IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **Randburg** on **16 – 20 August 2004, 5 October 2004** **CASE NUMBER**: LCC 39/01

before Moloto J

Decided on: **16 November 2004**

In the matter between:

MSINDO PHILLEMON MSIZA & Others Plaintiff

and

JOHANNES UYS First Defendant
DIRK CORNELIS UYS Second Defendant
JAN BLACKIE JOOSTE Third Defendant
THE DIRECTOR GENERAL OF LAND AFFAIRS Fourth Defendant
MINISTER OF LAND AND AGRICULTURAL AFFAIRS Fifth Defendant

JUDGMENT

MOLOTO J

1]Mr Amos Myelani Msiza, since deceased and hereinafter referred to as " the deceased", lodged a claim in terms of Chapter III of the Land Reform (Labour Tenants) Act[1] (Athe Act@) with the fourth defendant for an award of land and such servitudes of right of access to water, rights of way and other servitudes as are reasonably necessary or are reasonably consistent with the rights which he and his associates enjoyed or had previously enjoyed on the farm known as Remainder of Portion 4 (a portion of portion 2) of the farm Rondebosch 403 JS, in

1 Act 3 of 1996, as amended.

the district of Middelburg, Mpumalanga Province. I shall refer to it as "Rondebosch". The claim has been referred to this Court in terms of section 18(7)[2] of the Act.

1]
2]The first plaintiff stated that he acts in his representative capacity on behalf of himself and eight other family members of the deceased, as the deceased's "successor" within the meaning of that term as contemplated in section 3(4) of the Act and also as executor of the deceased's estate. The plaintiffs are children and daughters-in-law of the deceased.
2]
3]The first and second defendants are the sole trustees of the Dee Cee Trust which is the current registered owner of Rondebosch. The third defendant's wife was the registered owner of Rondebosch at the time the deceased lodged the claim. She has since passed on. The third defendant was in charge of Rondebosch at the time of such lodgment. No relief is sought against the third defendant. The fourth and fifth defendants were joined in their capacities as the officials responsible for administering the Act. The fourth defendant indicated that he will abide the Court's decision.
3]
4]The first and second defendants disputed the claim and filed a counter claim for the eviction of the plaintiffs from Rondebosch. The following issues, the first of which was raised by way of a special plea, stand to be determined:
4]
5]whether a proper claim in terms of the Act was lodged by the deceased in respect of 5]Rondebosch;

6]

6]whether the deceased was a labour tenant;
7]
7]the extent of the land that the deceased was entitled to claim, should it be found that he 8]was a labour tenant;

9]

8]whether the first plaintiff is the " successor" of the deceased;
10]
9]whether the second to ninth plaintiffs were "associates"[3] of either the deceased or the first 11]plaintiff; and

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2 It states that : "(2) If –

a) the owner does not submit proposals in terms of subsection (1); or
b) the applicant rejects a proposal in terms of subsection (4); or
c) the parties reach an agreement but the Director-General is not satisfied tht it is reasonable and equitable,

the Director-General shall, at the request of any party, refer the application to the Court and informt he parties that he or she has done so."

3 "associate" is defined in the Act as "a family member of a labour tenant, and any other person who has been nominated in terms of section 3(4) as the successor of such labour tenant, or who has been nominated in terms of section 4(1) to provide labour in his or her stead."

12]

10]the appropriate relief.
13]
14]Before dealing with the disputed issues, I record the findings of the inspection *in loco* that was conducted by the Court. These are :
15]
That the homestead of the plaintiffs is composed of 11 buildings which were explained as follows.

Starting from the northern side of the homestead and moving to the southern side, the buildings are numbered 1 to 11 and divided among the members of the family as follows:

The first three houses consist of an L-shaped building whose perpendicular part of the L is numbered 1 and the base of the L, 2. These two are built of mud and roofed with corrugated iron. They are flat roofed. Next and attached to the base of the L is a brick and mortar, flat roofed building marked No 3. These three buildings were said to be occupied by Elias Msiza.

The next building is a mud and corrugated iron flat roof building which is marked number 4. It is occupied by Phillemon Msiza, the plaintiff.

Next to house number 4 is another thatch roofed house, numbered 5, which was said to be occupied or used to be occupied by Amos Msiza.

House number 6 is a green flat roofed building. Within the same precinct as the green flat is a brick and mortar flat roofed building which was said to be a kitchen for the entire family. This flat roofed mortar and brick building also has a room which is occupied by Maria Msiza. The kitchen, i.e the brick and mortar building consisting of the kitchen and Maria's room is numbered 7.

Next is a mud house with thatch and canvass roof which was marked number 8. Next to it is a small corrugated iron roof flat. Nobody stays in these two structures as they are said to belong to the ancestors. The small flat was not assigned a number.

The next two houses, numbered respectively 9 and 10, a thatch-roofed house and corrugated iron roof flat, are occupied by April Msiza.

Behind the green flat, no 6, is a store-room numbered 11. House 3 is incomplete, the roof is half completed.

The yard in which all these houses are found is fenced and the area estimated at ½ hectare.

Other structures found on the yard are a motor-vehicle shed (port) under which stood some six motor vehicles that looked like scraps. There is also a small enclosed area behind buildings 1 to 3 which was said to be a place where some vegetables were cultivated but to no

avail.

On the western side of the houses and next to the car port, is a cattle kraal with smaller kraals which could be either goats or calves kraals.

The Middelburg Dam lies north of the homestead.

The inspection turned to the grazing land. Mr Jack Leon Williams the land surveyor, explained that the area bounded by the outer fence running from the homestead next to the cultivated fields and curving on the south of the homestead to the west and back towards the dam, is the grazing area. This area extends eastward along the banks of the dam for about one kilometer, past a spot pointed out as the ruins.

Mr Williams stated that the area pointed out to him as the cultivated fields extended along the western boundary of the said cultivated fields for a distance of approximately 5/6's of the designated fields on the plan; and extending for a distance of about 600m or 600 steps along its length up to a patch of uncultivated strip called the " wen-akker" . The parties appeared to agree that the length of the cultivated fields extended up to the wen-akker.

The width of the claimed land extends from the northern side of the fields, where there is a fence running east-west to a point in the cultivated fields where there is an uncultivated ridge which is said to block storm water from running into the cultivated fields. This point also represents the point where Mr Williams said there is a southern peg on the field. The northern peg is on the north most part of the cultivated fields where they meet the wen-akker.

Inside the claimed land, somewhere between the northern and southern pegs referred to above, are pieces of land which used to be cultivated by Swartbooi Mahlangu and Lucas Mokwena. However, between the self-same northern and southern pegs are also pieces of land which had been allocated to the women in the plaintiff's family.

It was pointed out that the plaintiffs first used to reside to the east of the current homestead whence they were moved to the current home upon the expropriation of the area by the municipality for purposes of the dam. The point where their old home used to be is under the water in the dam. They were moved from there in 1964.

The area between the dam and the northern boundary of the claimed land, and extending around the southern tip of the dam belongs to the Middelburg Municipality. Around the southern tip of the dam and on the northern side of the said tip, is a gate on the fence demarcating the municipal area.

Some cattle were found in the ½ hectare constituting the homestead on our arrival and others were seen grazing in the municipal area referred to in the previous paragraph on the northern side of the tip of the dam. Mr Phillemon Msiza stated that there were 35 of them.

16]Mr Williams is to furnish the distance from the beginning of the cultivated fields from

near the homestead to the wen-akker and the width thereof to enable a determination of the area.

17]

18]I turn to deal with the above disputed issues:

19]

11]Whether a proper claim was lodged in respect of Rondebosch

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21]In the claim that the deceased lodged for an award of land, the land claimed was described as Remainder of portion 11 (a portion of portion 9) of the farm Groenfontein 440 JS, Mpumalanga Province ("Groenfontein"). It was argued on behalf of the first and second defendants that inasmuch as the claim was in respect of Groenfontein, it was not a valid claim in respect of Rondebosch. It was further argued that the amendment in terms of which the name Rondebosch was substituted for Groenfontein was effected only after 31 March 2001,[4] the cut-off date for lodging claims for an award of land under the Act. This Court, so the argument continued, is a creature of statute hence has no inherent power to condone or rectify an incorrect claim, particularly because there is no provision for such condonation or rectification in the Act.

22]

23]Mr Euijen, for the plaintiffs, contended that the name of the farm given in the claim submitted to the fourth defendant is not a jurisdictional fact on which to base the Court's jurisdiction to adjudicate upon the claim for an award of land. He contended further that the claim is not a document that initiates the proceedings before Court, but rather merely initiates an administrative function performed by the fourth defendant. In support of this argument, reliance was placed on the cases of the *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* (1) 2003 (4) SA 397 (LCC) at 408C-409A [paras 21-22] and *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Others* 2003 (1) SA 373 (SCA) at 386C-E [para 25]; 387A-E [paras 28-30].

24]The following facts were either common cause or at least not disputed:

25]

a) the claim was lodged by letter dated 5 November 1996 from the office of attorneys Mkize, Phasha and Partners;

26]

b) the fourth defendant acknowledged receipt of the claim on 21 November 1996 by letter of the same date;

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4 See Section 16(1)(d) of the Act.

27]

c) the fourth defendant notified the third defendant of the claim in terms of the Act on 2 December 1996;

28]

d) the fourth defendant caused the claim to be published in Government Notice 5 of 1997 contained in Government Gazette of 3 January 1997;

29]

e) at the time of lodging the claim, the third defendant's late wife, Sarlina Gertruida Jooste (" the late Mrs Jooste") was the registered owner of both Rondebosch and Groenfontein;

30]

f) the two farms are contiguous to each other;

31]

g) the third defendant farmed and managed the two farms;

32]

h) at all material times the deceased's father, Mr Swartbooi Msiza, the deceased and his family resided, grazed cattle and cropped on Rondebosch;

33]

i) at all material times the two farms were owned by one and the same person or entity at the same time; and

34]

j) Mr Swartbooi Msiza and the deceased worked on both Rondebosch and Groenfontein.

35]

k) The amendment of the claim was effected after 31 March 2001.

36]

l) The correct name of the claimed farm was pointed out to the first plaintiff when the surveyor, Mr Jack Williams, visited the farm on 5 September 2001.

37]

38]The first plaintiff testified that when his family first arrived at Rondebosch, they knew it

as Groenfontein. This evidence was not contested. Documentation[5] in the papers before Court tends to support the impression that there was a reference to Rondebosch as Groenfontein, not only by the plaintiffs' family, but also by some of the people in charge of Rondebosch. Examples of such documentation are the following:

39]

i) Pages 1 and 2 of Bundle C of the documents are copies of the deceased's tax receipts. On these receipts, where it is stated "Name of farm or location" the name "Groenfontein" is entered. This information will most probably have been gleaned from his identity document (pass book) where it would have been written by his employer.

40]

ii) Pages 6, 7 and 8 are copies of the pages of a national identity document of one person, presumably one Mr Bosehla Enoch Msiza. Various " employers" signed these pages and under the heading "address of employer", the name "Groenfontein" appears. It is correct that the various people in charge of Rondebosch lived at Groenfontein, but for illiterate or semi-literate people, the fact that the name "Groenfontein" appears on their national identity documents might give them the impression that that refers to their own place of residence. This will be so when the reason for signing the pass-books in those days, is borne in mind. This was to provide proof of one's employment and the address where one was so employed.

41]

iii) Pages 12, 14, 15 and 18 are documents by the third defendant which he used to hand to the deceased (page 12), the first plaintiff (pages 14 and 15) and " J B Jooste arbeiders" (page 18), when these people transported their harvest to the Oostelike Transvaalse Koöperasie Bpk ("OTK"). These documents were addressed to the OTK to receive the grain and the third defendant's address appears on them as Groenfontein. For the same reason as in (ii) above, the bearers of these documents might have had the impression that " Groenfontein" referred to the farm where the harvest came from.

42]

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5 Bundle C of the papers.

iv) Pages 13, 16, 19, 20, 89, 90, 91 and 92 are "payment advice" slips to the people referred to in (iii) above who took grain to the OTK. The payment advices were issued by the OTK. Page 13 is addressed to "Amos Msiza", referring to the deceased, and the addressee's address is given as Groenfontein. Page 16 is addressed to "A Msiza" and his address is also given as Groenfontein. Pages 19 and 20 are addressed to "J B Jooste Arbeiders" and their address is also given as Groenfontein. Pages 89, 90 and 92 are addressed to "J.B. Jooste Arbeiders Groenfontein". It was accepted that "Amon Msiza" referred to the deceased. It is quite possible that the documents referred to in (iii) above created the impression on their recipients at OTK that their bearers also resided at Groenfontein, hence the bearer's address was given as Groenfontein on the payment advices.

43]

v) Page 17 is an "application for television licenses at special rate" . The application is by the third defendant who applied for a licence on behalf of the first plaintiff. Although it is stated on the form that the third defendant " owned /leased" the farm "Groenfontein/Rondebosch", his home address is given as "Groenfontein". Printed on the form below the name of the person on whose behalf the application was made are the words : "is a bona-fide farm labourer in my full-time employ who resides permanently on the above-mentioned farm . . ." It is not clear which " abovementioned farm" between Groenfontein and Rondebosch is referred to.

44]

vi) Pages 30, 31, 32, 33, 85, 86, 87 and 92 are delivery notes from Grain Marketing (Co-op) Ltd. The first three pages as well as pages 86, 87 and 92 are addressed to "J B Jooste arbeiders" while pages 33 and 85 are addressed to the first plaintiff. All give the addressee's address as Groenfontein.

45]

vii) Page 75 is a Labour Tenant Contract under section 4(1) of the Act No 24 of 1932 entered into between one Mr P S Muller ("Mr Muller") and Mr Swartbooi Msiza, the deceased's father and plaintiffs' grandfather. The farm

in respect of which the contract was entered into is stated as Groenfontein, although evidence was to the effect that the plaintiff's family, including Mr Swartbooi Msiza, resided on Rondebosch and never resided on Groenfontein. Of all the documents, this is the most telling.

46]

47]It is clear from the above that the name that was used in the daily lives of the plaintiffs' family was Groenfontein and not Rondebosch. It is hardly surprising that the family laboured under the impression that they resided on Groenfontein. When the first plaintiff noticed that the deceased had applied for an award of land and other relief on Groenfontein instead of Rondebosch, he caused an amendment to be effected to the claim. Section 3(1)(a) and (b) of the Act provides that –

48]

49]"(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 –

50]

m) to occupy and use that part of the farm in question which he or she or his or her associate 51]was using and occupying on that date.

n) 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. "

52]

53]

54]Section 16(1)(a) and (b) of the Act provides that –

55]

56]"(1) Subject to the provisions of this Act, a labour tenant or his or her successor may apply for an 57]award of –

58]

a) the land which he or she is entitled to occupy or use in terms of section 3;

59]

60](b) the land which he or she or his or her family occupied or used during a period of five 61]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;"

62]

63]The language of these two sections clearly states that the labour tenant has the right to apply for an award of that part of the farm which the labour tenant or his or her family or associate occupied or used or used to occupy and use . The first, second and third defendants were privy to the information in the title deeds of the properties and knew which property the plaintiffs resided on. The plaintiffs were not privy to such information. It should, therefore, have been clear to the first, second and third defendants which land the plaintiffs intended to

claim. The first, second and third defendants could not have been mistaken about the identity of the land claimed, simply because it was called by a different name. Yet correspondence in Bundle "A"[6] of the papers from the attorneys of some or all of the first, second and third defendants offered to settle the plaintiffs' claim without disputing the identity of the land claimed. I am mindful of the fact that the offer of settlement was made without prejudice, but am of the view that the making of the offer was in recognition of the validity of the claim or that even though it might have had defects, the said defects were not fatal. Besides, they could not have been prejudiced by the substitution of the name Rondebosch for the name Groenfontein. The contention on behalf of the first and second defendants, that this Court, as a creature of statute, does not have the inherent power to condone or rectify an incorrectly lodged claim is, in my view, misplaced. Section 22(2) of the Restitution of Land Rights Act[7] which is applicable also to the Act[8] provides that :

64]

65]"(2) Subject to Chapter 8 of the Constitution, the Court shall have jurisdiction throughout the Republic and shall have –

66]

67]

a) all such powers in relation to matters falling within its jurisdiction as are possessed by a High Court having jurisdiction in civil proceedings at the place where the land in question is situated including the powers of a High Court in relation to any contempt of the Court;

68]

b) all the ancillary powers necessary or reasonably incidental to the performance of its functions, including the power to grant interlocutory orders and interdicts;

69]

c) the power to decide any issue either in terms of this Act or in terms of any other law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the court considers it to be in the interests of justice to do so." (my emphasis)

70]

71]

72]I am satisfied that this Court has the power to condone or rectify an incorrectly lodged claim. The amendment is granted. Accordingly, I find that the deceased validly applied for an award of land and other relief in respect of Rondebosch.

73]

74](2) **Whether the deceased was a labour tenant**

75]

76]The Act[9] defines a labour tenant as –

77]

78]"a person –

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6 At p 2 to 3 thereof.
7 Act 22 of 1994, as amended.
8 See section 30 of the Act.
9 At section 1.

79]

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

80]

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

81]

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,

82]

83]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."

84]

85]A farmworker "means a person who is employed on a farm in terms of a contract of employment which provides that –

86]

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

87]

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

88]

89]It was common cause that the deceased resided on Rondebosch. The undisputed evidence was that he came to Rondebosch in 1936 with his father, Mr Swartbooi Msiza. He resided on Rondebosch until his death in 1997, a period of 61 years. Therefore, he satisfied the requirements of paragraph (a) of the definition of labour tenant.

90]

91]It was further common cause that the deceased had the use of grazing land on Rondebosch. The first plaintiff testified that from the early 1970's the deceased had about 26 or 28 cattle and the highest number was 38 cattle and 24 goats. (The cattle never reduced to below 20.) The first plaintiff's own cattle were 20 making the total 58. These cattle grazed all over Rondebosch with the third defendant's cattle. After 1976 they also grazed on Shill's farm, the use of which the third defendant had procured because grazing on Rondebosch had been reduced when some portion of it was expropriated to increase the Middelburg Dam. However, grazing on Shill's farm stopped when that farm was sold to someone else.

92]

93]The third defendant testified that the grazing of cattle by the deceased and any of the plaintiffs on Rondebosch was for free and not part of the consideration for which they provided labour. However, under cross examination, he stated that if the deceased and his family did not work for him they would not enjoy the free grazing.

The only exception he made was of a blind man. The first plaintiff testified that the man only had poor eye-sight and had worked for the third defendant, implying that he did not graze for free . To say if they did not work for him they would not enjoy free grazing is nothing less than saying they were entitled to graze because they worked for him. Therefore the grazing right was in consideration of the labour they provided him. On his own version, which confirmed the first plaintiff's testimony, the third defendant stated that the deceased's cattle grazed all over Rondebosch because there was no fencing.

94]

95]There is another factor to demonstrate that the deceased did not graze cattle for free or as a favour by the third defendant. In a notice purporting to dismiss the deceased, the third defendant wrote, amongst others, as follows:

96]

97]"(2) Aandag word daarop gevestig dat volgens oorspronklike ooreenkoms by indienstrede in 1971, jy geregtig is op aanhou van 18 stuks groot vee eenhede" (my emphasis).

98]

99]The deceased, it is found had grazing rights.

100]

101]It was further testified by the first plaintiff that the deceased, and some of the deceased's family members, had parcels of cropping land allocated to them by the third defendant. Each of the deceased, the deceased's sons, Boy and the first plaintiff had a piece of land measuring 600 x 50 paces. In addition, the deceased's wife and other females shared the yield from a piece of land also measuring 600 x 50 paces. Thus the deceased's family were entitled to the yield from four pieces of land each measuring 600 x 50 paces. These pieces had been allocated by the third defendant.

102]

103]Mr Havenga, appearing for the first and second defendants, argued that the entitlement to the yield from these parcels of land was not in consideration of the labour provided, as envisaged in the definition of labour tenant; but that it was payment in some other form of remuneration as contemplated in the definition of a farmworker. The basis for this contention was that the third defendant bore all the input costs for the cultivation of these parcels of land. The third defendant supplied the seed, used his tractors to plough and provided the transport for the yield to be taken to the milling company, OTK. I do not agree for the following reasons:

104]

a) If the entitlement to the yield was part of "some other form of remuneration", then the amount of the yield should have been constant every year irrespective of the harvest from such parcels of land;

105]

b) If the yield was to be constant, then there would have been no need for demarcating the parcels of land. It would have sufficed for the third defendant to cultivate the whole field as his own and then give each his or her ration of the constant yield. The demarcation was precisely for the purpose of defining the entitlement, in return for certain chores, as not everybody who worked was entitled to a parcel of land;

106]

c) The deceased and all those to whom parcels of land had been allocated bore the risk of profit or loss from such parcels. The risk was not borne by the third defendant; and

107]

d) It is not a requirement, in terms of the definition of a labour tenant, that the labour tenant must bear the input costs of cultivation. The deceased had grazing and cropping rights as envisaged in the definition of labour tenant, hence he satisfied paragraph (b) of that definition.

108]

109]The undisputed evidence of the first plaintiff that his grandfather, Mr Swartbooi Msiza, used to reside on Rondebosch, had cropping and grazing rights in consideration of the labour he provided to the owners of Rondebosch, proves that the deceased satisfied the requirements of paragraph (c) of the definition of a labour tenant. This evidence is supported by the written labour tenancy agreement between Mr Swartbooi Msiza and a Mr P S Muller. Although the agreement was in terms of Act 24 of 1932[10] and not in terms of the Act, it is clear from the wording of the agreement that Mr Swartbooi Msiza was granted the right to reside on the farm, crop and graze thereon in consideration of the labour he provided to Mr Muller. These are the requirements of paragraph (c) of the definition of a labour tenant.

110]

111]The deceased satisfied the requirements of paragraphs (a), (b) and (c) of the definition of a labour tenant. It remains to determine whether he was a farmworker or not. In so determining, reference must be made to his earnings; apart from the right to reside, crop and graze.

112]

113]The evidence showed that when the third defendant acquired Rondebosch in

10 Native Service Contract Act.

1971, he paid the deceased R8,00 per month and 80lbs of mealie meal per month. When a change to the metric system was introduced, the deceased was given 3 x 60kg bags of mealie meal every two months. This change evened out to the equivalent of 80lbs per month. The third defendant testified that he gave the deceased surplus milk after his own family needs had been satisfied. It is not known how much the surplus milk was or what its value was. The third defendant further testified that by the time he terminated the deceased's employment, the latter earned R200,00 per month. It is not clear for how long the deceased earned R200,00. The first plaintiff said it was from 1994 to 1996 that the deceased earned R150,00 and not R200,00. Neither the first plaintiff nor the third defendant mentioned how the deceased's earnings increased over the years from 1971 to 1994. The first plaintiff denied that the deceased earned R200,00 by the time his employment was terminated. He said the deceased earned R150,00 per month by then. The third defendant substantiated the assertion that the deceased earned R200,00, by reference to documentation relating to the deceased's claim in terms of the Workmen's Compensation Act, in which his earnings were stated as R200,00 per month. The third defendant stated that such information must have been given by the deceased himself, as he, the third defendant, did not supply it to the Workmen's Compensation Commissioner. I will accept, for purposes of computing the deceased's earnings, that he earned R200,00 per month at the time of the termination of his services.

114]

115]In comparing the value of the earnings with the value of the right to reside, crop and graze, the entire period of residence on the farm must be taken into consideration.[11] The deceased, according to the first plaintiff, resided on Rondebosch since 1936 when he came there with his father, Mr Swartbooi Msiza. The deceased provided labour to the owners or lessees of Rondebosch from 1940. Some of the owners or lessees he worked for were Mr Muller and Mr Pfyfer. Mr Swartbooi Msiza is said to have worked until 1960, from which time the deceased will have acquired the right to crop, graze and reside in his own right. No evidence of any

11 *Ngcobo and Others V Salimba CC*; *Ngcobo V Van Rensburg* 1999 (2) SA 1057 SCA at p 1075 paras [26] and [27].

remuneration was tendered. The only evidence of remuneration dates from 1971 when the third defendant acquired Rondebosch. According to the third defendant the deceased's average harvest was 5 ton per year. The deceased grazed between 20 and 38 cattle on Rondebosch and some goats which were removed after three years. The deceased had a homestead consisting of 9 houses (before the two incomplete structures were built) in which he lived with his wife and 12 children. The price of mealies varied over the years, according to the third defendant, from about R35,00 per ton in 1970 to about R300,00 per ton in 1996. He also said the deceased received 18 bags per year at R76,00 per bag.

116]

117]The deceased received R200,00 in wages. This was for a maximum of two years, according to the first plaintiff. He also received 18 bags per year at R70,00 per bag, which works out to R105,00 per month. At a price of R76,00 per bag it works out to R114,00 per month. The total cash wage is therefore R305,00 per month or R314,00 per month depending on whether a bag of mealie meal is priced at R70,00 or R76,00.

118]

119]The value of the right to reside, crop and graze was calculated by Mr Havenga as follows:

120]

a) According to Mr Uys, he rented land at R30,00 per hectare. Therefore the ½ hectare of residential area would be R15,00 per month.

121]

b) cropping right was an average yield of 5 tons per 2,5 hectare at R330,00 per ton which equaled R1 650,00 per annum or R137,00 per month.

122]

c) Mr Havenga argued that on the evidence on behalf of the defendants that the carrying capacity of the farm was 3 ha per Large Stock Unit (LSU), therefore 18 cattle would require 54 ha. However, the undisputed evidence of the first plaintiff was that the deceased had 38 cattle and the first defendant had 20. Therefore 38 cattle would require 114 ha. The value per month works out to 114ha x 30 ÷ 12 = R285 per month.

123]

124]

125]The comparison then works out as follows:

126]

127] **Cash wage + other form of remuneration**		**128]**	**129]Value of rights**	
130]Cash	131]R200,00 p m	132]	133]Residence	134]R15,00 p m
135]Mealie meal (at R70 p b)	136]R105,00 p m	137]	138]Cropping (2,5 ha)	139]R137,00 p m
140]	141]	142]	143]Grazing 38 cattle	144]R285,00 p m
145]Total	**146]R305,00 p m**	**147]**	**148]Total**	**149]R437,00 p m**

150]

151]

152]To the value of the rights must still be added the value of such rights from 1940 to 1971, a period about which there was no evidence of remuneration in cash or kind; the grazing of goats for 3 years according to the third respondent's evidence and the common cause fact that the deceased's cattle grazed all over the farm.

153]

154]I am not satisfied that the above is a correct way of calculating the value of the right to reside and graze. The value must be calculated from the point of view of the worker and not the farmowner.[12] In this way, there will be a comparison of apples with apples, inasmuch as the cash remuneration is the value to the worker (something the worker earns). In the above determination, the R15,00 per half hectare per month for residence, is not the benefit to the first plaintiff but rather the equivalent of the rent he would pay, were he to rent the half-hectare. The value will be the benefit he derives from investing his R15,00 in renting the half-hectare. That benefit consists of the home he is able to build on that half-hectare, which home in turn provides such benefits as security from the elements (the harsh winter nights, summer rain and hot sun), privacy and dignity. The list is not necessarily exhaustive. This is what

12 *Mahlangu V De Jager* 2000 (3) SA 145 (LCC) p 154 para [26] and p 157 para [41].

Olivier JA called " hearth and home"[13]. That it is difficult to place a monetary value on that benefit, is no reason for adopting an incorrect formula. The R15,00 is, to the deceased, in-put costs, but to the third defendant is income (from rental). Therefore, the amount of R15,00 constitutes value to the third defendant and not to the deceased. Whatever the monetary value of "hearth and home", it far exceeds the amount of rental or its equivalent, in particular in the circumstances of the deceased who raised 12 children in that home.

155]

156]The value of grazing must also be determined in the same manner. It must be determined what benefit the deceased got from grazing his cattle on the farm. This would be the increase in number of the livestock, the milk, meat from slaughtered beasts and proceeds of sales of some of them. Once again it is not easy to place a value on these benefits, particularly because no such records were kept by the deceased. Given that he was not a literate person, this is hardly surprising.

157]

158]

159]An attempt at placing a value on the right to reside and graze can be gleaned from the fact that he maintained a family of 14 from whatever he earned and managed to send some of the children to school up to tertiary level. The R305,00 per month would not have enabled him to send even one child to school, if all of them were to be fed and clothed. This is more so when it is borne in mind that the maximum wage of R200,00 per month was only earned from 1994 when virtually all the children were already grown ups.

160]

161]Viewed this way, the formula for the determination of the value to reside and graze is consistent with the formula used for determining the cropping right. The R137,00 per month value of the cropping right was determined by valuing the benefit derived from the cropping activity, not by valuing the input costs thereof.

162]

163]The value of the right to reside, crop and graze, clearly exceeds by far the amount of R437,00 mentioned above.

164]

165]The deceased was accordingly a labour tenant and not a farmworker.

166]

167](3) **The extent of the land the late Amos Msiza was entitled to claim**

168]

169]In determining this issue it is important to deal with it under three headings, namely (a) the homestead, (b) cropping land and (3) grazing land.

170]

a) <u>Homestead</u>

171]

172]The extent of the homestead, although unknown, is easily determinable.

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13 *Ngcobo and Others V Salimba CC*; *Ngcobo V Van Rensburg* at p 1076, para [28].

The homestead is fenced in an area that was estimated during the inspection to be ½ hectare. Whatever the correct extent may be, it is that area bounded by the fence running around the perimeter of the homestead.

173]

b) Cropping land

174]

175]The evidence established that this area is bounded by a fence on the western side just behind the plaintiffs' homestead running in a more or less south-north direction. The fence continues on the northern boundary and runs in a west-east direction. On the eastern side the boundary is demarcated by an uncultivated portion dividing the plaintiffs' cropping land and the third defendant's cropping land. This uncultivated portion was referred to during the inspection as the "wenakker" ("balk" or " headland"). The southern boundary is at a point in the cultivated lands where there is an uncultivated ridge for blocking storm water from running into the cultivated fields.

176]

177]Third defendant testified that the demarcated area as described above was made up of six pieces of land, each measuring approximately 600 x 50 paces. Each of the first plaintiff, the deceased, one Mr Lucas Mokwena, Mr Boy Msiza, Mr Swartbooi Mahlangu and the women had a piece of land approximately the said extent of 600 x 50 paces. The first plaintiff testified that he was no longer claiming Mr Lucas Mokwena's piece because he (Mr Mokwena) had later made an agreement with the third defendant. The first plaintiff also stated that an exchange was made between the women's piece and that of Mr Swartbooi Mahlangu in order to consolidate the land claimed. This would effectively reduce the demarcated area by two pieces of land each measuring 600 x 50 paces. In other words, the first four pieces of 600 x 50 paces, starting from the northern boundary would be the subject of the claim. This is so because in terms of section 3(1)(a) of the Act, the deceased is entitled to that " part of the farm . . . which he . . . or his . . . associate was using and occupying" (my emphasis).

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181]

c) Grazing land

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183]This is difficult to determine. The evidence was that the plaintiffs initially grazed their livestock all over Rondebosch. When part of Rondebosch was expropriated for purposes of the Middelburg dam, the third defendant procured the use of Shill's farm and all the livestock of the deceased, the plaintiffs and the third defendant grazed on both Rondebosch and Shill's farm. Shill's farm has since been acquired by a third party and the livestock of the plaintiffs no longer graze there. The third defendant has left the area. With the arrival of the first and second defendants on the farm, and after the lodgment of the claim, they restricted the plaintiffs' livestock to a camp approximately 36 hectares in extent.[14] The camp is said to be insufficient for the plaintiffs' grazing needs. It is by far less than the area that the plaintiffs used to use as grazing land. Rondebosch measures 352,5033 hectares[15] in extent. There are the cropping lands of the owners within this area, which will most likely not form part of the plaintiffs' grazing lands. Such cropping land would have to be excised for purposes of determining the extent of the deceased's grazing area.

184]

185]It was contended, on behalf of the defendants, that if the plaintiffs do succeed in their claim, then in relation to cropping land, they ought to succeed only to the extent of one parcel of land in extent 600 x 50 paces, being the piece actually used by the deceased. The basis for this contention was that in terms of section 3(1) read with section 16(1), a labour tenant is entitled to claim that portion of the farm "which he or she or his or her associate was using and occupying" on 2 June 1995. An "associate", so the argument went, is defined as a family member and a "family member"[16] is, in turn, defined as the "labour tenant's grandparent, parent, spouse (including a partner in a customary union, whether or not the union is registered), or dependant." Based on this argument it was submitted that the parcels of land allocated to the other members of the family must be excluded from the claim. The deceased's grandparents, parents and spouse having passed away and all the children of the

14 According to the diagram at page 9 of the pleadings Bundle.
15 Pleadings bundle, page 3, paragraph 9.1, admitted.
16 Section 1 of the Act.

deceased being adults and working, there was no one to be an associate of the deceased.
186]

187]I do not agree that so restrictive and narrow an interpretation should be given to "family member". Firstly such an interpretation would seriously undermine the Constitutional[17] imperative to promote secure tenure to this class of people. Secondly the long title of the Act states that "[t]o provide for security of tenure of labour tenants and those persons occupying or using land as a result of their association with labour tenants" (my emphasis).Thirdly, the children of the deceased, although adult and working, were and some still are, staying in the deceased's homestead on Rondebosch. They built their houses virtually as extensions of the deceased's house.[18] They were, at the time of lodging this claim with the fourth defendant, therefore still dependent on the deceased for a place to stay. To date some of them still live there. They were able to build such houses because the deceased had the right to live on Rondebosch with his family. The evidence of the first plaintiff was that he was nominated by his siblings as the deceased's successor during a meeting which was held on the homestead. In addition, he has been appointed executor of the deceased's estate.
188]

189]On the interpretation which I give to "family member" and by implication "associate", the parcels of land allocated to the other family members stand to be included in the claim. In this regard, it bears remembering that section 3(1)[19] states that ". . . a person who was a labour tenant on 2 June 1995 shall have the right with his or her family members –
190]

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;" (my emphasis)

191]

192]Section 16[20] in turn provides ". . . a labour tenant or his or her successor may apply for an award of –

193]

a) the land which he or she is entitled to occupy or use in terms of section 3."

194]

195]If I am wrong in holding that the adult, working children of the deceased are his family members or associates, then such adult children who worked on Rondebosch before the purported termination of their employment and either cropped or grazed on Rondebosch, will be labour tenants in their own right.

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17 Section 25(6) of the Constitution Act, Act 108 of 1996.
18 Most of the houses are built as attachments to one another, as observed during the inspection *in loco*.
19 of the Act.
20 of the Act.

They resided, cropped and/or grazed and provided labour in return. The deceased, their parent, had resided, cropped and grazed in return for which he provided labour. There is no evidence of their cash and kind remuneration exceeding the value of their right to reside, crop and graze. Such children would, at least, be the first plaintiff, and Mr Boy Msiza.

196]

197]Closely associated with the concept of "family member" was the argument, by Mr Havenga, that the first plaintiff left Rondebosch to live in Rusterwinter. On this issue the first plaintiff testified that he went to Rusterwinter when the grazing area on Rondebosch was reduced to a small camp by the first and second defendants, and long after the lodgment of the claim. He went there to seek feed for his cattle as there was insufficient grazing on the camp. There is no evidence that he left for Rusterwinter with his cattle, nor that he took with him every piece of property from his house. His house was still intact during the inspection *in loco*. I am not satisfied that the first plaintiff formulated the intention to permanently leave Rondebosch. He has in fact returned to Rondebosch.

198]

199]It was common cause that six parcels of land, each measuring 600 x 50 paces, were allocated to the workers. These were a parcel each for the first plaintiff, the deceased, Mr Lucas Mokwena, Mr Boy Msiza, Mr Swartbooi Mahlangu and the women. From the six must be deducted the parcels of Mr Swartbooi Mahlangu and Mr Lucas Mokwena who were not associates of the deceased. The women's parcel was shared by all the women who did certain types of work, including the deceased's spouse. All the other women, except the deceased's daughters, who shared in this parcel have either left or have not lodged claims for an award of land. The deceased's claim includes the land used by his spouse and daughters , being his associates. Therefore, four of the parcels of land fall within the deceased's claim, having been used by the deceased and his associates.

200]

201]The extent of the land occupied and used by the deceased is the whole of Rondebosch, less the cropping lands of the third defendant, Mr Lucas Mokwena and Mr Swartbooi Mahlangu.

202]

203](4) **Whether the first plaintiff is the successor of the late Mr Amos Msiza**

204]

205]The first plaintiff testified that he was nominated by his siblings at a meeting held

at the deceased's homestead as successor to the deceased. I have just found above, that the deceased's children, although adult and working, are his family members within the meaning of that term as defined in the Act. As family members, they are *ipso iure* also "associates"[21] of the deceased. Section 3(4) provides that such nomination may be made where the labour tenant is deceased, mentally ill or unable to manage his or her own affairs or suffers some other disability. The deceased's family nominated the first plaintiff after the deceased's demise. The majority of the family members who nominated the first plaintiff still live on Rondebosch in the deceased's homestead. He is therefore a successor to the deceased.

206]

207]The first plaintiff has also been appointed executor in the estate of the deceased by the Magistrate Middelburg on 30 June 1998. In that capacity the first plaintiff has the *locus standi* and duty to liquidate the estate of the deceased and distribute it to the heirs. Included in the liquidation of the estate is prosecuting to finality any actions which the deceased initiated in his lifetime and which had not been finalized at the time of his demise. Therefore, the first plaintiff has the necessary standing to finalise this claim which was initiated by the deceased.

208]

209](5) **Whether the other family members on whose behalf the first plaintiff purports to**

210]**act, were associates of either the late Mr Amos Msiza or the first plaintiff.**

211]

212] This issue has already been dealt with under paragraph (3) above, when determining the

213]extent of the land the plaintiffs are entitled to claim. It was found there that, at least those plaintiffs who still reside on Rondebosch, in the deceased's homestead, are the deceased's family members, therefore, also his associates.

214]

215](6) **The appropriate relief**

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217]The extent of the land the plaintiffs are entitled to claim, as stated above, is the following:

218]

a) the area of the homestead, demarcated by the fence on the perimeter of the homestead yard.

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21 See footnote no 3 above.

219]

b) four parcels of cropping land each 600 x 50 paces in extent.

220]

c) Grazing land in extent equal to the rest of Rondebosch less the remainder of the ploughing fields.

221]

222][5] **Costs**

223]

224]It was contended on behalf of the first and second defendants that, whatever the outcome of the case, "the conduct of the plaintiff and his attorney was such that an appropriate order of costs should be made against either the plaintiff or his attorney *de bonis propriis* or both jointly and severally." The basis for this contention was stated as the attempt to mislead the Court through the evidence of Mr Williams and the plaintiff.

225]

226]Mr Jack Leon Williams ("Mr Williams") was the surveyor who testified as an expert for the plaintiffs. His evidence left much to be desired, to say the least. He surveyed the cropping fields in September 2001 in preparation for trial. He was in the company of the first plaintiff who pointed out the fields to him. He determined the area of the cropping fields to be approximately 11,3 ha, yet testified that they measured 25 ha. He explained that his instructions were to draw a diagram showing 25 ha. This is dishonest and completely unacceptable.

227]

228]The first plaintiff on the other hand testified that he had been told by the third defendant that the parcels of cropping fields were 5 ha each. He persisted in this version through his evidence. However, during the inspection *in loco* he pointed out fields in the exact extent as the third defendant also pointed out. It was confirmed by Mr Williams also that what the first plaintiff pointed out was the same extent as what he had pointed out to him in September 2001. The first plaintiff did not try to point parcels of cropping fields bigger than was actually allocated. Therefore, to infer, as was suggested during argument, that his persistence that the fields were 5 ha each was deliberately misleading, is incorrect. It demonstrates a lack of understanding of measurements. He was clear about the identity of the parcels of land, but just did not know that they were not 5 ha each, but approximately 600 x 50 paces. He persisted that they were 5 ha because, according to him, that was what the third defendant had told him.

229]

230]The defendants' case is equally fraught with contradictions and inconsistencies which suggested an intention to mislead. The third defendant contradicted himself or tendered inconsistent testimony in the following respects :

231]

a) he testified that grazing by the deceased was a gift and not part of the remuneration in consideration of which he provided labour. Yet in the letter purporting to terminate the deceased's services he stated, among others, that :

232]" 2. Aandag word daarop gevestig dat volgens oorsponklike ooreenkoms by in dienstrede in 1971; jy geregtig is op aanhou van 18 stuks groot vee eenhede." (my emphasis.

233]

234]These two versions are *per se* contradictory.

235]

b) The third defendant ceased farming operations at the end of 1996. As a result he terminated the employment of all people working for him. He wrote to the first plaintiff, Mr Lucas Mokwena, Mr Swartbooi Mahlangu and Mr Dakwana Msiza[22] on 31 January 1997 informing them that the reason for terminating their employment was the cessation of farming operations. At the same time he wrote to the deceased, also terminating his employment, but gave as a reason the " onaanvaarbare verlengde afwesigheid van werkplek sonder verlof of toestemming en word beskou as gedros." The deceased was at the time a 76 year old man who had been involved in a tractor accident in 1994 resulting in a hip-replacement operation and long recuperation period. He had also just lost his wife in November 1996. The letter terminating his employment was dated 22 January 1997. There can be no reason for dismissing the deceased for absconding when the third defendant had ceased operations. The only reasonable inference for such a reason is that the deceased had lodged his claim in November 1996 and the third defendant was trying to lay a foundation for frustrating it. This, in my view, would merit special punitive costs in the same way as prayed for against the plaintiffs.

236]

237]The intention to frustrate the claim can also be inferred from the defences that the third defendant put up, namely that the grazing was a gift when he had stated in the purported termination letter that the deceased was entitled to graze 18 large stock units. In any case, the limit of 18 large stock units was

22 Pp 40, 75, 76 and 77 of Bundle B of the papers.

emphatically denied by the first plaintiff who stated that there was no limit to the number of cattle. There was no evidence of the third defendant ever demanding that the deceased keep his livestock within the limit of 18 cattle in the 25 years that the deceased was on Rondebosch with the third defendant. On the contrary, the undisputed evidence was that the deceased's cattle were never less than 20 and were 38 when the third defendant ceased farming operations. In addition to those there were 20 of the fist plaintiff. The limit of 18 cattle mentioned in the letter to the deceased was yet another fabrication aimed at thwarting the claim.

238]

239]A further plot to frustrate the claim was the claim by the third defendant that the yield from the cropping fields was not in consideration of the labour the deceased provided to him.

240]

241]I am satisfied that there has been reprehensible behaviour on either side, meriting equal punishment by way of a costs order. In the event, such orders cancel each other out.

242]

243]The following order is made :

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245]

a) the deceased is found to be a labour tenant.

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247]

b) The claim for an award of land and such servitudes of right of access to water, rights of way and other servitudes as are reasonably necessary or are reasonably consistent with the rights the deceased and his associates used to enjoy on the farm known as Remainder of Portion 4 (a portion of portion 2) of the farm Rondebosch 403 JS, district of Middelburg, Mpumalanga Province is granted.

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249]

c) The land awarded comprise the whole of the said farm referred to in paragraph (b) above as it was on 2 June 1995, less the ploughing fields of Jan Blackie Jooste, Lucas Mokwena and Swartbooi Mahlangu.

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d) There is no order as to costs.

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JUDGE J MOLOTO

For the plaintiffs:

Adv M Euijen instructed by the *Legal Resources Centre*, Pretoria.

For the 1st to 3rd defendants :

Adv H S Havenga instructed by *Peet Grobbelaar Attorneys*, Pretoria

For the 4th and 5th defendants:

Adv E I Moosa instructed by the *State Attorney*, Pretoria.