

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Heard at Pietermaritzburg in 2007
Before Ncube A J

CASE NUMBER: LCC 95/2006

Decided on 29 February 2008

In the case between:

SIMON MHLONGO

Plaintiff

and

SESLEY FARM TRUST

First Defendant

DIRECTOR GENERAL FOR DEPARTMENT OF LAND AFFAIRS

Second Defendant

JUDGMENT

NCUBE A J:

[1] This is an action, in terms of which the plaintiff seeks a declaratory order. He prays for an order declaring him to be a labour tenant at Selsely Farm. The plaintiff is Simon Mhlongo who is about 73 years of age. He resides at Selsely Farm in the District of Lions River. The first defendant is Selsely Farm trust. The second defendant is the Director General of the Department of land affairs. The first defendant is a trust. A trust has no legal personality in law and as such all trustees must have been cited in this action. That was never done. However, as the defence has raised no objection, I will not take that point any further.

[2] The plaintiff Simon Mhlongo was born in 1934, he was born on the farm known as Maritzdaal. Maritzdaal was owned, at that time, by McKenzie Guy Kimber. McKenzie Guy Kimber had three farms under his control. It was Maritzdaal, Nhlosana and Selsely Farms. Simon Mhlongo is a son of one Violet Nomanpondo

Mhlongo. Violet Nomanpondo Mhlongo was working for Mr Mckenzie Guy Kimber's wife as a domestic servant in Maritzdaal farm.

[3] The plaintiff, was born at Maritzdaal farm, he grew up on that farm and was subsequently employed by Mr. McKenzie Guy Kimber as a tractor driver. Violet and Simon continued working at Maritzdaal Farm up until 1953 or 1954 when they moved from this particular farm to Selsely Farm which is the present farm on which the plaintiff is residing at the present moment. When the plaintiff and his mother moved from Maritzdaal, the plaintiff's mother, Violet Mhlongo, had worked for Mr. Mckenzie Guy Kimber for a period of about forty three years. The plaintiff continued working as tractor driver at Selsely farm. At a later stage Mr Mckenzie Guy Kimber's son by the name of Michael Kimber took over Selsely Farm. Michael Kimber continued employing the plaintiff as a tractor driver but he was also performing other duties on the farm apart from being a tractor driver. At this stage McKenzie Guy Kimber had left Selsely farm and he had gone to Tongaat with his wife. Simon's mother went along with Mr Mckenzie Guy Kimber's wife to Tongaat to work for Mckenzie Guy Kimber's wife there, where they had purchased a house. The evidence reveals that the relocation of Violet to Tongaat was not on a permanent basis but it was just a temporary arrangement because on certain occasions Violet used to go back to her homestead which was at Selsely farm. She had left her family at Selsely farm. The plaintiff was also left at Selsely farm.

[4] It is not clear if Nomampondo had any cattle when she arrived at Selsely farm from Maritzdaal but it appears from the evidence that at a certain stage they, together with Simon Mhlongo acquired cattle. According to the evidence of Michael Kimber, Violet did not have cattle when she arrived but it was the plaintiff Simon Mhlongo who subsequently acquired stock. It is clear that the Mhlongo family was allowed to crop on Selsely farm. According to the plaintiff they were cropping in front of their homestead and also at the back of their homestead where later on a gum tree plantation was grown. The Mhlongo family also had a right to graze cattle on the farm. In 1982 Violet Nomampondo passed away and was buried on the farm. It was during this time that the plaintiff inherited cattle from his mother. Both Violet and Simon were paid a salary when they were working initially for Mr Mckenzie Guy

Kimber and Simon subsequently for Michael Kimber. It is not clear how much Violet was paid in salary but the plaintiff was initially paid an amount of two shillings per month and subsequently when he was working for Michael Kimber he was paid an amount of two hundred and sixty rands per month. Apart from their salary they were also paid rations. The rations which were given to Simon were a bag of mealie meal, 2,5 kilo grams of Sugar, tea and a bar of soap.

[5] Michael Kimber started farming on Selsely farm in 1958. The plaintiff worked for Michael Kimber as from 1958 up until 1998 when Michael Kimber sold Selsely farm to Mr. Watson. The plaintiff and other occupiers of Selsely farm who were there during the time of Michael Kimber continued working for Mr. Watson up until 1999 when the plaintiff fell sick and stopped working for Mr. Watson. Mr. Watson subsequently sold Selsely farm. The first defendant acquired Selsely farm in the year 2004. Mrs Wray and Dr Aldeus, her husband are both trustees of the first defendant.

[6] The first defendant acquired Selsely farm for purposes of conducting a business of racing horse breeding. The first defendant subsequently moved some of its racing horses to Selsely farm. The first defendant conducts this business for its own purposes and also on behalf of its clients. This business is internationally recognised. The first defendant breeds horses from all over the world. It breeds horses from Brazil, Argentina, Singapore, England, Ireland as well as Australia. It is a specialised type of business. The first defendant requires a big space at Selsely farm where it can freely conduct its business. When Mrs Wray arrived at Selsely farm in 2004 she called the plaintiff together with Mr Johnson Mdladla and Mr.Ndlovu who were the people still resident on Selsely farm after it was sold by Mr. Watson. She expressed a desire to employ them but apparently they refused to do so. Mr. Mhlongo indicated that he was sickly and Ndlovu and Mdladla were just not willing to work for the first defendant.

[7] This has been a very long trial. A total of ten witnesses in all testified. There were three witnesses called by Mr Mbhense on behalf of the plaintiff. The first witness was the plaintiff Mr. Mhlongo, the second witness was Mr. Ndlovu and the third witness was Mrs. Mhlongo the wife of the plaintiff. There were seven witnesses

called by Mr. De Wet on behalf of the first defendant. The first defence witness was Mr. Michael Kimber, the previous owner of Selsely farm, the second witness was Doctor Aldus who is the husband of Mrs G Wray and one of the trustees of Selsely farm trust. The third witness was Mr. Watson the person who bought Selsely farm from Michael Kimber and subsequently sold it to the first defendant. The fourth witness was Mrs Wray herself as one of the trustees of Selsely, the fifth witness was Mr. Kemp. Mr. Kemp is an agricultural expert who was once called upon to inspect the land which the plaintiff presently occupies and uses and to compare that land with a site that was offered to the plaintiff as an alternative land. The sixth witness called by the defence was Mrs. Hayworth who is a tenant of Mrs. Wray on the farm and the seventh and the last witness called by the defence was Mr. Stafford. Mr. Stafford is employed by a company called Rapid Agriculture which deals with water reticulation, they also dig boreholes and work on the amount of water that is necessary for people to help them with their horses. He is the person who was once called to Selsely farm in order to do an assessment and build a water trough for the plaintiff's cattle.

[8] The evidence of the plaintiff is to the effect that he arrived at Selsely farm in about 1953 or 1954 with his mother. They were from Maritzdaal farm. He started working at Selsely Farm at about that time. He told the court under cross examination that when he arrived at Selsely farm he personally did not have any cattle. He told the court that his mother acquired one cow and it was that one cow which his mother owned and afterwards they got many cattle from that cow. He told the court that his mother had borrowed money from her employer Mr McKenzie Guy Kimber in order to pay for the cow which she bought and that Mr. McKenzie Guy Kimber would then deduct that money from his mother's salary until the loan was paid off. The plaintiff told the court that he inherited his mother's cattle when his mother passed away in 1982. This shows that from 1954 up until 1982 when his mother passed away, he himself had no cattle but he was working on the farm and he was paid a salary, initially it was a salary of two shillings eventually he was paid a sum of two hundred rands a month and in addition he was paid rations which I have already mentioned. He was asked in cross-examination as to why he was working. His answer was that he was working in order to earn a salary. Mr. Mhlongo also told the court that at Selsely farm he had the right to crop and right to graze cattle. He told the court that when his mother passed

away he inherited about ten to twelve heads of cattle. He told the court that in 1995 he had about twelve head of cattle and twelve goats. The goats were subsequently stolen. He also had horses.

[9] According to his evidence, Mr Mhlongo was cropping mealies, madumbes, sweet potatoes and anything which he wanted to crop. In so far as the right to graze cattle is concerned, he told the court that there was no limit on the number of cattle and that at no stage was he asked to reduce the number of cattle to graze on the farm. In cross examination he was asked about the intimidation which is alleged to have been made by the plaintiff to Mrs. Wray. He was also asked about parties which he and other occupants of the farm had held over the years or since the time when the first defendant became the owner of Selsely farm. He denied the allegations of intimidation. He told the court he could not communicate in English, he can only speak Zulu and therefore he could not communicate with Mrs Ray in English. However he admitted that sometimes there would be certain functions taking place at Selsely farm and that such functions would stretch from Friday up until Sunday afternoon. He denied that they held such parties to make the life of Mrs. Wray difficult. He told the court that even during the time of Michael Kimber they held parties and that during that time such parties were attended by many people ranging from one up to ninety or hundred and that there was no problem with regard to the number of people attending the functions. It was Michael Kimber who was very fond of such cultural functions which he even attended himself. Mr. Mhlongo was cross examined about a contract of employment which he is alleged to have signed with Mr Watson, he was also cross-examined about a contract of lease and he denied having signed both the contract of employment and the contract of lease. He disputed the signature which appeared on both contracts, he was even asked to sign on a piece of paper and that piece of paper was handed in as an exhibit.

The only difference from the signature on both the contract of employment and lease contract is that, in those two contracts, the name of the plaintiff is reflected by means of an initial "S" where as in the piece of paper his name "Simon" is written in full. I shall return to this point later on in this judgement.

[10] Mr Mhlongo testified to the effect that he stopped working for Mr. Watson because he was sick. He told the court that Mr. Watson made him carry heavy iron

bars. A tractor was available. A tractor could have been used. It never was. Plaintiff contends that the reason why the tractor was not used, is because Mr. Watson wanted him to vacate the farm. The truthfulness of this statement could not be verified. In fact such contention leaves much to be desired. He stopped working for Mr. Watson in 1999. He was never chased out of the farm in fact he remained on the farm until the same was sold in 2004 to the first defendant.

[11] Mr. Mhlongo testified that his mother fell sick and was admitted at Edendale hospital where she passed away. The body was fetched by Mr McKenzie Guy Kimber in his bakkie and brought to Selsley farm where it was buried. This was initially disputed by Michael Kimber but he later on conceded that the plaintiff's mother might as well had been buried on the farm but expressed his dismay at the fact that he was not invited to attend the funeral. I shall deal with this aspect when analysing the evidence of Michael Kimber.

[12] The plaintiff disputed the allegations of threats to burn the farm, he also disputed the possibility of his cattle infecting the first defendant's horses with diseases as a result of non-inoculation. He contended that his cattle are in a poor state of health because Mrs Wray and Dr Aldeus burnt the plot where his cattle were grazing.

[13] Mr Mhlongo admitted drawing water from one of the springs in the conversation area without the knowledge and consent of Mrs Wray and Dr Aldeus. He told the court the reason is that Mrs Wray and Dr Aldeus cut the supply of water to his house. He never showed Mrs Wray and Dr Aldeus where he drew water from. The reason is that he feared that Dr Aldeus, as a medical doctor, would poison his water.

[14] Looking at the evidence of the plaintiff in its entirety, he impressed me as being an honest, reliable and truthful witness. He is very old, sick and weak but he survived a long cross-examination of Mr De Wet. There were few instances where he appeared to be evasive this however, cannot be said to be caused by deliberate untruthfulness or to say the least, recklessness in giving evidence.

[15] I turn now to deal with the evidence of the second witness called by Mr.

Mbhense a legal representative for the plaintiff and that was Vikimpi Pius Ndlovu. He testified to the effect that he knew Mr. Mhlongo and that he has known Mr. Mhlongo from the date on which Mr. Mhlongo fetched him from Blackhurst farm. He told the court that when he arrived at Selsely farm Mr. Mhlongo had cattle, goats and horses. Mr Ndlovu testified that Mr. Mhlongo had 22 head of cattle. The cattle were grazing in Selsely farm and also at the place known as Mahlathini.

[16] The long and short of the evidence of Mr. Ndlovu was that, on his arrival the plaintiff had livestock he also told the court that during the time of Mr. Michael Kimber there was no limit on the number of livestock an occupier could keep on the farm. Under cross-examination Mr. Ndlovu stated that 22 cattle he referred to in his evidence in chief in fact belonged to the plaintiff's mother Mangobese and that the plaintiff was an inmate in his mother's house.

[17] Mr Ndlovu's evidence was not very satisfactory. He appeared to be stubborn when he was cross-examined about Mr. Mhlongo's behaviour on the farm. Sometimes he contradicted himself. He told the court Mr. Mhlongo had 22 cattle, he later on changed to say that those cattle in fact belonged to Mr. Mhlongo's mother. He told the court he himself had 40 cattle when he arrived at the farm. Later on he told the court that by twenty cattle, he was referring to all occupiers' cattle on the farm collectively. When he was further asked to give the collective number of all the cattle on the farm, he could not give the number. When Mr. Ndlovu was told that Selsely farm could not keep so many cattle on the farm he changed and said he was not referring to Selsely farm only but to both Selsely farm and Nhlosana farms.

[18] I turn now to deal with the testimony of Ellen Mhlongo the wife of the plaintiff. She got married to the plaintiff at Selsely farm. This was immediately after the plaintiff and his mother had moved from Maritzdaal with Mr McKenzie Guy Kimber to Selsely farm.

[19] Mrs. Mhlongo told the court when she got married, her husband was staying with his mother Violet Nomampondo at Selsely farm. She testified that the plaintiff and his mother were cropping peas, mealies and potatoes. There were many fields

which they were ploughing including plots in front of the homestead.

[20] Mrs Mhlongo confirmed that the plaintiff and his mother had the right to graze cattle, although she could not say exactly how many cattle they were grazing on the farm. She estimated the number of cattle at Selsely farm to be three and the rest were kept at another farm known as Nhlosana. Ellen could not tell the court how much Violet, her mother-in-law, was earning. Her husband, the plaintiff according to her, was earning an amount of two pounds ten.

[21] Ellen and Simon have 7 children, 4 boys and 3 girls. Two of the children are late. One of their children is Nkosinathi. Nkosinathi is the one who is alleged to have caused problems on the farm because he quarrels with Mrs Wray and her husband Dr Aldeus, he does not recognise them as trustees of the farm. This allegation has been disputed by Ellen who told the court that Nkosinathi does not stay at home but stays at Howick, he only comes home when he is requested by his father to do so. Mrs Mhlongo denied that Nkosinathi causes problems on the farm and that he (Nkosinathi) intimidates Mrs Wray and Dr Aldeus. Of course one would not have expected Mrs Mhlongo to speak ill of her son. By this I do not mean that there is concrete evidence that Nkosinathi is causing trouble on the farm. However it is very disturbing that Nkosinathi was not called as a witness in the light of such allegations against him.

[22] Mrs Mhlongo confirmed in her testimony that the plaintiff refused to relocate with his family to an alternative land offered to them. She gave lack of water in the alternative land as being the reason for such refusal to relocate. The second reason was that there is no place to crop on the alternative land. The third reason they were reluctant or unwilling to leave their family graves at the place where they are residing now.

[23] Mrs. Mhlongo told the court that the Mhlongo family did not conduct cultural activities during the period of Mr. Watson. The reason is because it was not necessary. She told the court these cultural functions are held as and when there is a need for one. Mrs. Mhlongo's evidence was clear and straight forward. She proved herself to be both honest and reliable witness, and she was not subjected to any

vigorous cross-examination. She was the last witness for the plaintiff.

[24] The first witness called by the first defendant was Michael Kimber. Michael Kimber was the owner of Selsely farm until 1998. In 1998 he sold the said farm to one David Watson.

[25] Mr Michael Kimber is of Mr. Mhlongo's age, they grew up together at Maritzdaal farm before they could move to Selsely farm. He knows Mr. Mhlongo's mother Violet Mhlongo who was employed by Mrs. Kimber the senior. What is important in the testimony of Michael Kimber is that he denied that violet had any cattle when she arrived at Selsely farm. He did not recall Violet having 15 head of cattle on the farm. Michael Kimber testified that Mr Mhlongo subsequently acquired cattle. He could not remember how many cattle in all but he could remember that there was a limit of three cattle with their followers although the number used to fluctuate.

[26] Mr Kimber confirmed that the plaintiff worked for him (Mr Kimber) as a tractor driver and that the plaintiff was paid a salary every month. He told the court that keeping cattle and cropping were not part of Mr. Mhlongo's payment and that any other tractor driver could have been paid exactly the same salary as that one paid to the plaintiff.

[27] Michael denied that the plaintiff had to graze cattle in return for his services. He told the court, the plaintiff was paid a salary and in addition he was given rations. The maximum number of cattle allowed was ten, to be reduced to 3 or 5 cattle including calves. The other important feature of the evidence of Mr. Michael Kimber is that the plaintiff had to perform his duties in person he was not allowed to send another person to work in his stead.

[28] Mr Kimber informed the court that even during his time as the owner of Selsely farm, there were cultural activities on the farm. These activities would start from Friday afternoon and they used to stretch up until Sunday. He could not say how many people used to attend those cultural activities. He confirmed however, that

people used to come and go.

[29] Michael confirmed that the plaintiff signed an employment contract and a contract of lease with Watson. He was shown the signature on exhibit “A” and he identified it to be the signature of the plaintiff who was also known at the farm by the nickname of Maharaj.

[30] The disturbing feature of the evidence of Mr. Kimber is that his memory failed him. The reason for this might be old age. Unlike his friend Mr. Mhlongo, there are many things which Mr. Michael Kimber could not recall. He could not say if Mhlongo’s mother got money from his father to buy a cow. He could not remember when Violet moved to Tongaat at first he said it was in 1953 or 1954. When confronted in cross-examination and told that Mhlongo said it was in 1958 or 1959 he conceded that it might have been 1958. He was reminded that his statement indicated 1959 he replied “*possibly, what I said, I said*”. He did not know how much Violet was earning. He does not know how much he, himself paid to the plaintiff. He does not remember as to when the plaintiff acquired cattle. He was told that the plaintiff testified that he inherited cattle from his mother. He replied “*I was not there*”.

[31] Under the circumstances, it is hard to believe Mr. Michael Kimber when he says his father would have told him if Violet had borrowed money from his father to buy a cow. In any event, Guy, Michael’s father did not tell Michael everything. He never told him that he fetched the body of Violet from Edendale hospital and buried it on the farm. He did not tell him how much Violet was earning.

[32] I turn now to look at the evidence of Dr Aldeus. Just from the beginning it must be born in mind that Dr. Aldeus is a husband of Mrs Wray. Dr. Aldeus can, therefore, not be expected to give evidence which is unfavourable to his wife. He is not an independent witness. Dr. Aldeus testified about the nature of business which the first defendant conducts on the farm.

[33] The first defendant is conducting a highly scientific business which is race horse breeding on the farm. it breeds horses not only for the trust but also for other

clients. There are horses to breed from various countries which include Brazil, Argentina, Singapore, England, and Australia. Dr Aldeus told the court, these horses are very expensive as one such horse is valued at one million US dollars which, according to him, is equal to seven million rand in terms of South African currency.

[34] Dr. Aldeus expressed a concern that Mr. Mhlongo's cattle are the carriers of horse sicknesses as they are not vaccinated for bovine T.B and pyroplasmosis which are diseases transmitted by ticks. He testified about the risk which Mr. Mhlongo's cattle pose to his race horses.

[35] There was also evidence about the plaintiff grazing his cattle, in the conservation area. This leads to contamination of water. Contamination of water causes threat to human life and animals alike. Conservation area is an ecologically sensitive area which should be avoided by animals at all costs. Dr Aldeus testified that on several occasions he has warned Mr Mhlongo not to water his cattle in the paddocks used by the horses but there has been no co-operation from Mr Mhlongo.

[36] Dr. Aldeus told the court about the fire crackers which are ignited from Mr. Mhlongo's homestead over festive seasons. He told the court that over a period of two years, the first defendant has lost two horses through abortions because of fire crackers ignited from Mr. Mhlongo's house. In short, the evidence of Dr. Aldeus relates to the nature of business and the problems which the first defendant has encountered on the farm since it acquired the farm in 2004. That is the long and short of the evidence of Dr. Aldeus.

[37] David Watson also testified. He bought the farm from Michael Kimber in 1998. The gist of his evidence is that when he took over Selsely farm, he entered into two written contracts with three occupiers who were on the farm at the time. The first contract was the employment contract and the second one was the contract of lease.

[38] Mr. Watson told the court that the plaintiff, whom they call Maharaj, signed both contracts. He also told the court that the plaintiff was paid a salary of R500.00

per month. In addition to his salary, the plaintiff was given rations. The plaintiff worked for Mr. Watson for several months and he stopped working because of sickness. When he stopped working, he was not replaced by any member of his family.

[39] Mr. Watson told the court further that the plaintiff had a right to graze cattle on the farm. He was allowed to keep 3 cattle with 3 followers. If he exceeded the limit his cattle could be 6 or 8. He was not obliged to provide labour because he was given the right to graze cattle on the farm. He was also given a right to crop, he was in fact cropping in front of his homestead. About burial rights, Mr. Watson testified that the plaintiff had no right to bury his relatives on the farm and he was infact assured by Mr. Michael Kimber that there were no graves on the farm. It later transpired that there were graves on the farm. This might have been the reason why Mr. Michael Kimber was reluctant to admit that Mr. Mhlongo's mother was buried on the farm in question.

[40] Mrs. Wray testified .She is responsible for day to day operations on the farm. She testified about different incidents which took place on the farm. She told the court, that the people on the farm were not happy with their arrival as the trustees of the first defendant. The matter was even reported to Mr. Ntombela who threatened to have the farm expropriated if they did not comply with the needs of the occupiers. The first defendant had bought the farm from Mr. Watson, in November 1998.

[41] On arrival at the farm Mrs Wray called the occupiers. Those occupiers were the plaintiff, Mr Mdladla and Mr. Ndlovu. The occupiers refused to talk to Mrs. Wray. They told her to talk to their lawyer. Mrs. Wray asked the occupiers if they could work for the first defendant, but they all indicated that they were not prepared to work for the first defendant.

[42] Mrs Wray brought 32 horses when she arrived at Selsely farm. There was a need to construct more paddocks. She told the court that she was compelled to use a piece of land which had been used as the access road, she shifted the access road. Nathi, the son of the plaintiff, approached Mrs. Wray and told her, she had no right to close their access road. Nathi at that occasion was, according to Mrs. Wray, rude and

very aggressive.

[43] Mrs. Wray told the court that in December 2004, the plaintiff had 25 cattle which were grazing all over the farm. The cattle were grazing even in the conservation area. She called on the plaintiff to keep his cattle away from that area, but the plaintiff did not heed the call. Because the plaintiff's cattle were roaming around the farm, in January 2005, Mrs. Wray's dog attacked Mr. Mhlongo's cow whilst it was grazing in the paddock where it was not supposed to graze.

[44] Mr Mhlongo's cow was again attacked by the dog whilst it was grazing in the conservation area. Mrs. Wray approached Mr. Mhlongo and told him to keep his cattle away from that area. Mr. Mhlongo is alleged to have said that the farm was his and that he had been there longer than Mrs. Wray. It is also alleged that on that day, the plaintiff threatened to burn the farm.

[45] Mrs. Wray testified that in winter 2005, she had an altercation with a woman who was walking on the pastures, through the paddocks. The woman and a girl came from the plaintiff's homestead. Mrs. Wray warned the woman not to walk there. The woman said she was free to walk anywhere on the farm since there were no signs showing she could not walk on that part of the farm.

[46] In August 2005 there was fire on the farm after one of the workers had heard a voice of an old man saying there was going to be more fires since the new owners did not employ local people. This piece of evidence is hearsay and I shall not rely on it. However Mrs. Wray reported all incidents to the police. The police arranged a meeting with all people concerned. At the meeting, the occupiers were warned to reduce the number of their cattle. The plaintiff refused to reduce the number of his cattle.

[47] Mrs. Wray informed the court that her greatest concern is the level of noise. People come in and out of the farm. During festive seasons occupiers, including the plaintiff, always have parties. They crack fire works. Horses become frightened and get injuries. Sometimes the plaintiff and his family hold church functions at his

homestead although there is a proper church house and a school on the farm.

[48] Mrs. Wray is prepared to allow the plaintiff to graze his cattle on the passage which is about 9 or 10 hectares. She is prepared also to allow the grazing of the plaintiff's cattle on the Kikuyu pasture. In fact she testified that the plaintiff has, in the past grazed his cattle on the Kikuyu pasture.

[49] For more than three years, Mrs. Wray has been trying to reason with the plaintiff without success. Because of all the incidents which have occurred on the farm, Mrs. Wray and Dr. Aldeus want the plaintiff to be evicted from the farm. If the plaintiff is not evicted, they ask the court to put the conditions that he must reduce the number of his cattle, that he must not graze his cattle in the conservation area but on the corridor and the Kikuyu pasture.

[50] Mr. Kelson Camp, an agricultural expert testified. He told the court, he was requested to assess the land occupied by the plaintiff. He was requested to compare the land occupied by the plaintiff with the alternative land which was offered to Mr. Mhlongo. Mr. Camp told the court the concern is that the plaintiff grazes his cattle on the conservation area.

[51] Plaintiff's cattle go to the conservation area in order to drink water from the spring. Cattle leave cow-dung which contaminates water in the spring. Contamination of water causes a health hazard for both animals and human beings. Mr Camp indicated that the conservation area has been overused and it shows signs of soil erosion. There must always be grass on that area in order to act as water-catchment to prevent soil erosion.

[52] According to Mr. Camp, the uncontrolled movement of cattle on the farm will interfere with the first defendant's horse breeding enterprise. Mr. Camp testified to the effect that he had seen the corridor where the plaintiff is required to graze his cattle. He told the court, that corridor together with the Kikuyu pasture, are suitable to graze three cattle and three followers. He told the court that the first defendant needs more space for its operations. The first defendant has at present 17 hectares of land but it

needs another 19 hectares.

[53] Under cross examination, Mr Camp indicated that the corridor where the plaintiff is required to graze his cattle does not have water. Mrs. Wray had indicated that she was prepared to put up water troughs for the cattle, but the plaintiff chased away the person who was coming to build those troughs.

[54] Francis told the court that she is a tenant on a cottage in Selsely farm. She has given a notice to vacate the cottage. She signed a one year lease. She is leaving the farm at the end of the 11th month. The reason for leaving is that Mr. Mhlongo's cattle give her problems, they roam around the cottage all the time even at night. One morning Mr. Mhlongo and another man were talking loudly in front of her cottage. The plaintiff's children also play on the tree which is directly opposite the bedroom window.

[55] The last defence witness was David Stafford. He is employed by a company known as Rapid Agriculture. The company deals with irrigation and water reticulation on the farms. Mr Stafford testified to the effect that he at one stage was requested by Mrs. Wray to come and install a water trough behind the house of Mr. Mhlongo. He proceeded to where the trough was supposed to be installed.

[56] Mr. Stafford told the court that when he (Stafford) mentioned the word "water", he was approached by two females and a gentleman. Those people were aggressive. He was shouted at. He suggested to Mrs. Wray that they had to leave the farm immediately which they did. Mr. Stafford testified that Mrs. Wray has water problems. Water is scarce and it cannot be shared by cattle and horses.

[57] This is all the evidence which has been placed before the court in this trial. I am expected to make my determination on the evidence as it stands before me. I must look at the evidence in its totality. In making a determination, I am guided by the fundamental principles of our law. One of those fundamental principles is, that in a civil trial, the onus is on the plaintiff to prove his or her case on a balance of probabilities.

[58] It is clear from the evidence before me that there are enormous problems on

Selsely farm. These problems are between the plaintiff Mr. Mhlongo and the trustees of the farm. The first defendant has a registered title over that land. On the other hand, Mr. Mhlongo is living on the land. Mr. Mhlongo grew up on that farm. He has stayed on the farm for fifty four years. Mr. Mhlongo worked on Selsely farm for forty four years. He stopped working because of ill health. Mr. Mhlongo knows no other life apart from farm life and that farm happens to be Selsely farm.

[59] What is also clear from the evidence is that all occupiers of Selsely farm were given freedom on the farm during the days of Mr. Michael Kimber. They could freely graze their cattle. They could use water on the farm and they could hold cultural functions as they like. Although, Mr Mechael Kimber testified that there was a limit on the number of cattle to keep, the evidence reveals that the plaintiff had other cattle at another farm known as Nhlosana. In summer the plaintiff used to move some of his cattle to that farm.

[60] It appears to me that the cultural activities held from Friday to Sunday are not aimed at harassing Mrs. Wray. Those activities were held even during the days of Mr. Kimber. Mr. Kimber himself admitted that many people would attend those functions. Mr Ndlovu mentioned in his evidence that Mr. Kimber himself used to participate in such activities. One can understand why occupiers find it difficult to co-operate with Mrs. Wray who now comes with restrictions and rules which they must comply with. These restrictions are new and the occupiers are not used to them. However that does not mean that occupiers should not obey the instructions of the owner of the farm.

[61] With regard to the number of cattle which occupiers were entitled to keep, in my view, Mr. Kimber was not strict on the limit. There was no written agreement as to the number of cattle to be kept. When Mr. Watson took over Selsely farm, written agreements were signed in the presence of Mr. Kimber. Mr Kimber was selling the farm he wanted a buyer. He could not get a buyer if he did not assure the prospective buyer that there was a limit on the number of cattle the occupiers were entitled to keep. He could not get a buyer if he said there were graves on the farm. That was the reason why Watson was angry with Mr. Kimber when Watson subsequently discovered that there were graves on the farm.

[62] Concerning the documents alleged to have been signed by the plaintiff, I was only worried about the name “Maharaj”. It has been explained under oath that the plaintiff was known by that name on the farm. Both Watson and Kimber testified under oath that the plaintiff signed the contracts in their presence. I believe that the plaintiff signed both the lease contract and the contract of employment. The plaintiff wanted to work for Mr. Watson as he had been working for Mr. Kimber. If he wanted to work for Mr. Watson and Watson wanted his workers to sign a contract, he had no choice but to sign that contract.

[63] The main issue which calls for a determination is whether or not the plaintiff is a labour tenant. It is accepted that the plaintiff is presently residing on Selsely farm and that he has been resident on that farm for fifty three or fifty four years. It is accepted that the plaintiff’s mother Violet Nomampondo was working and resident on Selsely farm. The plaintiff was also working on Selsly farm. However, the fact that the the plaintiff and his mother were resident and working on the farm for such a long time, does not in itself qualify them as labour tenants.

[64] It is perhaps important to look at what is meant by labour tenancy in common law. In common law, there are two distinguishing characteristics of this type of contract. Those characteristics are:-

- (i) An undertaking by the labour tenant to supply labour to the farmer for part of the year.
- (ii) In return for the right to use some of the land for his or her own purposes¹.

The contract of labour tenancy has been described as a contract falling somewhere between a lease of land, known in Roman Dutch law as a *locatio conductio rei* and a contract of employment, known as *locatio conductio operarum*. It is not a true lease because the rent does not take a form of money, it is also not an ordinary contract of employment because the reward does not consist in money but in the right to occupy and use the land².

¹ Hathorn and Hutchison “Labour tenants and the Law” in Murray and O’ Regan- No place to rest. “Forced Removals and the Law in South Africa” page 200-201.

² No 1 Supra at 198.

[65] From the above, it is clear that the contract of labour tenancy is a contract *sui generis*. It is not a contract of lease and it is not a contract of employment. In **Mvubu v. Herbst**³ Krause J expressed himself in the following terms:-

“It is true that the relationship of a master and servant is incidentally established, in the performance of the contract, but I do not think that breaches of the agreement, from whatever cause, are governed by the principles which are peculiar to that relationship..... The contract between the parties is sui generis”.

In **De Jager v. Sisana**⁴, a leading case on the subject, Wessels JA referred to the contract of labour tenancy as an “innominate” contract.

[66] In common law labour tenancy, the labour tenant paid for the ground he was using in services he rendered to the landowner⁵. In certain instances in addition to the right to use the land, rations were also offered to the labour tenant. The other distinguishing feature of the contract of labour tenancy, is that the labour tenant was not obliged to provide labour in person, he could send another member of the family to the work in his stead⁶.

[67] Section one of the land reform (Labour Tenants) Act⁷(hereinafter referred to as the “Act”) defines a labour tenant in the following terms:-

“a person-

- (a) who is residing or has the right to reside on a farm;
- (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and
- (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm, including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3 (4) and (5), but excluding a farm worker”

On the other hand, the Act defines a farm- worker as follows:

“‘**farmworker**’ means a person who is employed on a farm in terms of a contract of employment

3 1924 TPD 741 at 749 and 752.

4 1930 AD 71.

5 Crous v Crous 1937 CPD 250 at 256.

6 No 1 above at 201- “obligations of the labour tenant”

7 Act no 3 of 1996.

which provides that-

- (a) in return for the labour which he or she provides to the owner or lessee of the farm, he or she shall be paid predominantly in cash or in some other form of remuneration, and not predominantly in the right to occupy and use land; and
- (b) he or she is obliged to perform his or her services personally.”

[68] A person who claims to be a labour tenant must satisfy all the requirements of paragraph (a), (b) and (c) of the definition of those terms⁸. The definition in section 1 of the Act must be given a conjunctive interpretation⁹. In the present case, the plaintiff has proved that he resided on Selsely farm. He has proved that he resided on Selsely farm since 1954. He has proved that he was working at Selsely farm since 1954. He has proved that as from 1982 he had the right to use cropping and grazing land on Selsely and Nhlosana farms. The plaintiff has also proved that his mother Violet Nomampondo was providing labour to Mr McKenzie Guy Kimber on both Maritzdaal and Selsely farm and that his mother had the right to use cropping and grazing land on Selsely farm.

[69] The plaintiff’s evidence falls short of providing that the right to use cropping and grazing land on the farm was exercised in consideration for the labour which he and his mother provided to the owner of the farm. He told the court, he was paid a salary of two shillings and he was subsequently paid R260.00. His mother was also paid a salary but he could not say how much was paid to his mother. Mr. De Wet has argued that it is imperative for the plaintiff to prove the latter part of paragraph (b) and (c) before he can be found to be a labour tenant. In other words the plaintiff must prove the link between the provision of labour and the right to use cropping and grazing land on the farm. I do not agree.

[70] In my view the test is whether a person is a farm-worker or not. The fact that a person was paid a salary cannot in itself lead to an inference that he is not a labour tenant but a farm-worker. The Act has, to a greater extent altered the common law position. The definition of a “farm-worker” in the Act contemplates a situation where a person can still be a labour tenant even if he or she is paid in cash or some other form of remuneration provided that payment does not predominate over the value of

⁸ De Jager & Sons v khumalo 1999(2) ALL SA 629 at 634.

⁹ Ngcobo and others v Salimba CC, Ngcobo and others v Van Rensburg 1999 (2) ALL SA 491 (SCA) and 1999(2) SA 1057 (SCA).

the right to use the residence, grazing and cropping land. In fact the plaintiff and his wife told the court that they could have survived even if no salary was paid. They would live on their crops and livestock.

[71] Section 2(6) of the Act, enjoins the court, in making its determination, to have regard to the combined effect and substance of all the agreements entered into between the person who claims to be a labour tenant and his/her parents or grand parents and the land owner or lessee of the land in question. In terms of agreements between the plaintiff and Guy Kimber and later Michael Kimber, the previous owners of the farm, the plaintiff had the following rights:-

- i) A right to establish his own homestead on the farm.
- ii) A right to reside on the farm.
- iii) A right to crop.
- iv) A right to graze cattle on the farm.
- v) A right to hold cultural activities from Friday till Sunday. Michael Kimber also took part in such activities and encouraged other workers to hold their cultural activities as well.
- vi) A right to bury the deceased members of his family on the farm.

[72] Apart from the provisions of Section 2(6) of the Act, Section 2(5) provides that in any proceedings where it is proved that a person falls within paragraphs (a), (b) and (c) of the definition of “labour tenant”, that person shall be presumed not to be a farm- worker, unless the contrary is proved. The onus was on the first defendant to prove that the plaintiff is a farm-worker. In my view, the first defendant has failed to prove that the plaintiff is a farm-worker. Accordingly, the presumption remains that the plaintiff is not a farm-worker but a labour tenant.

[73] I turn now to deal with the first defendant’s counter-claim. The first defendant amended its papers in order to introduce the counter claim. The first defendant seeks eviction order against the plaintiff irrespective of whether or not the plaintiff is found to be a labour tenant.

The grounds on which the eviction is sought are summarized in the heads of argument as follows:-

- i) Refusal by the plaintiff to provide labour to the plaintiff.
- ii) Refusal by the plaintiff to either speak or take instructions from the land owner which is the first defendant.
- iii) Refusal by the plaintiff to reduce the number of his cattle.
- iv) Refusal by the plaintiff to graze his cattle in a designated area.
- v) Threats by the plaintiff to burn the farm.
- vi) Claims by the plaintiff that the farm belongs to him.

[74] The plaintiff is over seventy years (70) years of age. He is a sickly pensioner, he stopped working for Mr. Watson because of sickness. This was confirmed by Mr. Watson. Under the circumstances the plaintiff cannot be expected to work for the first defendant. Concerning the allegation that the plaintiff claims the farm to be his, those allegations are unsubstantiated. Mr. De Wet clarified that point with the plaintiff in cross-examination. The plaintiff told the court, he had never claimed to be the owner of the whole of Selsely farm, but that he wanted a declaration to the effect that he was entitled to a certain portion of that farm.

There is insufficient evidence that the plaintiff threatened to burn the farm. It was the word of Mrs. Wray against that one of Mr. Mhlongo. Mr. Mhlongo does not understand English and Mrs. Wray does not understand Zulu. The matter was reported to the police and up to this stage, no arrest has been made, possibly because of lack of evidence. Having said this, the evidence reveals that Selsley farm cannot accommodate the number of cattle which the plaintiff keeps on the farm together with the first defendant's horses. If the plaintiff is allowed to continue residing at Selsely farm, he should reduce the number of his cattle.

[75] In terms of Section 14 of the Act, no labour tenant may be evicted while an application by him for acquisition of rights in land is still pending except where the court finds that special circumstances exist which make it fair, just and equitable to do so. In *casu*, there are no such circumstances. The eviction of the plaintiff in this case is also prohibited in terms of section 9(1) (a) of the Act. It is clear from the evidence that there is a breach of the relationship between the plaintiff and first defendant, but it is still possible to remedy it. This is fortified by the fact that Mrs. Wray concedes that the plaintiff is an old man and he may as well be allowed to stay on the farm until his death if certain conditions are imposed. It is true that even if the plaintiff is found

to be a labour tenant, the court has powers in terms of section 33(1)(eA) of the Act to prescribe as to how he must behave on the farm. In my view, in the circumstances of this case and pending further determination of the issues, the court will be entitled to exercise its powers in terms of Section 33(1) (eA) above.

[76] I shall now deal with the relief sought by the plaintiff. I have no problem with relief sought in terms of paragraph 12.1 of the plaintiff's statement of claim. However, I cannot grant the relief sought on paragraph 12.2 and 12.3. In paragraph 12.2, the plaintiff prays for an order against the first defendant, awarding the land or rights in land to the plaintiff in terms of section 22(2) of the Act. This I cannot do. Section 22(2) is only applicable after the application in terms of Section 16(1) has been referred to the Land Claims Court for determination. In *casu* there was no such referral, and the plaintiff did not identify any portion of the farm which he claims he is entitled to.

In paragraph 12.3 the plaintiff prays for an order against the second defendant which is the Director General in the department of Land Affairs, to award grants or subsidies for acquisition of land in terms of section 26 and 27 of the Act. Those sections deal with the administrative powers of the Minister to award grants and subsidies and in terms of section 27, the Labour tenant must apply to the Minister for the advance or subsidy.

[77] The plaintiff made an application to the Director General of the Department of Land Affairs for an acquisition of ownership of land in terms of section 16(1) of the Act. The first defendant denied that the plaintiff was a labour tenant and that he was entitled to an award of land. There was no agreement reached. The Director General did not refer the application to court. The plaintiff can still ask the Director General to refer his application to the Land Claims Court.

[78] In the circumstances I make the following orders;

1. The plaintiff Simon Mhlongo is declared a labour tenant with labour tenancy rights in Selsely farm.
2. The first defendant's counter claim is dismissed.

3. Pending a determination of the issue of acquisition of land:-
- (i) The plaintiff is prohibited from grazing his cattle in the conservation area and from interfering with the first defendant's paddocks.
 - (ii) The plaintiff is ordered to graze his cattle in the designated passage and the Kikuyu pasture.
 - iii) The first defendant is ordered to provide water troughs for the plaintiff's cattle at the spot pointed out by the plaintiff and fill them with water.
 - iv) The plaintiff is ordered to reduce the number of his cattle to six cattle within thirty days from the date of service upon him of this judgment by the Sheriff of Lions River and his cattle may not exceed the number of six at any given time.
 - v) In the event of the plaintiff failing to comply with the order granted above, the Sheriff of Lions River is hereby ordered to remove all the plaintiff's cattle in excess of the number of six, as indicated by the plaintiff; from the farm Selsely in the district of Lions River and take such cattle to such other place indicated by the plaintiff within the magisterial district of Lions River and in absence of the plaintiff indicating such other place, to remove such cattle to the nearest pound for the Pound master to deal with in terms of the applicable legislation dealing with Pounds.

4. No order is made as to costs.

ACTING JUDGE T NCUBE

For the plaintiffs:

Mr. Thabiso Mbhense for University Law Clinic Pietermaritzburg

For the first defendant:

Advocate A De Wet instructed by Hay and Scot Attorneys