different attorney. The case was quashed before that Court, for reasons that will become apparent later, and had to be recommenced before us. On recommencement pre-trial conferences were held in terms of rule 30 to establish the state of the case and to prosecute it further. During the second pre-trial conference, Mr Omar, who had appeared for applicant since the beginning of the quashed proceedings, withdrew as attorney of record. This resulted in a delay while the services of a substitute attorney were being sought. At that stage Mr van Strijp, for the respondent, gave notice of respondent's intention to apply for an order for costs *de bonis propiis* against Mr Omar. In time Ms Govender was appointed as attorney of record for applicant.

[2] The applicant brought an application in terms of the Land Reform (Labour Tenants) Act, No 3 of 1996 (hereinafter referred to as "the Act") for an order as follows:

> "(A) Condoning the non-compliance with the rules relating to form and service in terms of Rule 6(12) of the rules of this Honourable Court;
>
> (B) (i) Applicant be regarded as a labour tenant in terms of Section 1(xi) of the Land Reform (Labour Tenants) Act No 3, 1996;
>
> (ii) That the Respondent restores Applicant occupation of portion of the farm Banklaagte (district Bethal) which portion Applicant and his family occupied immediately prior to 9 February 1996 when the learned Magistrate of the Bethal Magistrate's Court under case number 15/96 granted an order for the eviction of the Applicant and his family from the said portion;

(iii) That the Respondent restore to Applicant his (Applicant's) house and contents in the same condition / state as it was prior to the date referred to in (ii) above;

(iv) That Respondent restore possession to Applicant of Applicant's 24 (twenty four) cattle, 8 (eight) goats, 30 (thirty) chickens and 5 (five) dogs which Respondent had removed consequent upon the aforesaid order of the learned Magistrate - Bethal under case number 15/96;

(v) That Respondent restore Applicant that portion of the farm aforesaid which the cattle, goats, chickens and dogs occupied prior to the learned Magistrate's order aforesaid made on 9 February 1996;

(vi) That Respondent restore Applicant with possession of a light blue 1300 Datsun Bakkie and without detracting from the specificity of the aforegoing Respondent restore possession to Applicant of all Applicant's belongings which were removed and/or destroyed consequent upon the order of the learned Magistrate - Bethal aforesaid.

(C) That the order embraced in B above operate as an interim order until the Director-General has adjudicated upon applicant's claim contained in annexure "A" annexed hereto.

(D) That the Respondent be ordered to pay Applicant's costs on the Attorney/own client scale.

(E) Further and/or alternative relief."

[3] It is common cause that applicant and his father were born and raised on respondent's farm. Applicant has lived all his life, but for a brief period in about 1961, on the farm until February 1996 when respondent obtained an ejectment order against him in the Magistrate's Court, Bethal. The applicant was duly evicted. He now seeks re-instatement onto the farm under the same conditions as before.

The issues to be tried

[4] In order to succeed on prayer B(i), applicant has to prove that he is a labour tenant. Section 1 of the Act defines a labour tenant as a person -

"(a) who is residing or has the right to reside on a farm;

(b) who has or has had the right to use cropping and grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and

(c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm,

including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3(4) and (5), but excluding a farmworker."

On the other hand, the Act defines a farmworker as follows:

"A 'farmworker' means a person who is employed on a farm in terms of a contract of employment which provides that -

(a) in return for the labour which he or she provides to the owner or lessee of the farm, he or she shall be paid predominantly in cash or in some other form of remuneration, and not predominantly in the right to occupy and use land; and

(b) he or she is obliged to perform his or her services personally."

[5] To succeed on prayers B(ii) to B(vi), applicant must satisfy the requirements of section 12(1) of the Act which states that:

"(1) A person who -

(a) in terms of section 3 would have had a right to occupy and use land if the provisions of this Act had been in force on 2 June 1995; and

(b) between 2 June 1995 and the commencement of this Act vacated a farm or was for any reason or by any process evicted,

may institute proceedings in the Court for an order of reinstatement of such rights."

[6] The order of eviction in the Magistrate's Court was granted, according to the Notice of Motion referred to in paragraph (2) above, on 9 February 1996. The date of commencement of the Act is 22 March 1996. It is not clear from the papers when the physical removal of the applicant took place. In any case it was not made an issue, presumably because it also took place before 22 March 1996 or because the parties accepted that eviction took place when the Magistrate made the order. I do not propose to deal with it in detail. Suffice it, for purposes of this judgment, to say I accept that applicant "vacated" respondent's farm or was "evicted" therefrom between 2 June 1995 and "the commencement of this Act".

[7] As regards the requirement contained in section 12(1)(a) of the Act, the relevant part of section 3 provides:

"3(1) Notwithstanding the provisions of any other law, but subject to the provisions of subsection (2), a person who was a labour tenant on 2 June 1995 shall have the right with his or her family members -

(a) to occupy and use that part of the farm in question which he or she or his or her associate was using and occupying on that date;

(b) to occupy and use that part of the farm in question the right to occupation and use of which is restored to him or her in terms of this Act or any other law."

[8] As a result of the disputes of fact in the affidavits of the parties and their witnesses, the matter was referred for hearing of oral evidence. In determining the issues to be tried, the following is the relevant part, on agreed facts and facts in dispute, of the minutes of a pre-trial conference:

"(a) that applicant satisfied paragraphs (a), (b) and (c) of the abovementioned definition of labour tenant, but that respondent contends that applicant is nonetheless a farmworker;

(b) that the applicant's remuneration as at 2 June 1995 needs to be determined; and

(c) that the value of applicant's right to occupy and use land as at 2 June 1995 needs to be determined;

(d) that applicant was obliged to perform his services personally."

[9] Points (b), (c) and (d) were therefore the issues about which oral evidence was to be led. Because of the provisions of section 2(5) of the Act, it was furthermore agreed that respondent bore the onus of proving that applicant is a farmworker. Section 2(5) reads as follows:

> "If in any proceedings it is proved that a person falls within paragraphs (a), (b) and (c) of the definition of 'labour tenant', that person shall be presumed not to be a farmworker, unless the contrary is proved."

[10] In order to determine whether applicant was a labour tenant or farmworker as at 2 June 1995, a comparison of what he earned as remuneration, on the one hand, and the value of his occupation and use of the land, on the other hand, needs to be made. For that, I return now to the facts of the case.

The Evidence

(a) Applicant's remuneration and right to occupy and use land

[11] Two witnesses testified for applicant, the applicant himself and Mr Ferreira. Mr Ferreira is a valuer registered in terms of the Valuers' Act, No 23 of 1982 and he testified as an expert witness. For the respondent only one witness testified, being Mr Winckler, who is also a registered valuer in terms of the Valuers' Act and who also testified as an expert witness. Respondent did not testify.

[12] Applicant testified that his grandfather came to the farm Banklaagte many years ago, and that his father and himself were born on the farm. His relatives are buried on the farm. He has lived on the farm all his life except for a period of two years around 1961 when he left the farm. However, the owner of the farm fetched him from where he was and he continued to live on the farm until his eviction in 1996.

[13] While applicant lived on the farm he had the right to graze cattle and goats and he also had 30 chickens and 5 dogs on the farm. He had cropping rights on part of the farm. He also had his home built on the farm. His family lived with him on the farm. At the time of his eviction he actually had 24 cattle and 8 goats which grazed on the farm. He agreed, during cross-examination, with Mr van Strijp, that in addition to these rights he received one litre of milk for every day that he worked. These days came to 24 days per month. He also received one 80kg bag of sifted mealie meal per month, ten 70kg bags of yellow mealies per year, twenty 70kg bags of white mealies per year (the latter two at harvest time), a cash bonus of R100,00 per year and a monthly wage. At some stage applicant said the bags of mealies were given to him in return for the fields that the farmer had taken from him. The monthly wage was R20,00, until around the April 1994 elections when the amount was increased to R250,00 per month. He explained that the amount had been so increased because the farmer had wanted to stop him (and did stop him) from cultivating the fields allocated to him on the farm.

[14] The farmer's sheep were sheared annually and for this the workers were paid separately. Applicant emphatically denied Mr van Strijp's suggestion that he was paid R72,50 for shearing sheep in 1995. He said he could not remember how much he was paid, then later said it was

R10,00. He was, however, certain that he sheared 30 sheep in 1995 and that he used to be paid R0,01 per sheep, which was later increased to R0,03 per sheep. It can, therefore, be accepted that in 1995 he sheared 30 sheep at R0,03 per sheep.

[15] In return for the above rights and receipts in cash and kind, applicant provided labour to the owner of the farm. He was a general labourer and tractor driver. His children also helped on the farm at times, especially at harvest time. Although his children were not contracted to work on the farm, whenever they did work, they did so with the full knowledge of the owner of the farm, who never objected to them working. When he was ill, the remainder of his co-workers did what had to be done. He did, however, mention that at times his children worked in his stead when he was ill. Respondent was aware of the fact that they worked on his behalf and she had no problem with that. Despite this, under cross-examination he said he had no right to appoint a nominee to work in his stead. I am not satisfied that he understood the question put to him at that point. There was confusion on the interpretation of the question. It was interpreted first as a "need" to appoint someone to provide labour and then as a "right". From the applicant's demeanour when replying, I was not satisfied that he knew what he was answering to. He had told the Court right at the beginning that he is uneducated and unsophisticated and this indeed became apparent to the Court from his testimony. He had also said there had never been a need to appoint someone to work in his stead except when he was will, so, if he understood "right" to mean "need" that would explain why he answered as he did.

[16] The rights and receipts in cash and kind were then separated into remuneration and rights to occupy and use land as at 2 June 1995 as follows:

Remuneration	Rights to occupy and use land
(1) Cash wage paid monthly	(1) Right to have a home and live on the farm
(2) 1 x 1 litre of milk for 24 days per month	(2) Right to graze 24 cattle
(3) 1 x 80kg sifted mealie meal per month	(3) Right to graze 8 goats
(4) Cash bonus per year	(4) Right to keep 30 chickens
(5) 10 x 70kg yellow mealies per year	(5) Right to keep 5 dogs
(6) 20 x 70kg white mealies per year	
(7) Cash for shearing sheep once a year	

[17] I am not quite satisfied that the 30 bags of white and yellow mealies constitute remuneration and not a cropping right, particularly because of applicant's statement that he was given these bags when his ploughing fields were taken from him. Furthermore, these were given at harvest time, suggesting that they are a share of the crop or the harvest. Although I raised the point with Mr van Strijp during argument, the point was not fully argued, certainly not by Ms van Nieuwenhuizen, who appeared for applicant. I will not decide the point. For purposes of this case I accept that it forms part of the remuneration.

[18] Mr Winckler testified that he established from the local mills and shops that in 1995 the undermentioned items, except the annual cash bonus, cost the amounts stated opposite each of them in the following table:

	Amount per month	Amount per annum
1 x litre of milk for 24 days per month at R1,25 per litre	R30,00	R360,00
1 x 80kg sifted mealie meal	R77,00	R924,00
Cash bonus	R8,33	R100,00
10 x 70kg yellow mealies	R36,14	R433,67
20 x 70kg white mealies	R56,38	R676,60

[19] From the notice of the summary of Mr Ferreira's evidence it is quite clear that he received no brief to investigate the above values and, indeed, he did not testify in relation to them. I have no reason to reject Mr Winckler's testimony on the amounts. I also accept as established, the monthly cash wage of R250,00, and the sheep shearing in 1995 of 30 sheep at R0,03 per sheep amounting to R0,90 for the year.

[20] Mr Ferreira testified that he is a valuer registered with the South African Council of Valuers in terms of section 14 of the Valuers' Act No 23 of 1982. He has been a member of the South African Institute of Valuers since April 1985. He has done valuations for companies such as Anglo American, Duiker Exploration , Eskom, Standard Bank, Nedcor, Onderstepoort and ABSA Bank. He is also a cattle farmer of 10 years' experience. After undertaking a survey and taking into account his knowledge and experience of the area he gave the rental for grazing on respondent's farm - Banklaagte - as R30,00 per hectare per year. This figure represents the rental of grazing as at 1995. He stated that he arrived at this figure by using what is called the comparables approach, that is, comparable rentals. He consulted with some experts in the area - notably a director of OTK (Oos-Transvaalse Koöperasie) and a Mr Gert Smith - to confirm his opinion. Mr Ferreira stated that one beast would need 3,5 hectares of land per year if no winter feeding was given. To calculate the rental for grazing 24 cattle per month you multiply 24 by 3,5 by 30 and divide by 12, thus:

$$\frac{24 \times 3{,}5 \times 30}{12} = \text{R210,00 per month}$$

[21] Using the formula that 7 goats are equivalent to one large stock unit he then calculated that the rental for grazing one goat (small stock unit) per month would be:

$$\frac{3{,}5 \times 30}{12 \times 7} = \text{R1,25}$$

[22] For 8 goats, the value of grazing then becomes R1,25 x 8 which is R10,00 per month.

[23] It was Mr Ferreira's expert opinion that the rental of grazing land for residential purposes should be calculated at R30,00 per hectare per year if housing is provided by the occupant himself and not the farmer. He estimated the area where applicant's home stood to be 1500 square metres, which is 15% of a hectare. From this he arrived at a rental for residential purposes, excluding any other benefits, of R4,50 per year or R0,38 per month .

[24] Mr Ferreira then compared purchases of stands or plots in a town like Witbank to determine what it would cost applicant to obtain alternative accommodation there. In my view, these comparisons are, however, too far removed from applicant's type of accommodation on the farm and too far in distance from where he lived. I therefore believe they are too remote to be helpful.

[25] Mr Ferreira did, however, explain that applicant's situation is unique and defies comparison with any other that he (Mr Ferreira) had compared. He then looked at the personal circumstances of applicant and attached what he said was a "reasonable and fair figure" to applicant's value of the right to occupation and use of land for residential purposes. These personal circumstances, he enumerated as, and I quote:

> "This is a farm labourer, a simple man who had no worries in life. His grandfather and his father and his brothers were buried on this land. He had full right of access even to their graves. He was staying right on his place of employment. He was staying right next to his - call it his grocery store, the place where he got his mealie meal from, where he got his milk from on a daily basis. He was staying in a socially stable environment with all his relations near to him. He was actually staying on the job. He had no need for transport and I had to attach a reasonable and fair figure to it after consultation with the applicant and I reiterate, except for the figures that I put forward here in court, I have no monetary books to hook this onto except to tell this court this is what I think is fair and reasonable for a man whose cattle are being looked after right at the place of his abode. The figure that I arrived at is R250,00."

[26] He further explained that the figure of R250,00 represents the value per month of occupation of the homestead by applicant. The figure of R4,50 per year (or R0,38 per month) represents the bare rental of the land and is value to the landlord and not the occupier. Mr Ferreira stated that he arrived at the figure of R250,00 after making "trade-offs" which he explained as lack of fresh water, no electricity, no sewerage system, amongst others.

[27] Mr Ferreira gave no value of the occupation and use of the land by 30 chickens and 5 dogs. That concluded applicant's case.

[28] Mr Winckler, the expert witness for respondent, stated that he is a registered associated valuer in terms of section 14 of the Valuers' Act No 23 of 1982. He has been appointed an appraiser in terms of section 6(1) of the Administration of Estates Act, No 66 of 1965 for the district of Ermelo. He has been an agricultural estate agent since 1984, specialising in agricultural properties. He registered as a valuer in training in 1987 and as an associated valuer in 1994.

[29] According to Mr Winckler the rental for grazing in the area around Banklaagte farm ranges from R12,50 to R45,00 per hectare per year. However, from discussions he had with a number of experts in the area, indications are that the range is between R25,00 and R30,00 per hectare per year. In terms of formulae in Government Gazette 10029 of 6 December 1985 and "Cumbud" (apparently a document, which is an enterprise budget for livestock, compiled by the Directorate of Agricultural Economics) one large stock unit equals 1:1 head of cattle. For small stock units -

sheep and goats - 7 goats equal one large stock unit. Finally, by comparing (like Mr Ferreira, Mr Winckler also used the comparable sales or comparable rentals approach which is generally used in their profession) a farm leased by one P F Erasmus of Bekkersrust, 15km south-east of Bethal, he arrived at a grazing rental figure of R27,00 per hectare per year for the farm Banklaagte. He also calculated the carrying capacity of the farm to be 4 hectares per large stock unit per year.

[30] Using the figures mentioned in the above paragraph, Mr Winckler calculated the rental of grazing land for 24 cattle to be R196,20 per month or R2 354,40 per year, and for 8 goats, to be R10,35 per month or R124,20 per year.

[31] Mr Winckler applied the same formula as Mr Ferreira in calculating the rental for the area used for the homestead, when it is treated as normal grazing land. He estimates the area to be 1500 square metres which is 15% of a hectare and calculated 15% of R27,00 as value. He arrived at a figure of R4,08 per year. Mr Winckler made a comparison with plots in Emzinoni in Bethal where he calculated that monthly leases could be R20,00. While not being able to put an amount on it, Mr Winckler accepted that the personal circumstances of the occupier are a factor to be considered when determining the value of the right to occupy and use land. He actually likened the value of these personal factors to what, in his own words, "Dr Gildenhuys calls a solatium".

[32] Mr Winckler referred to some erven in Daval, an area nearby, which measured 2885 square metres and which were being given away for free because the owners did not want to pay municipal rates and taxes. He estimated the rates and taxes at between R400,00 and R500,00 per year. He also mentioned some unserviced erven which were selling for R40,00 in 1997. He suggested that payment of R500,00 per year for rates and taxes could be the cost to the applicant for alternative accommodation.

[33] Mr Winckler stated that grazing is available in Daval, but did not say whether it is fenced. He also did not say where the cattle would be kept overnight, neither did he say how much it would cost to employ a herdman. He accepted that there is value in having one's livestock fenced in, but stated that the value is included in the rental charged for grazing on fenced farms. I do not agree. In his calculation of rental for grazing he looked strictly at the carrying capacity and nowhere is security factored into the equation. The carrying capacity of an unfenced area can be determined using the same formula, and the fact that it is unfenced will not show.

[34] In response to a question by the Court, Mr Winckler agreed that Daval and Witbank (the town where Mr Ferreira made some comparisons) were basically the same, being both towns hence governed by township rules and regulations as against Banklaagte which is agricultural land.

[35] Finally, Mr Winckler, like Mr Ferreira, did not give any value on the occupation and use of the land by 30 chickens and 5 dogs.

[36] From the evidence of the two experts the following differences emerge. Mr Ferreira's figures are as follows:

	Per month	Per annum
Grazing for 24 cattle	R210,00	R2 520,00
Grazing for 8 goats	R10,00	R120,00

	Per month	Per annum
Grazing lands for residential purposes	R0,38	R4,50
Homestead land as value to occupier	R250,00	R3 000,00

Mr Winckler's figures are as follows:

	Per month	Per annum
Grazing for 24 cattle	R196,20	R2 354,40
Grazing for 8 goats	R10,35	R124,20
Grazing lands for residential purposes	R0,34	R4,08
Rates and taxes in Daval	R41,67	R500,00

Argument

[37] Ms van Nieuwenhuizen argued that applicant had denied, under cross-examination, the allegation in respondent's affidavits that applicant received as remuneration R72,50 for sheep shearing, and clothing costing R155,18. I have already indicated that respondent did not testify. I have no reason to reject applicant's version that he was paid R0,90 for sheep shearing and that he was paid a bonus of R100,00 in 1995. At the hearing of oral evidence no testimony was tendered about the R155,18 for clothing, which amount had been disputed. Accordingly I find that the amount is not part of applicant's remuneration. Ms van Nieuwenhuizen further submitted that, although applicant admitted receiving milk and maize, he denied that these formed part of his remuneration. I do not agree with this submission as regards milk. Food rations are usually accepted as benefits which form part of the total package of remuneration. I have already mentioned my views on the maize and do not wish to repeat myself.

[38] On the value of grazing, Mr van Strijp argued that the version of Mr Winckler must be preferred to that of Mr Ferreira because the former had researched the subject by comparing actual rentals as at 1995 and sought the opinion of other experts in the area. As against that, Mr Ferreira relied on his knowledge and experience of 22 years of the area and consultation with some experts. Perhaps the most telling point about Mr Winckler's version is that he said he had taken into account the characteristics of Banklaagte when determining the rental per hectare of the farm. He considered the vegetation type, rainfall patterns, availability of water, the type of farming possible and various other factors and arrived at the figure of R27,00 per annum which seems to account for the major difference (together with the fact that one large stock unit is equal to 1:1 cattle) between the two experts. But these are not reasons to reject Mr Ferreira's entire evidence as unreliable as Mr van Strijp would have me do. I am particularly reinforced in my view by the fact that Mr Ferreira's rental determination at R30,00 is within the two ranges of Mr Winckler's, to wit, R12,50 to R45,00 and R25,00 to R30,00. I am persuaded that the formula as explained by Mr Winckler in terms of which cattle must first be equated to large stock units is the one used in the trade, hence the rentals of R196,20 and R10,35 per month respectively for cattle and goats.

[39] I must point out, however, that the figures given by both experts as value of grazing are simply grazing rental and do not take into account the value of a right to occupy and use. Being rental, they are value to the landlord or farm owner and not the occupier. The right to occupy and use, are value to the occupier.[1] Considerations such as a fenced-in camp, availability of windmills and/or other supplies of water, the fact that a herdman can be dispensed with are some of the factors which should be taken into account. In this respect it needs be borne in mind that respondent herself deposed that while applicant's livestock was on her farm and in his absence, she suffered damages of R640,00 per month (contrast this with R196,20 + R10,35 per month). Mr van Strijp's submission that damages are different from the value to occupy and use land because the former includes such costs as repairing fallen fences cannot hold, because the respondent deposed that they are monthly damages.

[40] I am not satisfied that everything that needs to be considered in order to determine the value of the right to occupy and use land for grazing and cropping purposes has been taken into account. I will revert to this point later.

[41] As regards the value of the land for residential purposes, Messrs Winckler and Ferreira valued the land as grazing land and came to the conclusion that the 1500 square metre area is valued, respectively at R4,08 and R4,50 per year. The figures of R4,08 and R4,50 are rental of the area from the landowners' point of view. Therefore, that is value to the owner and not to the occupier. On this point Roper J says the following:

> "There is a dearth of authority as to the method of computation of the value to the occupier of the right of occupation; clearly it is not the rent due, for that is the value to the landlord, and not the value to the occupier. Where premises are occupied for residential purposes the value of the right of occupation would presumably be the cost of renting for the period of the occupation similar premises elsewhere". [2]

[42] Mr van Strijp submitted that at the lower end, the value of applicant's right of occupation and use for residential purposes should be R0,34 per month or R4,08 per annum, and that at the upper end, it should be R500,00 per annum (presumably the estimated amount of the annual rates and taxes for the 2885 square metre erven in Daval). However, he conceded that the Daval premises, being township erven, are not exactly similar to applicant's residence on Banklaagte and that such residences are not easily available in the open market. In that case, it is said that "valuation by means of comparable sales should not be attempted."[3] The method of valuation by comparables tends to be unreliable if there are no sales sufficiently comparable, and it is recommended rather to rely on "other methods of valuation or the general experience of the valuer."[4] I find that the comparison with Daval is unreliable and should not be used. The rental amount of R0,34 per

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1 See, for example, *Van der Westhuizen v Peterson* 1922 TPD 412 at 414; *Hibbs v Wynne* 1949 (2) SA 10 (C) at 14; *Gallman v Dombrowsky* 1973 (2) SA 261 (C) at 262H-263A.

2 *Langham Court (Pty) Ltd v Mavromaty* 1954 (3) TPD 742 (T) at 746F.

3 Joubert (ed), LAWSA, Vol 10 Part 1 (Butterworths, Durban 1998), para 194 at 175

4 Ibid, para 195 at 175 and *Davey v Minister of Agriculture* 1979 (1) SA 466 (N) at 472C

month cannot be used as it is value to the landlord and not to the occupier. Besides it is value of grazing land, not residential.

[43] As against the comparable method, Mr Ferreira used his "general experience" and said that for residential purposes the premises occupied by applicant on respondent's farm should be valued at R250,00 per month. I have already mentioned the factors he took into consideration to come to this figure. I find, therefore, that the value of the right to occupy and use the land for residential purposes is R250,00 per month.

[44] That concludes the factors considered in evidence to determine the values of the remuneration and the right to occupy and use land. It is, therefore, an appropriate stage to tabulate these values for comparison:

		Remuneration		Right to occupy and use	
		p m	p a	p m	p a
(i)	Cash wage	R250,00	R3 000,00		
(ii)	1 x litre mild per month	R30,00	R360,00		
(iii)	1 x 80kg sifted mealie meal	R77,00	R924,00		
(iv)	Cash bonus	R8,33	R100,00		
(v)	10 x 70kg yellow mealies	R36,14	R433,67		
(vi)	20 x 70kg white mealies	R56,38	R676,60		
(vii)	Shearing of 30 sheep	0,075	R0,90		
(viii)	Grazing 24 cattle			R196,20	R2 354,40
(ix)	Grazing 8 goats			R10,35	R124,20
(x)	Land for residential purpose			R250,00	R3 000,00
	TOTAL	R457,93	R5 495,17	R456,55	R5 478,60

[45] The excess of remuneration over the right to occupy and use land is therefore R1,38 per month or R16,57 per year.

[46] It now remains to consider those aspects of the right to occupy and use land for the purpose of keeping 30 chickens and 5 dogs and the right to occupy and use land for grazing.

[47] I raised the point with the expert witnesses that some of the factors that could be considered in determining the value of keeping 30 chickens are the eggs they produce, meat and cash, should applicant be inclined to sell some of them. This value exceeds the R1,38 per month and R16,57

per year by far. I do not know what value applicant got from keeping 5 dogs, as I do not know what he kept them for and what type of dogs they were, but there must be some value. Added to the value of keeping chickens then the R1,38 per month and R16,57 are exceeded even further. I do not need to state by how much these rights exceed the R1,38 and R16,57, as long as I am satisfied that they do exceed those amounts.[5]

[48] I said earlier that I would revert to what needs to be considered to determine the value of the right to occupy and use land for grazing and cropping purposes. In *casu* this right excludes cropping. I have already referred to some of the factors that need to be considered for grazing rights and I am satisfied that on a proper consideration, they exceed the amounts of R1,38 per month or R16,57 per year by far. These factors include, amongst others, fenced-in camps, availability of water, the need or otherwise for a herdman. They need to be investigated and be argued in a proper case. Even if I am wrong in saying that there are factors extraneous to grazing rental to be considered in determining the value of the right to occupy and use land for grazing purposes, I am satisfied that the right to keep 30 chickens alone, even without the right of keeping 5 dogs, far exceeds the amounts of R1,38 per month and R16,57 per year.

[49] Finally, there is a point which was not raised during the trial but which I believe deserves noting. The point is whether the value of the right to occupy and use land is the value to the farm owner or the occupier. In these proceedings it seems to be accepted by both parties that it is value to the occupier and the decisions of the High Court tend to support this view.[6] However, Act 63 of 1997[7] amended section 2 of the Act by introducing a sub-section 5 which reads as follows:

> "(5) If in any proceedings it is proved that a person falls within paragraphs (a), (b) and (c) of the definition of 'labour tenant', that person shall be presumed not to be a farmworker, unless the contrary is proved".

[50] In these proceedings it was rightly accepted that respondent bore the onus of proving the contrary, that is, that applicant is a farmworker. To do so she had to adduce evidence of applicant's remuneration and factors that influence the value of his (applicant's) right to occupy and use land; factors which are peculiarly within the knowledge of applicant. Invariably respondent will place values from her point of view and these may not necessarily be value to the occupier. It can, of course, be argued that it is for respondent to place evidence of remuneration and then it will be up to applicant to adduce rebutting evidence of a value of the rights to occupy and use land. I am satisfied that it is value from the occupier's perspective.[8]

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5 *Van der Westhuizen v Peterson* supra n1; *Hibbs v Wynne* supra n1 and *Gallman v Dombrowsky* supra n1 at 263D. In all these cases no amount of excess was stated.

6 Cases in supra n1.

7 Land Restitution and Reform Laws Amendment Act.

8 Cases in supra n1.

(b) **Was applicant obliged to perform his services personally?**

[51] The only testimony on this aspect of the case is that of the applicant. He testified that he was able to work at all times except when he was ill, when his children worked on his behalf with respondent's full knowledge. Respondent was "in agreement with the arrangements" he made with the children.

[52] Under cross-examination, however, applicant said that nobody worked on his behalf when he went on leave. This statement does not take the matter any further, because when he is on leave he is not obliged to provide a substitute worker for himself. Either the employer makes do with the remaining labour force or, if she needs more hands, she makes her own arrangements to obtain a substitute. That is what happens in all employment situations. The situation envisaged in the definition of labour tenant by the exclusion of a farmworker is one where applicant could appoint someone to work on his behalf while he is obliged to provide labour, that is, not on leave.

[53] In reply to a question by Mr van Strijp whether he ever had the right to say "I am going to stay at home now for three months and this person will now work in my place", applicant replied that there was never such a need. At harvest time everybody would get involved, including his own children. He also agreed that when his children so worked during harvest time, they were doing what is called on the farm "tog", that is, temporary employment.

[54] Finally, applicant was asked whether he ever had a right to appoint someone to work for him and there was confusion of the words "right" and "need" in the interpretation. He had told the Court at the beginning of his evidence that he is uneducated and unsophisticated. In response to a question by the Court applicant answered that there was never such a right.

[55] I am not satisfied that applicant knows for a fact that there was never such a right. On more than one occasion he indicated that there was never a need to appoint somebody. He has, therefore, never tested the situation to establish whether he had the right or not. What he knows clearly is that his children have worked on his behalf when he was ill or with him during harvest time.

[56] There being no evidence to the contrary I must accept that he was indeed not obliged to perform his services personally.

[57] I, therefore, find that applicant satisfies the requirements of paragraphs (a), (b) and (c) of the definition of a labour tenant, he is not a farmworker and was not obliged to perform his services personally. In the circumstances, I find that he is a labour tenant as defined in the Act.

Costs

[58] The question of costs in this case is a vexed one. First of all the costs in the quashed case were reserved for decision in this case, then there was an application by respondent for an order of costs *de bonis propiis* against Mr Omar in the quashed case and in the present case up to the

time he withdrew as attorney of record. Finally, there are costs for the remainder of the case, i e the part after Mr Omar's withdrawal as attorney of record up to the conclusion of the case.

[59] I propose to deal with the costs for the remainder of the case first. It is a basic rule of our law that an award of costs is in the discretion of the court.[9] This discretion is to be exercised judiciously and in the judicious exercise of the discretion a general rule arose which is well-established namely that costs follow the event.[10] This Court has, however, stated [11] before that, dealing as it does, with social legislation it cannot bind itself to the practice that costs follow the event. Like the erstwhile Industrial Court and now the Labour Court, this Court deals with parties who must, quite often, continue to live together after the case has been finalised. It does not do subsequent relations good if parties harbour ill-feelings towards each other because one of them was "punished" with an order for costs.

[60] I am mindful of the fact that this case has dragged on for a long time with resultant hardship for applicant who was uprooted from his place of abode and whose property and livestock are scattered all over. But the delay in finalising the matter cannot be placed at respondent's door.

[61] In keeping with the practice of this Court, which recognises that we are dealing here with social legislation, I cannot award costs to either party.

[62] I now deal with the reserved costs of the quashed case and the costs of the remainder of the case up to Mr Omar's withdrawal as attorney of record.

[63] I will deal with these two stages of the case separately. I do so for a number of reasons. These two stages are distinct from each other in terms of the constitution of the court hearing them, Mr Omar's behaviour and most importantly the separation of the stages by a case[12] in which Mr Omar's behaviour during the quashed case is catalogued, but not the behaviour during the resumed case.

[64] Working backwards with the case, I turn now to the resumed portion of the case up to the point where Mr Omar withdrew as attorney of record. Upon resumption of the case pre-trial conferences in terms of rule 30 of the Rules of Court were convened by the Court to progress the matter. The relevant conferences were held on 12 March 1998 and 6 April 1998. In the conference of 12 March 1998 an order was made that Mr Omar, as applicant's representative,

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9 Cilliers, *Law of Costs*, 3ed (Butterworths, Durban 1997), para 2.01 at 2-3; Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4ed (Juta & Co Ltd, Kenwyn, 1997), para III at 703; *Graham v Odendaal* 1972 (2) SA 611 (A) at 616; *Lornadawn Investments (Pty) Ltd v Minister van Landbou* 1980 (2) SA 1 (A) at 5.

10 *Cilliers* ibid at para 2.08 at 2-7; *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A)*; Hlatshwayo & others v Hein* [1997] 4 All SA 630 (LCC) at 640a.`

11 *Hlatshwayo & Others v Hein* ibid at 640b and 642c-d and the authorities quoted there.

12 *Du Preez NO v Mahlangu & others*, LCC12/97, 9 July 1997, unreported

must prepare a statement of agreed facts and facts in dispute, agree with Mr van Strijp on the correctness of the statement and have it filed by 1 April 1998. The pre-trial conference was then postponed to 6 April 1998, when, amongst other issues, the statement of agreed facts and facts in dispute would be considered.

[65] Mr Omar did not furnish a statement of agreed facts and facts in dispute in compliance with the Court Order of 12 March 1998. Instead at the conference on 6 April 1998 Mr Omar referred to a letter dated 16 March 1998, he had written to respondent's attorneys as a statement of agreed facts and facts in dispute. The Court admonished him that that letter could not be such a statement. On being asked whether he had any further facts in dispute to add to the statement of agreed facts and facts in dispute that had been prepared by Mr van Strijp (Mr van Strijp prepared the statement of his own volition, presumably after receiving Mr Omar's letter of 16 March 1998), Mr Omar replied by saying that the affidavits were succinct enough for those facts to be identified from them. The Court observed that Mr Omar had been required to identify those facts, in accordance with its order of 12 March 1998, and that by referring the Court to the affidavits instead of obeying its order, he could be behaving contemptuously. Thereupon Mr Omar withdrew as attorney of record for applicant.

[66] It must be pointed out that in the said letter of 16 March 1998, Mr Omar had used, as authority for going against an earlier Court Order that applicant bears the duty to begin, the *Tselentis*[13] judgment and the amendment to section 2 of the Act.[14] This, despite the fact that he knew that at the time of making the order the Court had been aware of both the judgment and the amendment.

[67] The results of this behaviour on Mr Omar's part were further delays in finalising the matter and incurring of further costs because of aborted conferences.

[68] That is the background relating to this part of the application for costs *de bonis propiis*.

[69] The tendency is to award cost *de bonis propiis* against erring attorneys only in reasonably serious cases, such as cases of dishonesty, wilfulness, or negligence in a serious degree.[15]

[70] Mr van Strijp submitted that this behaviour on the part of Mr Omar was wilful conduct and should be punished by way of an order for costs *de bonis propiis*. On the other hand, Mr Cassim, who appeared for Mr Omar, submitted that, at best, the letter of 16 March 1998 was a brilliant document which, while mindful of the Court's earlier order, nevertheless suggested that

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13 *Tselentis Mining (Pty) Ltd and another v Mdlalose and others* [1997] 3 All SA 657 (N).

14 See footnote 7 above.

1 Cilliers, *Law of Costs,* supra n9, para 10.25 at 10-24; Herstein and Von Wensen, *The Civil Practice of the Supreme Court of South Africa*, supra n9, para E at 728; *Waar v Louw* 1977 (3) SA 297 (O) 304 at 304G; *Machumela v Santam Insurance Co Ltd* 1977 (1) (SA 660 (A) at 664B-C; *Webb v Botha* 1980 (3) SA 666 (N) at 673D-F; *Khunou and others v M Fihrer & Son (Pty) Ltd and others* 1982 (3) SA 353 (W) at 363C-D.

respondent should commence leading evidence because of the new developments unknown to the Court namely the *Tselentis* judgment and the amendment to section 2 of the Act. At worst, so the argument went, it had been a case of "muddled thinking"[16].

[71] I do not agree with Mr van Strijp that this was willful conduct; neither do I agree with Mr Cassim that this was a show of brilliance. (I accept, of course, that Mr Cassim may not have known that the *Tselentis* judgment and the amendment to section 2 of the Act had been discussed in a prior pre-trial conference and were therefore not new to the Court).

[72] I am satisfied that Mr Omar was guilty of muddled thinking, a fact to be regretted, and that no improper motive can be attributed to him in the circumstances. He genuinely believed his letter of 16 March 1998 to be a statement of agreed facts and facts in dispute. The application for an order for costs *de bonis propiis* from the time of the resumption of the case up to Mr Omar's withdrawal as attorney of record is, therefore, dismissed.

[73] Finally, I deal with the quashed case. This was the very first case in the Land Claims Court. It was initiated on 17 April 1996. During the conduct of the case Mr Omar made himself, together with two others, guilty of fifteen counts of contempt of court, of which no less than ten were committed directly by Mr Omar himself.

[74] Correspondence written by Mr Omar to the Court and the Department of Land Affairs was most distasteful, disrespectful and insulting. This unlawful and contemptuous behaviour took place over a long period of time, from at least 12 June 1996, when the letter to the Department of Land Affairs was written, to 27 January 1997 when Mr Omar addressed a telefacsimile to the Registrar of the Court.

[75] Sithole AJ described the contempt as follows:

> ". . . Yours were calculated and pre-meditated contempt of court committed over a considerable period of time. You had all the time to reflect and to think before engaging in this unseemly conduct, especially each time you used First Respondent as a tool by shielding behind the phrase 'our client instructs us that . . .' In your correspondence you used this phrase, in all your correspondence to the Department of Land Affairs and the Court. That you had time for mature and considered reflection is borne out by the fact that despite a warning by way of a letter about your conduct by the Honourable Judge President of this Court, Judge Bam, you persisted in your contumelies and diatribe where there existed no justifiable basis for doing so. Up to this moment it still escapes the Court why you elected to put your scorn on members of this Court in such a callous and racialistic fashion, for that matter where there was no iota of cause present for your doing so. So far it would appear that you have not taken this Court into your confidence to explain why you persisted in your contumelious conduct. You merely admit the contempt and tender your apology to the Court and its judges and express readiness to pay the costs which this Court may direct."[17]

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[16] *Nkosi v Caledonian Insurance Co* 1961 (4) SA 649 (N) at 663G-H.

[17] *Du Preez v Mahlangu* supra n12 at 31

[76] Of the individual acts of contempt, the learned judge had this to say, and I quote excerpts at random:

> "Certain allegations contained in the letter dated the 12th of June 1996 and addressed to the Department of Land Affairs in Pretoria. In this regard the following features are relevant:
>
> 1. It is a contempt of Court *ex facie curiae*
>
> 2. It was perpetrated by Second Respondent. (Mr Omar).
>
> 3. It is directed at Judges Dodson and Gildenhuys.
>
> 4. It includes racial bias and infers incompetence on the part of the learned judges."[18]

and another example:

> "Allegations contained in the memorandum entitled 'FACTORS IN SUPPORT FOR THE RECUSAL OF THE JUDGE PRESIDENT OF THE LAND CLAIMS COURT.' In this regard the following is relevant:
>
> 1. It is contempt *ex facie curiae*.
>
> 2. It was perpetrated by the Second Respondent.
>
> 3. It is directed at Judges Dodson and Gildenhuys.
>
> 4. It is racist in tone and gratuitously imputes incompetence to the learned judges.
>
> 5. It constitutes scurrilous abuse which reflects on the learned judges' capacity as such.
>
> 6. Although not *per se* an application for recusal it exceeds the lawful limits of the grounds upon which such an application can be based."[19]

Another example:

> "Statements contained in the letter dated the 27th September 1996 and addressed to the Registrar of the Land Claims Court. In this regard the following is relevant. This is contempt *ex facie curiae*. It was perpetrated by the Second Respondent and it is directed at Judges Dodson and Gildenhuys. It baldly attributes racial bias, partiality and deliberate injustice to the learned judges and is patently disrespectful. It sets out absurd and untrue grounds for the recusal of the learned judges. It is insulting and contemptuous of the learned judges."[20]

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[18] *Du Preez v Mahlangu* supra n12 at 18.

[19] *Du Preez v Mahlangu* supra n12 at 18.

[20] *Du Preez v Mahlangu* supra n12 at 20.

The last example:

> "Statements contained in the letter dated 16th October 1996 addressed to the Registrar of the Land Claims Court. In this regard the following merits mention. This is contempt *ex facie curiae*. It was perpetrated by the Second Respondent and it is directed at Judges Dodson and Gildenhuys. It imputes racial bias and deliberate injustice to the learned judges. It clearly shows the Second Respondent's ulterior motive in bringing the application for the recusal of the learned judges, to wit, that he did not wish to take the matter on appeal but wished to bring the application in the Land Claims Court for the third time before a differently constituted Bench."[21]

[77] Other acts of contempt were described by the learned Sithole AJ in more or less the same fashion.

[78] Mr Cassim submitted that Mr Omar had been duly convicted of contempt of court and adequately punished. He contended that to grant an order *de bonis propiis* would amount to double punishment. I am not persuaded by this argument. Respondent was put to considerable expense to defend the case that Mr Omar brought. That case dragged on for a long time, with several appearances in Court, all of which came to naught when the case was finally quashed. In this regard (the quashed case), Sithole AJ's words in the last sentence of the last example of the contempts described above are apposite. Respondent is merely asking that she be reimbursed her expenses, not that Mr Omar be punished a second time. Somebody must take responsibility for the consequences and that person can only be the one who caused her to incur such costs. That person is Mr Omar. I am asked to order the responsible person to compensate respondent for her unnecessary loss and the question of double jeopardy, I believe, does not arise. Mr Omar will have to pay respondent's costs *de bonis propiis* for the quashed case.

[79] It remains now to grant the order. Ms van Nieuwenhuizen intimated during argument that applicant does not persist with an order for prayer B(iv). Accordingly, the following order is made:

(1) Paragraphs A, B(i), (ii), (iii), (v) and (vi), and C of the order prayed as contained in the Notice of Motion are hereby made an Order of Court.

(2) Mr Omar is hereby ordered to pay, *de bonis propiis*, respondent's costs of the quashed proceedings.

(3) Each party to pay its own costs of the proceedings from the date of recommencement of the case.

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JUDGE J MOLOTO

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[21] *Du Preez v Mahlangu* supra n12 at 18.

MEER J:

[1] I agree with the findings of my colleague. I add the following:

There is, I believe, another kind of value which attaches to a labour tenant's rights to use and occupy land, which must be factored into the above calculation. This I shall call the non-economic value to the labour tenant of the right to use and occupy land. It is clear from the applicant's testimony that the right to use and occupy land to him as a labour tenant translates into land as home and means of production. Land in this sense, I believe, is inextricably intertwined with certain venerable human values: security, independence, dignity and pride - values which are essential for mental and emotional health. As one commentator on the labour tenant system states,

> ". . . the benefits of the present system do not consist of wages, leave and paid overtime. They consist of being able to keep cattle and sheep, of being able to grow their own mielies, beans and pumpkins. Of having a home where everyone sits around the fire on winter evenings and tells stories".[22]

The same commentator states:

> "When a family is evicted from a farm the cash wage is the least of its losses. It loses the extensive houses which it has built and maintained in expectation of living out its lifeon the farm. All its other assets become burdens which weigh it down when it takes to the road; the large number of children and old people in the family; the ploughs and unwieldy agricultural equipment and most of all the prized cattle, sheep and goats."[23]

[2] The applicant's situation is not dissimilar to the above quoted scenarios. Applicant has throughout his life resided on respondent's farm as have three generations of his family. His family graves are on the farm and he testified that no other place will have the same value to him. Applicant is not a young man and would have great difficulty rebuilding what he enjoyed on respondent's farm.

[3] Labour tenants are perceived to value their land with such fervour because in reality it is irreplaceable. From applicant's testimony it is clear that his right to use and occupy land on respondent's farm is considered by him to be irreplaceable. This view is borne out in a recent report[24] concerning labour tenants in Mpumalanga. It describes the conditions of former labour

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[22] Transvaal Rural Action Committee *A Toehold on the Land* (1984) 2.1

[23] Ibid.

[24] Dlomo and Luphandwana, *Sise ngamakafula ... [We are still kaffirs] Final report on the Practical Problems Relating to the Implementation of the Labour Tenants Act in Mpumalanga, February 1998* (Nomfundo Communications CC, 1998).

tenants in that area, who upon eviction, ended up at Daggakraal, a squatter camp spawned from evicted labour tenants.

[4] Having duly acknowledged the significance of the non-economic value to the labour tenant of the right to use and occupy land, I now turn to the vexed issue of attaching a monetary figure to this right. Here I readily concede that the difficulty of trying to place a figure on a labour tenant's right to use and occupy land is extreme, precisely because the value of land to labour tenants is not purely economic. In *Durban City Council v Kadir*[25] Harcourt J remarked that:

> "....in particular the value of the right of occupation is a difficult matter which has been considered in numerous cases in which the courts have not, however, attempted to lay down any general test or formula, let alone a comprehensive or exclusive formula for a determination of the question"

[5] Ms van Nieuwenhuizen took cognisance of the non-economic value of the applicant's right to use and occupy a portion of the respondent's farm but did not attempt to attach a figure thereto. She referred us to the case *Gallman v Dombrowsky*[26] where the learned judge acknowledged that personal circumstances can be taken into account in considering the value of the right to occupy.

> "I must point out that it is not only the rent that must necessarily be taken into account. There are many other personal matters that can also be taken into account in determining the value of the occupation of the tenant. When I say this I do not wish it to be understood that a purely subjective approach can be applied in assessing the value of such matters. The approach must always be an objective one. It can, for instance, make a great deal of financial difference to a tenant where she lives in relation to where she works. This is but one of the personal circumstances that could be taken into account."

Similarly, in *Smith v Coetzee*[27] Murray J stated that one of the considerations to be taken into account when determining the value of a clear right to occupy is

> "... any facts peculiar to him (the occupier) which would affect the value to him of the right to occupation of the premises."

[6] Mr van Strijp suggested that the value of applicant's right to use and occupy a portion of the farm represented no more than security of tenure terminable on one month's notice. I believe

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[25] 1971 (1) SA 364 (N).

[26] 1973 (2) SA 261 (C) at 283.

[27] 1945 TPD 359 at 362.

this may be but one of the many factors which must be considered in determining the value of the right to use and occupy land.

[7] The above difficulties notwithstanding, I believe that in this case the non-economic value of the right to applicant of the use and enjoyment of the land, is not a vexed issue. For we need only consider whether the value of this right exceeds R1,38 per month or R 16,57 per year, these figures being the excess of remuneration over the right to occupy and use land, arrived at by my brother judge in the valuation exercise conducted by him.[28]

[8] I have no doubt whatsoever from applicant's testimony that the non-economic value of applicant's right to use and occupy the land is well in excess R1,38 per month or R16,57 per year. Nor do I doubt that the value of security of tenure, terminable on one month's notice, referred to by Mr van Strijp, exceeds these figures.

[9] Accordingly I am able to find that applicant's right to use and occupy the land exceeded his right to remuneration.

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JUDGE S MEER

Heard on : 17 - 18 November 1998, 13 January 1999 **Handed down on: 9 February 1999**

For the applicant:

Adv N Janse van Nieuwenhuizen instructed by *Govender Attorneys,* Bronkhorstspruit

For the respondent:

Mr J van Strijp from *Noltes Attorneys*, Ermelo

For Mr Z Omar:

Adv N Cassim

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[28] Supra para [45].