IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 2-6 August, 23 September 1999 **CASE NO**: LCC 34/99
Before **MEER and DODSON JJ**, **STEPHENSON (ADVISORY ASSESSOR)**

In the matter between:

MPONGENI JOHN KHUMALO	1st Applicant
T A MDLETSHE	2nd Applicant
M I NHLEKO	3rd Applicant
ME MHLONGO	4th Applicant
M MHLONGO	5th Applicant
K J MKHONZA	6th Applicant
P S MLABA	7th Applicant
E NHLEKO	8th Applicant
S NHLEKO	9th Applicant
B NKOSI	10th Applicant
A D MDLETSHE	11th Applicant
P MDLETSHE	12th Applicant
S MDLETSHE	13th Applicant
M S KUNENE	14th Applicant

and

H W POTGIETER	1st Respondent
DEPARTMENT OF LAND AFFAIRS	2nd Respondent
FIRST NATIONAL BANK	3rd Respondent

REASONS FOR RULINGS

DODSON J:

Introduction

[1] The Court's reasons for its rulings on a point *in limine* and a postponement application are dealt with herein. The dispute arises from an application for the award of land in terms of chapter III of the Land Reform (Labour Tenants) Act.[1] I will refer to it as the "Labour Tenants Act". The land concerned consists of three adjacent farms in the administrative district of Vryheid, Kwazulu-Natal. They are:

(i) Portion 2 of the farm KLIPRIF No. 111, in extent 492, 0147 hectares;

(ii) Remainder of the farm KLIPRIF No. 111, in extent 492, 0147 hectares;

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1 Act 3 of 1996.

(iii) Portion 3 of the farm BASAN No. 382, in extent 59,3434 hectares.

I will refer to them collectively as "the farm".

[2] It is common cause that the applicants are labour tenants as defined in section 1 of the Labour Tenants Act. They enjoy rights of use and occupation as contemplated in chapter II of the Labour Tenants Act in respect of the farm. The first respondent is the registered owner of the farm. The second respondent is the Department of Land Affairs.[2] The third respondent is First National Bank and is the holder of a mortgage bond over the farm. The third respondent abides by the decision of the Court in this matter.[3]

Factual Background

[3] It is necessary to go into the sequence of events leading up to the hearing of this matter in some detail, because it is relevant to the rulings which are dealt with here. There is, apparently, a history of disagreement between the applicants and the first respondent in respect of their occupation and use of the land. This gave rise to certain legal disputes, the details of which are not relevant to the decision of this matter. Suffice it to say that those disputes lead to negotiations between the applicants and the first respondent and the submission by the applicants of an application for the award to them of the farm in terms of section 16 of the Labour Tenants Act (the "section 16 application").[4]

[4] After submitting the section 16 application, there were further negotiations between the applicants pursuant to section 18 of the Labour Tenants Act.[5] The negotiations resulted in the signing of a written agreement between the applicants and the first respondent on 22 October 1998 ("the agreement"). The agreement is a purchase and sale of the farm, with the applicants as the purchasers and the first respondent as the seller. The following are important clauses for present purposes:

"**[Preamble]**

1.

.....

2 It was not suggested by anyone that the Department of Land Affairs did not have standing to litigate and I will therefore assume that it does.

3 In the course of the proceedings, the third respondent successfully brought an application to intervene as a formal participating party, but later withdrew, recording that it would abide by the decision of the Court.

4 Section 16(1)(a) allows a person who complies with the definition of a labour tenant to apply for the award of land which he or she was entitled to occupy of use in terms of section 3 of the Labour Tenants Act. Section 3 of the Labour Tenants Act in turn gives a labour tenant the right to use and occupy "that part of the farm in question which he or she. . . was using and occupying on [2 June 1995]".

5 Section 18 provides for the resolution of an application for the award of land in terms of section 16 by agreement between the applicants and the land owner.

2.

The ... Seller hereby admits that the .... purchasers have been Labour Tenants as at 02 June 1995 and that none of them has waived any of his/her rights in terms of the Act.

3.

The Seller for the purpose hereof admits that the purchaser and the Department of Land Affairs have duly complied with the provisions of Sections 16 and 17 of the Act respectively.

4.

The Seller in terms of Section 18 of the Act hereby proposes that the purchasers ' applications in terms of the Act be finalised upon the undermentioned terms and conditions which the Seller regards as fair.

5.

NOW THEREFOR THE PARTIES hereto conclude the following agreement for consideration by the Director-General of the Department of Land Affairs:

[Main Agreement]

1. .....

2(a) The purchase price payable by THE PURCHASER to THE SELLER is the sum of R1.2 million.

(b) The purchase price of THE PROPERTY shall be payable against registration of transfer, which amount is to be lodged in cash or in the form of a guarantee acceptable to the Conveyancers payable free of exchange in Pietermaritzburg against registration of transfer, such cash or guarantee to be lodged with the conveyancers within 6 (six) months of the certification of this agreement by the Department of Land Affairs and failing such certification determination by the Land Claims Court.

3(a) This offer is subject to the PURCHASER being granted a subsidy by the Department of Land Affairs in accordance with Section 26 of the Act.

(b) THE PURCHASER shall be obliged to submit this agreement immediately to the Department of Land Affairs for consideration in terms of the Act.
.....

8 In the event of the PURCHASER failing to carry out any whatsoever of his obligations hereunder and in the event of his continuing in such default for more than 30 (THIRTY) days after written notice has either been handed to him or has been addressed to him by prepaid registered post or on behalf of THE SELLER requiring him to remedy such default, THE SELLER shall have the right to either enforce this agreement or, at his opinion, to declare the same cancelled.
.....

12. Should the Director-General of the Department of Land Affairs fail to certify this agreement in terms of Section 18(5) of the Act within 30 (THIRTY) days from October 31 1998, the parties hereby in terms of Section 18(8) of the Act request the Department of Land Affairs to refer this agreement immediately and by no later than 10 December 1998 to the Land Claims Court in terms of Section 18(7) of the Act, failing which either partie (sic) shall be entitled to take appropriate legal action to have the fairness of the agreement adjudicated upon by the Land Claims Court in accordance with the provisions of the Act."

[5] As is apparent from clause 12 of the agreement, section 18(5) of the Labour Tenants Act requires such an agreement to be certified by the Director-General of the Department of Land Affairs or incorporated in an order of Court before it has any effect. On 15 February 1999, the Director-General duly considered the agreement and declined to certify it in terms of section 18(5). The reason why the Director-General declined to certify the agreement was expressly stated by him in the certificate to be that he did not consider the compensation payable to the first

respondent for the farm to be reasonable and equitable. At the time, the second respondent had commissioned a report by a valuer, Mr Teversham, in which he valued the farm at R780 000,00 whereas the "purchase price" payable in terms of the agreement was R1 200 000.00.[6] Where the Director-General declines to certify an agreement, section 18(7)(c) of the Labour Tenants Act requires him, at the request of any party, to refer the section 16 application to the Land Claims Court. The Director-General duly referred the matter to the Land Claims Court.[7]

[6] Upon receipt of the matter by the Land Claims Court, the President of the Court directed that the matter be heard by the Court.[8] The presiding judge in the matter, Judge Meer, then convened a series of pre-trial conferences in terms of Rule 30 of the Land Claims Court Rules. Rule 30 gives the presiding judge the power to convene such a conference of his or her own accord or at the request of any party in order to "promote the expeditious economic and effective disposal of the case." The first pre-trial conference was held on 21 April 1999. The need for an early hearing of the matter was emphasised by the first and third respondents.

[7] The next pre-trial conference was held on 27 May 1999. At that conference, the parties agreed that there was only one issue in respect of which they were in dispute and that related to the amount of compensation which the first respondent was to receive for the farm. This was duly minuted. The need for the matter to be heard urgently was once again emphasised by the first and third respondents. This is reflected under item 4 of the minutes of the conference in the following statement:

> "Mr van Zyl emphasised the need to resolve this matter as expeditiously as possible given the financial ramifications both for the Bank and Mr Potgieter if the matter was not speedily resolved."

In order to accommodate the first and third respondents, the Court and the parties established that the earliest dates upon which everyone would be available were 2 to 6 August 1999 and the matter was set down for hearing then. The presiding judge also directed at the conference that a meeting be held between the parties' expert witnesses as contemplated in rule 49(3) of the Land Claims Court Rules.[9] It was further agreed that another pre-trial conference would be held on 26

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6 In fact, Mr Teversham initially valued the farm in May 1998 at R1 040 000,00. However, this included compensation for a building on the farm which had been destroyed. After subsequent discussions with the applicants and an official of the second respondent, he revised the valuation in July 1998 to R780 000,00, which excluded the figure which he had allocated for such compensation.

7 The validity of the referral is dealt with in paragraphs [27] to [33].

8 Section 19(1) of the Labour Tenants Act gives the President of the Court the discretion to decide whether the matter should be heard by the Court itself or referred to arbitration. It reads:

> "**19 Hearing of application by Court or referral to arbitration**
>
> (1) On referral of an application by the Director-General, the President of the Court or a judge of the Court nominated by him or her may direct either that the application be heard by the Court or that it be referred to arbitration."

9 Rule 49(3) reads:

July 1999.

[8] On 22 July 1999 the meeting of the expert witnesses took place. The second respondent's expert witness at the meeting was a valuer, Mr Derrick Griffiths (not Mr Teversham who had provided the Department with its earlier valuation) and the first respondent's expert witness was a Mr H C Venter, an estate agent from the area. Also present were the applicants' attorney, the first respondent's attorney and counsel, an official of the third respondent and the second respondent's attorney. The experts agreed on a number of important issues, most of which are not relevant here. What is important for present purposes is that Mr Griffiths indicated at the meeting that he valued the farm at R230 000,00. Mr Venter valued the farm at R1 106 000,00. Also important is that in the minutes of the meeting it is reiterated that "the only fact in dispute is the valuation given to the property".

[9] The third and final pre-trial conference was held on 26 July 1999. At the conference the first respondent indicated, for the first time, that he intended arguing a point *in limine* at the commencement of the hearing of the matter on 2 August 1999. Details of the point *in limine* are set out below. The first respondent also indicated at the conference that he would call two valuers as expert witnesses and the second respondent indicated that it would call one valuer. The presiding judge was assured by all of the parties that they were ready to proceed with the hearing on 2 August 1999.

[10] On the same day as the last pre-trial conference, the first respondent filed four documents. The first document is headed "FACTS AGREED/FACTS IN DISPUTE". It reads as follows:

> "1. **FACTS AGREED**
>
> 1.1 That Applicants are Labour tenants
>
> 1.2 Locality of Farms
>
> 1.3 That [First] Respondent is lawful owner of the Farms
>
> 1.4 That the parties entered into an Agreement on 22nd October 1998 whereby Applicants purchased [First] Respondents (sic) farms, commonly known as Klipdrift, from [First] Respondent.
>
> 1.5 That prior to this Agreement, a written Agreement was entered into between the parties in April 1998 whereby Applicants bought the farms from the [First] Respondent.
>
> 2. **FACTS IN DISPUTE**
>
> 2.1 Valuation of the farms:...[the three farms are then listed]

"The presiding judge may direct expert witnesses employed by the parties to meet for a discussion of their evidence, and to prepare and sign a minute of their discussions, which must set forth -

(a) those facts, opinions and conclusions on which the expert witnesses agree;
(b) those facts, opinions and conclusions on which the expert witnesses do not agree; and
(c) the reasons for any disagreement.

The presiding judge may direct how and by whom the minute must be prepared, and who may be present at that meeting. "

2.2 Whether dwelling house on Klipdrift and other improvements should be taken into account in determining price of land concerned or not. In other words what exactly constitutes just and fair compensation."

[11] The second document is an expert notice and a summary in respect of the first respondent's expert witness, Mr H C Venter.

[12] The third document is a notice of the point *in limine*. The material part of which reads as follows:

"**KINDLY TAKE NOTICE** that the [First] Respondent will seek....a ruling on.....:

(a) Whether the Court has any function other than to determine the fairness of the Deed of Alienation (agreement);

(b) Whether the Court has the power to determine a purchase price binding upon the seller, in the event of the Court finding that the agreement is not fair.

KINDLY TAKE FURTHER NOTICE that should both the aforementioned questions be answered in the negative, the [First] Respondent will not oppose the Director General of Land Affairs' refusal to certify the agreement as reasonable and equitable, without conceding the point, given the great disparity between the contract price and that which the Department of Land Affairs now considers to be a fair price viz R230 000-00 as opposed to the contract price of R1,2 million.

The [First] Respondent will thereafter pursue his right to cancel the agreement and claim related relief in terms of the common law".

[13] The fourth document is an additional list of agreed and disputed facts which differs from the statement referred to in paragraph [10] above. In essence it is a summary of the heads of argument on which the point *in limine* is based. Both statements of agreed and disputed facts are signed by the attorney for the first respondent.

[14] The point *in limine* was argued on 2 August 1999. The Court made the following ruling the next day:

"The Court has considered the points *in limine* that were raised yesterday and as was promised we are now in a position to make a ruling.

The Court makes the following ruling on the respondent's points *in limine*:

1. The Court does have a function other than to determine the fairness of the Deed of Alienation.

2. The Court does have the power to determine a purchase price binding upon the respondent in so far as the Court has the power in terms of the Land Reform (Labour Tenants) Act, particularly in terms of section 22(4)(d) and 23(2),to determine the compensation payable to the first respondent as owner of the affected land and other persons whose rights are affected by the applicants' application for an award of land in terms of Chapter 3 of that Act.

3. Costs are to stand over for determination at a later stage."

Although the reference is to the first respondent's points *in limine*, the two issues are really part and parcel of a single point. Immediately after the Court gave its ruling, the first respondent

applied for the postponement of the matter on the grounds that it needed to secure the services of a valuer and in order to introduce into the proceedings a dispute in relation to whether or not the applicants had in fact used and occupied the entire farm. The application for a postponement was refused. The reasons for these rulings follow.

[15] The arguments advanced in support of the point *in limine* give rise to the following three questions:

(i) Does the Court have the power to determine a purchase price binding on the parties?

(ii) Does chapter III apply where an award is sought in respect of an entire farm?

(iii) Was there a proper referral?

I will deal with each question separately.

Question 1: does the Court have the power to determine a purchase price binding on the parties?

[16] The first respondent argues that the agreement entered into between the applicants and the first respondent was a private sale to which chapter III of the Labour Tenants Act does not apply. He argues that the only function conferred on the Land Claims Court by that agreement is to give an opinion on whether or not it agrees or disagrees with the Director-General regarding the fairness of the purchase price in the agreement. The agreement does not give the Court the power to determine a fair purchase price and bind the first respondent to it. Given the disparity between the first and second respondents regarding the alleged value of the farms and the limits on the Court's function to that of simply giving an opinion, the first respondent takes the view that an enquiry in regard to value will be pointless. Instead, the first respondent is willing to concede the unfairness of the purchase price and to proceed in terms of his common law remedy of cancellation of the agreement.

[17] This argument does not withstand scrutiny. Section 18(5) of the Labour Tenants Act reads:

> "No agreement for the settlement of any application shall be of any effect unless the Director-General has certified that he or she is satisfied that it is reasonable and equitable, or unless it is incorporated in an order of the Court in terms of this Act."

This means that, if the agreement in this case is an "agreement for the settlement of any (section 16) application ", it has no effect, because the Director-General did not certify it and it has not been incorporated in an order of this Court. A reading of the agreement makes it quite clear that it is indeed an agreement for the settlement of a section 16 application. This is apparent from the following aspects of the agreement:

(i) The preamble of the agreement confirms that there has been compliance with sections 16 and 17 of the Labour Tenants Act.

(ii) Clause 4 of the preamble specifically records that the terms of the agreement represent the first respondent's proposal in terms of section 18 of the Labour Tenants Act as to how

the applicants applications should be settled. Section 18 deals specifically with settlement agreements in respect of section 16 applications.

(iii) Clauses 2(b) and 12 of the agreement specifically contemplate the referral of the matter to this Court in the event that the agreement is not certified by the Director-General.

The fact that the agreement has no effect means that it is not open to the first respondent at this stage to attempt to resort to contractual remedies arising from the contract, as he threatens to do. It also means that one must look at chapter III of the Labour Tenants Act, and not the agreement, in order to determine the extent of the Court's jurisdiction in these proceedings.

[18] The starting point in analysing the jurisdiction conferred on the Court by chapter III is section 18 (7)(c). That provision comes into operation when the Director-General declines to certify a settlement agreement in terms of section 18(5) of the Labour Tenants Act. Section 18(7)(c) provides:

> "If-
>
> (a) . . .
>
> (c) the parties reach an agreement but the Director-General is not satisfied that it is reasonable and equitable,
>
> the Director-General shall, at the request of any party, refer the application to the Court and inform the other parties that he or she has done so."

Now although the settlement agreement does not have effect as a binding agreement, clause 12 of the agreement records a valid request by the parties to the agreement to refer the matter to the Land Claims Court in terms of section 18(7)(c). In response to that request, the Director-General referred the matter to this Court. Assuming for the moment that it was a valid referral, the Land Claims Court then became seized of the matter in terms of section 19(1).[10]

[19] Once the Land Claims Court is seized of a matter in terms of chapter III of the Labour Tenants Act, it has the powers (amongst others) conferred by section 22(4) of the Labour Tenants Act which include the power to make an order on:

> "(d) the compensation to be paid by the applicant to the owner of affected land or to a person other than the owner whose rights are affected by the determination, order or award;
>
> (e) the manner and period of payment of compensation;".[11]

The Court not only has this power but it is, in a matter such as the present, duty-bound to

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10 Section 19 is quoted in n 8.

11 The term "affected land" referred to in section 22(4)(d) is defined in section 1 as "land in respect of which an application has been lodged in terms of section 17(1)". Section 17(1) deals with the lodging of a section 16 application ie an application for the award of land in terms of chapter III of the Labour Tenants Act.

determine compensation. This is so because section 22(1) provides that:

> "An arbitrator and the Court may dismiss an application referred to in section 16: Provided that the arbitrator and the Court shall not dismiss an application if it is found by the arbitrator or the Court, or if it is not in dispute, that the applicant is a labour tenant." (my emphasis)

In this matter, it is common cause that the applicants are labour tenants, so the Court is obliged to grant the section 16 applications and make an award of land.[12] Section 23 of the Labour Tenants Act then provides that:

> "(1) The owner of affected land or any other person whose rights are affected shall be entitled to just and equitable compensation as prescribed by the Constitution for the acquisition by the applicant of land or a right in land.
>
> (2) The amount of compensation shall, failing agreement, be determined by the arbitrator or the Court.
>
> (3) Compensation shall, failing agreement, be paid in such manner and within such period as the arbitrator or the Court may determine as just and equitable." (my emphasis)

That, in my view, leaves the Court with no choice but to determine a binding purchase price (in the form of compensation envisaged by section 23) where it is seized of a section 16 application, it is not in dispute that the applicants are labour tenants and there is no agreement as to the compensation payable in respect of the land to be awarded.

[20] It was argued on behalf of the first respondent that section 23(2) cannot apply in this matter because there was an agreement between the applicants and first respondent as to price. I disagree. As I have pointed out in paragraph [17], the effect of section 18(5) is that there is no effective agreement between the applicants and the first respondent. In the circumstances section 23(2) applies. Even if I am wrong in this regard, the reference to "agreement" in section 23(2) must, apart from the labour tenant-applicants and the landowner, include agreement by the Director-General as to compensation, particularly where the Minister of Land Affairs is providing the funds which will be used for compensating the land owner.[13]

[21] The first respondent also complained that, to interpret chapter III of the Labour Tenants Act in this way, would allow the Court to expropriate his property. His counsel referred to the "strong presumption against the confiscation of rights". He referred to the cases of *Lenz Township Company (Pty) Ltd v Lorentz and Stapylton-Atkins NNO and Another*[14] and *Malherbe*

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12 It is so that section 22(4)(f) gives the Court the power to make an order on "compensation which shall be paid to the applicant in lieu of an award of land or a right in land". This form of relief is not referred to at all in section 16 where the various awards in relation to land and rights in land are set out. Because it was not suggested by any party in this case that the applicants should get relief in terms of section 22(4)(f), it is not necessary to decide whether the Court may order compensation instead of an award of land where the applicants have applied for an award of land only.

13 See clause 3(b) of the agreement read with section 26 of the Labour Tenants Act.

14 1959 (4) SA 159 (T) at 164E - 165A.

v Van Rensburg en 'n ander.[15] However, if regard is had to those decisions, the presumption referred to is that the legislature does not intend to confiscate without compensation unless this is expressly provided for or necessarily implied. It is quite clear from a reading of the Labour Tenants Act that confiscation without compensation is not intended. At the same time, it is quite clear that a form of expropriation is contemplated if the section 16 application is successful.[16]

Question 2: does chapter III apply where an award is sought in respect of an entire farm?

[22] The next argument was as follows: Section 16(1)(a) provides that "a labour tenant or his or her successor may apply for an award of . . . the land which he or she is entitled to occupy or use in terms of section 3". Section 3(1)(a) provides that "[n]otwithstanding the provisions of any other law. . . a person who was a labour tenant on 2 June 1995 shall have the right with his or her family members . . 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" (my emphasis). This application relates to three complete farms, not a part of a farm. Therefore chapter III cannot apply.

[23] I do not agree with this argument. It is so that the ordinary dictionary definition of "part" would usually connote something less than the whole.[17] However, the word "part" in section 3(1)(a) must be interpreted in the context of the Labour Tenants Act as a whole, with due regard to its purpose.[18] To accept the first respondent's interpretation would mean that the protection afforded by section 3(1)(a) would fall away if a labour tenant occupied the entire farm rather than a part if it. That section gives security of tenure to persons who qualified as labour tenants on 02 June 1995. It is backed up by the right to reinstatement[19] of a labour tenant who was evicted between 02 June 1995 and the date of promulgation of the Labour Tenants Act. On first respondent's argument, the right to reinstatement would also fall away if the labour tenant used and occupied the entire farm rather than a part of it. The idea of labour tenants using an entire farm is not fanciful or unusual.[20] To exclude labour tenants who occupy an entire farm from the

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15 1970 (4) SA 78 (C) at 82G - H.

16 There are a number of other indications in the Labour Tenants Act that a scheme of expropriation is indeed intended by chapter III. For example, the cross reference to "just and equitable compensation as prescribed by the Constitution for the acquisition by the applicant of land . . ." in section 23(1) is a cross reference to section 25(3) of the Constitution of the Republic of South Africa Act 108 of 1996, the subsection of the property clause which deals with the determination of compensation for expropriation of property. See also Section 38(1) of the Labour Tenants Act which deals with the registration of deeds of transfer in respect of land awarded in terms of chapter III of the Labour Tenants Act. Transfer takes place in terms of section 31 of the Deeds Registries Act 47 of 1937 which deals with the transfer of expropriated land.

17 See *S v Wymers* 1968 (1) SA 118 (O) at 120.

18 See *Mlifi v Klingenberg* [1998] 3 All SA 636 (LCC) at 648i-649e and *Minister of Land Affairs and another v Slamdien and others* [1999] 1 All SA 608 (LCC) at 615b-617d.

19 See section 12 of the Labour Tenants Act.

20 There was reference in the evidence in this case, which was not disputed, to the well-established concept of a "labour farm" which is to be found in the northern KwaZulu-Natal area. This is apparently a farm which is used exclusively by an employer of labour tenants and their families to provide them with land

rights conferred by sections 3, 12 and chapter III would seriously undermine the main purposes of the Labour Tenants Act. Those purposes are described in the long title as follows:

> "To provide for security of tenure of labour tenants and those persons occupying or using land as a result of their association with labour tenants; to provide for the acquisition of land and rights in land by labour tenants; and to provide for matters connected therewith. [21]

[24] In interpreting the word "part", regard must be had to the presumptions of statutory interpretation that an absurd, harsh or unjust result is not intended.[22] On first respondent's interpretation of that word, labour tenants who occupied and used an entire farm would have no claim under chapter III, yet those who occupied only a fraction less than the whole farm would be entitled to claim. This would amount to an unjustifiable form of discrimination. The result may well be that a labour tenant who has a claim in respect of an entire farm, would couch his or her claim in respect of a small fraction less than the whole to ensure that the claim was not rejected. This would be an absurd and undesirable state of affairs.

[25] There is another absurdity to which the first respondent's suggested interpretation gives rise. Paragraphs (a) and (b) of section 16(1) of the Labour Tenants Act set out various areas of a farm for which application might be made for an award, depending on the particular circumstances of the labour tenant before promulgation of the Labour Tenants Act. In paragraph (a), it is that part of the land concerned which the labour tenant was entitled to use and occupy on 2 June 1995.[23] In paragraph (b), it is:

> "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".

In paragraph (b), there is patently no limitation to a portion less than the whole of a farm. If the first respondent's argument was to be accepted, the labour tenant who used to occupy the whole farm, but was deprived of his or her occupation (a labour tenant contemplated in paragraph (b)) is entitled to the benefits of chapter III, while the labour tenant who occupied the whole farm without necessarily being so deprived (a labour tenant contemplated in paragraph (a)), is not. There is no logical reason for treating the two categories differently.

[26] In order to avoid these unjust and absurd results, the word "part" in section 3(1)(a) must

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for residential purposes, grazing and cropping. The labour tenants then provide labour on other farms belonging to the employer.

21 The last two paragraphs of the preamble are also relevant. They read:

> "WHEREAS it is desirable to institute measures to assist labour tenants to obtain security of tenure and ownership of land;
>
> AND WHEREAS it is desirable to ensure that labour tenants are not further prejudiced;"

22 Devinish *Interpretation of Statutes* (Juta, 1992) at 177-178

23 See above n 4.

be interpreted to include the entire farm, where the entire farm was used and occupied by a labour tenant. This in turn means, because of the cross-reference to section 3 in section 16(1)(a), that an award in terms of chapter III of the Labour Tenants Act is possible in respect of an entire farm.

Question 3: was there a proper referral?

[27] It was argued further by the first respondent that the section 16 application was not properly referred to this Court by the Director-General in terms of section 18(7) of the Labour Tenants Act[24] and that the referral was, therefore, void. The basis for this contention is that, if regard is had to the wording of the notice of referral, the Director-General referred to this Court an agreement and not an application as he was required to do by that section. The wording of the relevant part of the notice is as follows:

> "This document gives you notice that the Director-General of Land Affairs is referring a settlement agreement to the Land Claims Court concerning an application for an award of certain rights in land to Mpogeni John Khumalo and 13 others . . ." (my emphasis).

[28] The referral of matters to the Court in terms of chapter III is dealt with not only in the Labour Tenants Act, but also in rules 40 and 41 of the Land Claims Court Rules.[25] Sub-rules (1) and (2) of rule 40 provide as follows:

> "(1) When the Director-General refers any application to the Court in terms of section 17(6) or section 18(6) or (7) of the Land Reform (Labour Tenants) Act, he or she must initiate the case by a notice of referral based on form 5 or 6 (as the case may be) of Schedule 1 to these rules.
>
> (2) When filing a notice of referral, the Director-General must also file a bundle which contains at least the information and documents listed in rule 41, where relevant." [26]

[29] Form 5 of schedule 1 is a notice of referral expressly stated to be for the referral of matters by the Director-General where agreement has been reached and form 6, a notice of referral for the situation where no agreement has been reached. The referral in this case was effected by way of a notice of referral based accurately on form 5 of schedule 1 to the Land Claims Court Rules. The first part of the document[27] echoes the wording of form 5. It includes a description of the three farms making up the farm. It informs parties of their obligation to deliver a notice of appearance in the event that they wish to participate in the "Court proceedings which deal with the agreement". It informs the parties of their right to deliver a response to "the agreement or any report or other document in the bundle filed by the Director-General with the Land Claims Court". Attached to the notice of referral were the documents required by rule 41, including the settlement agreement and the Director-General's certificate in terms of section 18(5) of the

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24 The relevant part of section 18(7) is quoted in paragraph [18].

25 Published in Government Notice No 594 in Government Gazette No 20049 dated 7 May 1999.

26 Rule 41 deals with the information and documents to be submitted by the Director- General when referring an application to the Land Claims Court.

27 Including the part which I have quoted in paragraph [27].

Labour Tenants Act.[28]

[30] In my view, the Director-General complied with rules 40 and 41. His choice of form 5 as opposed to form 6 cannot be faulted. Rule 41(h)(iii)[29] suggests that, on referral of the matter to the Court, the relevance of a settlement agreement does not fall away if the Director-General declines to certify the agreement. The rule requires both the agreement and the certificate to be submitted to the Court as part of the referral. This is what he did. Moreover, form 6 is designed for the situation where the matter is to be referred to arbitration, not for the situation where the parties envisaged adjudication by the Court.[30]

[31] The question then is whether the Director-General's compliance with the rules gave rise to an invalid step in terms of the Act. That is not necessarily an impossible result if the rules have not been framed so as to be properly co-ordinated with the Labour Tenants Act.[31] Section 18(7) clearly envisages the referral of an application to this Court by the Director-General. Were the notice of referral and annexed documents in this case something other than an application?

[32] In my view the documents referred to the Court by the Director-General together constitute an application as envisaged by section 18(7). This is apparent from the following features of the documentation:

(i) The words "settlement agreement" in the above extract from the notice of referral are qualified by the words "concerning an application for an award of certain rights in land".

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28 Rule 41 (1)(h) reads:

> "When the Director-General refers any application to the Court as envisaged in rule 40(1), he or she must submit the following information and documents to the Court, where relevant -
> ...
>
> (h) where a settlement agreement for the resolution of any claim has been concluded, also -
> (i) the settlement agreement;
>
> (ii) where the settlement agreement was signed on any party's behalf, proof that the signatory was duly authorised to sign; and
>
> (iii) a certificate from the Director-General indicating whether or not he or she is satisfied that the settlement is reasonable and equitable."

29 Quoted above n 28.

30 In fact form 6 is outdated and needs to be amended pursuant to the amendment to section 19(1) of the Labour Tenants Act brought about by the Land Restitution and Reform Laws Amendment Act 63 of 1997. Prior to that amendment, all cases referred to the Court had to be referred to arbitration. The President of the Court now has a discretion whether to refer the matter to arbitration or direct that it be heard by the Court. Section 19(1) is quoted above in n 8.

31 See the discussion of the relationship between a statutory provision and subordinate legislation (the rules) in Erasmus *Jones and Buckle Civil Practice of the Magistrates' Courts in South Africa* 9th ed Vol 2 Service Issue (Juta ,1996) at 1-8

(ii) The heading to the notice refers to the applicants as "applicants" and to the first respondent as "respondent". This is nomenclature which suggests an application.

(iii) If there was any doubt as to the nature of the legal action being taken, this was resolved by perusal of the settlement agreement which formed part of the referral. Although it was not a binding contract because of section 18(5), it was very clear evidence of what the Director-General was doing, particularly when read with the certificate in terms of section 18(5). In clause 12 of the agreement, both applicants and the first respondent expressly requested "the Department of Land Affairs to refer this agreement immediately . . . to the Land Claims Court in terms of Section 18(7) of the Act" (my emphasis).

(iv) As required by rule 41(b), title deeds, the results of deeds office searches and maps in respect of the farm were included in the documents annexed to the notice of referral. There was accordingly no doubt as to which properties were affected.

(v) Also included in the documents annexed to the notice of referral was a copy of a notice which had appeared in the gazette in terms of section 17(2)(c) of the Labour Tenants Act giving notice that an application for the acquisition of land had been lodged in terms of section 17(1) of the Act. The properties making up the farms are described in the notice and the applicants are listed and described in the notice as applicants.

[33] The Court was accordingly satisfied that the application was properly referred.

The postponement

[34] Immediately after the Court handed down its ruling on the point *in limine*, the first respondent applied for a postponement on the following grounds:

(i) he wished to secure the services of a valuer to deal with the new approach of the second respondent regarding the value of the farm;

(ii) he wished to place in dispute the area of the farm to which the applicants had any claim and to contend that this did not amount to the entire farm;

(iii) he wished to "raise an estoppel" against the second respondent so as to prevent it from relying on the value contended for by them since the meeting of the expert witnesses;

(iv) generally it was argued on behalf of the first respondent that the court's ruling had taken him by surprise and that he had not, until the Court's ruling, been aware of the nature of the proceedings. Only now would he be in a position to prepare properly.

[35] These arguments were devoid of merit. The first respondent was legally represented throughout. Perusal of the settlement agreement reveals that the first respondent was fully aware of the nature of the proceedings and the implications of the referral of the matter (at the request of the first respondent himself, along with the applicants) to the Court in terms of section 18(7). This understanding of the matter was confirmed when all the parties agreed at the conference on 27 May 1999 that the only issue to be tried was the just and equitable compensation to be paid

in terms of section 23 of the Labour Tenants Act. This agreement was recorded in the minute of that conference. The latter part of rule 30(10) of the Land Claims Court Rules provides:

> "If feasible, the minutes must be submitted to the parties who attended the conference for comment. Thereafter the minutes will . . . be certified by the presiding judge, whereupon those minutes will be binding on all parties."

The minutes pertaining to that conference were duly circulated for comment and certified. In my view it was not open to the first respondent at such a late stage in the proceedings to attempt fundamentally to redefine the dispute by introducing new contested issues. He was bound by the minute of the conference on 27 May 1999.

[36] The suggestion that it was the second respondent which had caused the need to brief a new valuer was unfounded. The first respondent indicated at the conference on 26 July 1999 that he was ready for trial and would be calling two valuers as witnesses. One of those valuers, Mr Venter had filed an expert summary which confirmed that he would support the first respondent's contention as to the value to be placed on the farm. There was no suggestion as a basis for the postponement application, that Mr Venter was not available. Moreover, there had been three opportunities to object to the late notification by the second respondent of the low value which it would seek to place on the farm, none of which had been made use of. These were the meeting of the expert witnesses where this information was conveyed for the first time, the conference on 26 July 1999 and the time when the expert summary in respect of Mr Griffiths was filed. On none of these occasions did the first respondent raise the need for a postponement.

[37] Nor could the second respondent be blamed for the hurried fashion in which the proceedings were conducted. As I have illustrated above, this was at all times at the request of the first respondent. A party to litigation is not entitled to a postponement as of right.[32] This is all the more so where the first respondent was expressly not willing to tender any wasted costs relating to the postponement.[33] A postponement subject to a costs order would in any event not properly have remedied the prejudice which the other parties faced. Moreover, the first respondent, by his counsel's own admission, is in financial difficulty and may well not be able to make good any costs order.

[38] For these reasons, the postponement was refused. The costs issues arising from the matters referred to in these reasons are dealt with in the judgment of my colleague Judge Meer pertaining to the merits of this matter.

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32 Dendy (ed) *Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa*, 4th ed (Juta & Co, Cape Town 1997) at 666.

33 *Herbstein & Van Winsen* above n 33 at 668-670.

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JUDGE A DODSON

I agree

_____
JUDGE YS MEER

Heard on: 2-6 August 1999 and 23 September 1999 **Handed down:** 05 November 1999

Assessor appointed in terms of section 28(6) of the Restitution of Land Rights Act No 22 of 1994:
Mr A Stephenson

For the applicant:
C Loots of *Loots Attorneys, Pietermaritzburg*

For the 1st respondent
Adv A De Wet instructed by *J L Boshoff Attorneys, Pietermaritzburg*

For the 2nd respondent:
Adv J G Rautenbach instructed by *The State Attorney, Johannesburg*

For the 3rd respondent:
Unrepresented