IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case No: LCC140/ 2010

(1) REPORTABLE: YES ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES ~~NO~~
(3) REVISED.

26/04/2019 [signature]

DATE SIGNATURE

Heard: 30 May 2017, 31 May 2017, 1 June 2017, 29 June 2017, 30 June 2017, 4 September 2017, 5 September 2017, 20 November 2018, 22 November 2018
Judgment: 26 April 2019

In the matter between:

PHUNYULA DANIEL KUBHEKA	Plaintiff
and	
ELIZABETH SUSARA ADENDORF	First Defendant
DR HUBERT ADENDORF	Second Defendant
DIRECTOR GENERAL: DEPARTMENT OF LAND AFFAIRS AND RURAL DEVELOPMENT	Third Defendant

---

JUDGMENT

BARNES AJ

INTRODUCTION

1. This is an action in terms of the Land Reform (Labour Tenants) Act 3 of 1996 ("the Act") in which the plaintiff seeks a declaratory order in terms of section 33(2A) of the Act to the effect that he is a labour tenant and an award of land in terms of section 16 of the Act.

2. The affected land is portion 1 of the farm Cardie No 12399, Registration Division HS, in the district of Newcastle in Kwa-Zulu Natal ("the farm").

3. The plaintiff is Mr Phunyula Daniel Kubheka, a 69 year old pensioner currently residing on the farm. The first and second defendants, Mrs Elizabeth Adendorf and Dr Hubert Adendorf, are married and oppose the action. The Statement of Claim described them as the joint owners of the farm. The correct position however is that the first defendant, Mrs Elizabeth Adendorf, is the registered owner of the farm.

4. The third defendant has not opposed the action and abides the decision of the Court.

5. There were two key issues in dispute between the parties in the action, namely:

5.1 whether the plaintiff is a labour tenant as defined in the Act; and

5.2 whether the plaintiff lodged an application in terms of section 17 of the Act for the award of land.

6. I will deal with the law and the evidence pertaining to each of these issues in turn below.

IS THE PLAINTIFF A LABOUR TENANT?

The Law

7. Labour tenant is defined in section 1 of the Act as follows:

> "'**labour tenant**' means 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 farmworker;"

8. Paragraphs (a), (b) and (c) of the definition of labour tenant are to be read conjunctively.[1]

9. Farmworker is defined in section 1 of the Act as follows:

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

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

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

10. The onus which rests upon a plaintiff to prove that he or she is a labour tenant

[1] *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA) at para 11.

is set out at section 2(5) of the Act, which provides as follows:

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

11. Section 2(5) was introduced by way of an amendment to the Act in 1997. Before that an aspirant labour tenant bore the onus of proving both that he or she complied with paragraphs (a), (b) and (c) of the definition and that he or she was not a farmworker. The effect of the amendment is that once a plaintiff proves that he or she complies with paragraphs (a), (b) and (c) of the definition, the onus shifts to the defendant to prove that the plaintiff is a farmworker.[2]

12. The Supreme Court of Appeal ("SCA") has held that the definition of labour tenant must be understood and applied in a holistic and continuous sense, and that the enquiry should be focused on establishing the predominant quality of the occupation over the entire period for which the plaintiff occupied the land in question. The SCA held as follows in this regard:

> "If one approaches the definition in this holistic or continuous sense, it follows that what has to be established is the predominant quality of occupation over the whole period during which the present occupier has been complying with paras (a) and (b). It may be, as illustrated above, that in respect of some periods, the remuneration paid to the occupier in cash or some other form of remuneration (see para (a) of the definition of 'farmworker') may have exceeded the value of the right to occupy and use the land; and *vice versa*. What we have to find is the overall sense and value of the occupation. The present time is but one moment in this

[2] See *Mlifi v Klingenberg* 1999 (2) SA 674 (LCC) and *Mbhense v Brown and Another* (LCC33/05) [2006] ZALCC 8 (11 October 2006) at para 7.

continuum."[3] (emphasis added)

The Evidence

The Evidence for the Plaintiff

The Plaintiff, Mr Phunyula Daniel Kubheka

13. The plaintiff, Mr Phunyula Daniel Kubheka, was born on 19 September 1949. He is 69 years old.

14. Mr Kubheka was born and raised on Glen Barton farm, in the district of Newcastle in Kwa Zulu-Natal. Glen Barton is in the same valley as "the farm" - the affected land in this action. Mr Kubheka lived with his parents and 10 siblings in their family homestead on Glen Barton which comprised 9 structures.

15. Mr Kubheka testified that his parents had cropping and gazing rights on Glen Barton. They kept livestock and grew mielies, pumpkin and beans. Mr Kubheka's parents provided labour to the owner of Glen Barton, Mr Wynand Adendorf. They were not paid.

16. Mr Kubheka attended school up to Standard 2. When he was 11 years old he

[3] *Ngcobo v Van Rensburg* (supra n 1) at para 27.

started working on Glen Barton. So did his siblings. Mr Kubheka tended the chickens, collected the cows for milking and worked in the fields. Mr Kubheka testified that he was occasionally paid R1.00.

17. When Mr Adendorf passed away his nephew, Mr De Villiers Theunissen, took over the running of Glen Barton. In 1975, Mr De Villiers Theunissen asked Mr Kubheka to move to the farm, which he owned, to assist him with the running of a newly built dairy there. Mr Kubheka was 25 years old. He moved onto the farm with 20 cattle, 5 goats and 2 horses. He was allocated an area on the farm to build his homestead. He was entitled to graze his livestock and to plough. He provided labour for Mr De Villiers Theunissen. In particular he tended the dairy cattle, mended the fences and drove the tractor. Mr De Villiers Theunissen gave Mr Kubheka a bag of mielies every month. He sometimes gave him R30.00 but this was not a regular monthly occurrence.

18. Mr Kubheka's parents passed away and are buried on Glen Barton farm.

19. In 1980 Mr Kubheka married Ms Sellinah Tobhi Madlabane. She was born and raised on the farm. The couple had 6 children. Over time they built a homestead on the farm comprising 8 structures.

20. There was no limit on the number of livestock the Kubhekas were entitled to keep on the farm. Over the years, Mr Kubheka maintained his herd of cattle at approximately 20. He also had horses, goats and chickens. Mr Kubheka

testified that prior to the second defendant, Dr Hubert Adendorf, taking over the farm, he also had 8 oxen.

21. Mr Kubheka testified that from the time that he moved onto the farm in 1975 until 2001, he was entitled to use two camps on the farm for the grazing of his cattle.

22. Mr Kubheka testified that his family survived through selling the goods they produced on the farm. This included the crops that they cultivated, namely mielies, sorghum and pumpkins, and the milk they produced from their cows. They also sold chickens. Mr Kubheka testified that his wife went to the market in Volksrust twice a week in order to sell this produce. In addition, Mr Kubheka occasionally sold one of his cows.

23. In 1978 Mr De Villiers Theunissen passed away. Mr David Van der Linde rented the farm from 1978 to 1984. Mr Kubheka testified that Mr Van der Linde paid him R20.00 a month plus a bag of mielies. Save for this, Mr Kubheka testified that nothing changed. He continued farming on his portion of the farm. He provided labour for Mr Van der Linde as he had done for Mr De Villiers Theunissen.

24. Thereafter from 1984 to 1986, the second defendant, Dr Hubert Adendorf rented the farm. In 1986, Dr Adendorf purchased the farm and registered it in his wife's name. Dr Adendorf ran the farm. Mr Kubheka provided labour for Dr

Adendorf and testified that he was under the impression that Dr Adendorf owned the farm. Dr Adendorf paid him R30.00 a month. By the time Dr Adendorf left the farm in 1995, this had gone up to R80.00 a month. Mr Kubheka testified that the terms of his occupation and use of the farm did not change under Dr Adendorf and he continued to farm on his portion of the farm as he had done before.

25. In 1995, Dr Adendorf left the farm and rented it to Mr Paul Oosthuizen. Mr Kubheka testified that Mr Oosthuizen paid him R100.00 a month plus a bag of mielies. He provided labour to Mr Oosthuizen as he had done for Dr Adendorf. The terms of his occupation and use of the farm did not change.

26. In 2001 Mr George Lubbe replaced Mr Oosthuizen as the lessee of the farm. Mr Kubheka testified that Mr Lubbe paid him R750.00 month plus a bag of mielie meal. He provided labour for Mr Lubbe as he had done for Mr Oosthuizen. Mr Kubheka testified that Mr Lubbe stopped him from using one of the camps on the farm that he had always used to graze his cattle. He was very unhappy about this and complained to Dr Adendorf. Dr Adendorf did nothing about it and from 2001 Mr Kubheka was confined to one camp for grazing his cattle. Save for this, the terms of Mr Kubheka's occupation and use of the farm did not change.

27. Mr Kubheka stopped working in 2004.

28. Tragically, two of Mr and Mrs Kubheka's children passed away. They are buried on the farm.

29. In cross examination, it was put to Mr Kubheka that there was a limit on the number of livestock he was entitled to keep on the farm, namely 10 cattle, 10 goats and 2 horses and that his livestock numbers had been within these limits. Mr Kubheka denied this and maintained that he had kept livestock in the larger numbers set out above.

30. It was put to Mr Kubheka that he had only ever had the use of one camp on the farm for grazing his cattle. Mr Kubheka denied this and maintained that he had the use of two camps until Mr Lubbe stopped him from using the one in 2001.

31. It was put to Mr Kubheka that during the time that Dr Adendorf ran the farm he had, on an annual basis, provided Mr Kubheka with seed and fertiliser and ploughed for him using his tractor. It was put to Mr Kubekha that he had received the benefit of many good harvests as a result. It was put to him that 1995 had produced a particularly bountiful harvest and had yielded 56 bags of mielies for Mr Kubheka. Mr Kubheka agreed that Dr Adendorf had ploughed for him an on annual basis but said that prior to Dr Adendorf's arrival on the farm he had used his oxen to plough and Dr Adendorf had required him to sell his oxen. He had had 8 oxen. Mr Kubheka disputed that he had ever received 56 bags of mielies and said that 20 bags of mielies was the most he ever

received after a harvest.

32. It was put to Mr Kubheka that he had been paid significantly higher cash amounts than he claimed by the successive owners and lessees of the farm. These amounts are set out below. Mr Kubheka denied this and maintained that he was paid the cash amounts set out above.

Mrs Sellinah Tobhi Kubheka

33. Mrs Kubheka testified that her family survived by selling the crops they grew on the farm, namely maize, sorghum and pumpkin, the milk they produced from their cows and the chickens they bred. She testified that she made amasi from the milk they produced and sold this also. She testified that she went to the market in Volksrust every Wednesday and Saturday to sell this produce.

34. Mrs Kubheka testified that there was no limit on the number of livestock her family was entitled to keep on the farm. She testified further that her family had always had the use of 2 camps for grazing their cattle until Mr Lubbe stopped them from using one of the camps.

35. Mrs Kubheka did not know what cash amounts her husband was paid. She testified that she knew that Mr Oosthuizen had, on one occasion, paid her husband R100.00. She did not know whether this was a monthly occurrence.

36. Under cross examination, the same propositions regarding the limit on the number of livestock and the use of one camp that had been put to her husband, were put to Mrs Kubheka. She denied them.

37. Like her husband, Mrs Kubheka agreed that Dr Adendorf had ploughed for them but disputed that they had ever received 56 bags of mielies after a harvest. The most they had ever received, she said, was 20 bags.

38. It was also put to Mrs Kubheka that her husband was paid significantly higher cash amounts than he claimed by the successive owners and lessees of the farm. Mrs Kubheka stated that she did not know what her husband was paid.

The Evidence for the Defendants

Dr Hubert Adendorf

39. Dr Adendorf, the second defendant, is a medical doctor and a farmer.

40. Dr Adendorf testified that he rented the farm from 1984 to 1986. In 1986, he purchased the farm and registered it in his wife's name. Dr Adendorf ran the farm from 1984 to 1995. In 1995, he took a break from farming. He rented the farm to Mr Paul Oosthuizen from 1995 to 2001 and to Mr George Lubbe from 2001 to 2004. In 2005, Dr Adendorf resumed running the farm.

41. Dr Adendorf testified that when Mr Kubheka commenced working for him, he paid him R400.00 a month. He testified that this is also what Mr De Villiers Theunissen and Mr Van der Linde had paid Mr Kubheka. Dr Adendorf testified that he increased his workers' wages over the years and that by 1995, when he left the farm, he was paying Mr Kubheka R680.00 a month.

42. Dr Adendorf testified that he knew that Mr Van der Linde had paid Mr Kubheka R400.00 a month because he had spoken to him about it. The impression initially created in Dr Adendorf's evidence was that this conversation had taken place many years ago. However, it transpired during Dr Adendorf's evidence that he had not in fact spoken to Mr van der Linde but that his son, Mr Hubert Adendorf junior, had phoned Mr Van der Linde, during the course of the trial, and asked him what he had paid Mr Kubheka.

43. Dr Adendorf testified that he did not know what Mr Oosthuizen had paid Mr Kubheka but assumed it was the same as what he had paid.

44. Dr Adendorf testified that he paid all his workers the same, with the exception of Mr Madlabane, whom he paid slightly more because he had some mechanical skills. Dr Adendorf testified that one of his workers, Mr Mshushisi Zikalala, assisted him in paying the workers and handled the envelopes containing the wages. These envelopes were never sealed, said Dr Adendorf, and Mr Zikalala knew what all the workers, including Mr Kubheka, were getting paid.

45. Dr Adendorf accepted that Mr Kubheka had cropping and grazing rights on the farm. He testified however that Mr Kubheka's livestock were fewer in number than he claimed and that he had only ever been entitled to use one camp for grazing his cattle.

46. Dr Adendorf testified that when he arrived on the farm he had advised Mr Kubheka to sell his oxen on the basis that he would plough for him on an annual basis. He could not say how many oxen Mr Kubheka had at the time, but doubted that it was as many as 8.

Mr Mshushisi Zikalala

47. Mr Zikalala testified that he started working for Dr Adendorf in 1984 and still works for him currently. He testified that when he started working for Dr Adendorf he was paid R400.00 a month. He testified that his salary has increased over time. When asked what he is being paid now, he stated that he does not know.

48. Mr Zikalala testified that he sometimes assisted Dr Adendorf in paying the workers. He testified however that the envelopes containing the wages were always sealed and he had no idea what Mr Kubheka or any of the other workers were paid by Dr Adendorf.

Mr David Van der Linde

49. Mr Van der Linde testified that he rented the farm from 1978 to 1984. He testified that, as far as he remembered, he had paid Mr Kubheka R400.00 a month over that period.

50. Mr Van der Linde confirmed that Mr Adendorf junior had phoned him during the course of the trial and asked him what he had paid Mr Kubheka. He said that he had told Mr Adendorf that as far as remembered it was R400.00 a month.

51. In cross examination, Mr Van der Linde conceded that it surprised him that Mr Kubheka was being paid as much R400.00 a month in the 1970s.

Mr Willem Oosthuizen

52. Mr Willem Oosthuizen is the son of the late Mr Paul Oosthuizen who rented the farm from 1995 to 2001. Mr Oosthuizen testified that he assumed that his father had paid Mr Kubheka R350.00 a month because that is what his father had paid his other workers. He conceded however that he had no personal knowledge of what his father had paid Mr Kubheka.

Mr Hubert Adendorf junior

53. Mr Hubert Adendorf junior is the first and second defendant's son. He is a chartered accountant and established the firm Adendorf's Audit, Accounting, Tax and Advisory in which he has been a partner since 2010. Since 2013, he has been farming full time. He is currently running the farm.

54. Mr Adendorf junior was called as both a factual and an expert witness.

55. As far as his factual evidence was concerned, Mr Adendorf testified that he knew that Mr Kubheka was paid R680.00 in 1995. This, he said, was because he used to accompany his father to the farm as a child and was present when he paid his workers. Notably, in 1995 Mr Adendorf was 12 years old.

56. Mr Adendorf's expert evidence consisted of a report which attached arithmetic value to Mr Kubheka's occupation and use of the farm over the period from 1975 to 2001 and compared this to the value of the cash and other forms of remuneration received by Mr Kubheka over the same period. I will refer to this as "the Adendorf report." The Adendorf report formed the linchpin of the first and second defendants' defence to the action.

57. The Adendorf report was premised on the assumption that Mr Kubheka was paid the cash amounts testified to by Dr Adendorf and the other witnesses for the first and second defendants. The Adendorf report categorised the bags of

mielies given to Mr Kubheka by the successive owners and lessees of the farm as remuneration. It also categorised the seed and fertiliser given to Mr Kubheka by Dr Adendorf as well as the use of his Dr Adendorf's tractor to plough for Mr Kubheka as remuneration.

58. On the other side of the equation, the Adendorf report valued Mr Kubheka's housing benefit and grazing and cropping rights on the farm.

59. Mr Kubheka's housing benefit was valued with reference to the rental value of a comparably sized house in a nearby township. Mr Adendorf noted that Mr Kubheka's homestead comprised 8 structures, however, he based his calculation on the square meterage of the three largest structures only, reasoning that the Kubheka family could not live in all 8 structures simultaneously. Taking that square meterage with reference to rentals paid in a nearby township, and adjusting the value over time, Mr Adendorf calculated the value of Mr Kubheka's housing benefit on the farm each year from 1975 to 2001.

60. Mr Kubheka's grazing rights on the farm were valued in a similar fashion, using the rental value of grazing land in the area to calculate the value of this benefit to Mr Kubheka each year from 1975 to 2001. This exercise was conducted on the assumption that Mr Kubheka had the use of one camp only for the grazing of his cattle.

61. Mr Kubheka's cropping rights on the farm were valued with reference to the cropping yield, on an area of 1,4 hectares, which is what Mr Adendorf contended the size of the Kubheka's cropping area to be, for each year from 1975 to 2001.

62. The Adendorf report concluded, based on its calculations, that:

62.1 the value of the gross annual remuneration received by Mr Kubheka exceeded the other benefits that Mr Kubheka received, namely the right to occupy the farm and cropping and grazing rights on the farm; and

62.2 over the relevant period, being 1975 to 2001, Mr Kubheka was paid predominantly in cash and other forms of remuneration and not predominantly in the right to use and occupy the land.

63. Under cross examination, it was put to Mr Adendorf, that as the son of the first and second defendants, the person running the farm and the person who stood to inherit it, he was not objective and not competent to testify as an expert. Mr Adendorf denied this and maintained that his calculations were objective and fair.

64. Certain of Mr Adendorf's calculations were challenged under cross examination. It is, for the reasons that will become apparent below, not

necessary to deal with these challenges.

Analysis

Does Mr Kubheka comply with paragraphs (a), (b) and (c) of the labour tenant definition?

65. As stated above, Mr Kubheka bears the onus to establish that he complies with paragraphs (a), (b) and (c) of the Act's definition of labour tenant.

66. As far as paragraph (a) is concerned, Mr Kubheka has resided on the farm since 1975 and still resides on the farm. The first and second defendants conceded, correctly, in argument that Mr Kubheka complies with paragraph (a) of the definition of labour tenant.

67. As far as paragraph (b) is concerned, it was not disputed that Mr Kubheka had and still has cropping and grazing rights on the farm. It was also not disputed that Mr Kubheka provided labour for Mr De Villiers Theunissen when he owned the farm and for Mr Van der Linde, Mr Oosthuizen and Mr Lubbe, all of whom leased the farm at various stages. Indeed, it was conceded by the first and second defendants in argument that Mr Kubheka complies with paragraph (b) of the labour tenant definition insofar as the periods 1975 to 1986 and 1995 to 2001 are concerned.

68. Advocate Du Plessis SC, who appeared for the first and second defendants, contended however, that because Mr Kubheka worked for Dr Adendorf during the period from 1986 to 1995 and because Dr Adendorf was neither the owner nor the lessee of the farm, Mr Kubheka did not comply with paragraph (b) of the definition during that period and is therefore not a labour tenant.

69. There are, in my view, two difficulties with this submission. The first is that it is overly formalistic. On his own version, Dr Adendorf, bought the farm and registered it in his wife's name. Dr Adendorf ran the farm. Mr Kubheka quite understandably, in these circumstances, believed that Dr Adendorf was the owner of the farm. He was certainly the person in charge. It is arguable that a purposive interpretation of paragraph (b) of the definition of labour tenant would include "person in charge" within its ambit.

70. It is however, not necessary to decide this question in this case. The second difficulty with Mr Du Plessis's submission is that it fails to adopt a holistic and continuous approach the definition of labour tenant. Even if one discounts the labour provided by Mr Kubheka to Dr Adendorf, Mr Kubheka provided labour to the other owners and lessees of the farm for a cumulative period of 18 years. On a holistic and continuous interpretation of the labour tenant definition, this clearly, in my view, constitutes compliance with paragraph (b) thereof.

71. As far as paragraph (c) is concerned, Mr Kubheka testified that his parents

lived on the farm Glen Barton, had cropping and grazing rights on that farm and provided labour to the owner of that farm. This was not seriously disputed by the first and second defendants in the trial. Compliance with paragraph (c) of the definition is therefore established.

72. In the circumstances, Mr Kubheka has established that he complies with paragraphs (a), (b) and (c) of the Act's definition of labour tenant.

Is Mr Kubheka a farmworker?

73. As stated above, once Mr Kubheka has established that he complies with paragraphs (a), (b) and (c) of the definition of labour tenant, as he has done, the onus shifts to the first and second defendants to establish that he is a farmworker.

74. It will be apparent from what has been set out above that the first and second defendants attempted to discharge their onus in this regard through the Adendorf report.

75. There are, in my view, a number of fundamental difficulties with the Adendorf report.

76. In the first place, there is, in my view, merit in the contention made on behalf of the plaintiff that Mr Adendorf junior is not objective and was therefore not

competent to give expert evidence.

77. The law requires that an expert witness should remain objective despite the fact that he is – in terms of our adversarial system – called by a party to testify in support of the latter's case. The courts have held that if an expert is to be helpful he must be neutral; and that the opinion of an expert is of little value where he is partisan and consistently asserts the cause of the party calling him.[4]

78. Mr Adendorf junior is the son of the first and second defendants. He is currently running the farm. He stands to inherit it. He could not, in my view, conceivably be objective in these circumstances and his so-called expert evidence is accordingly of little value.

79. Quite apart from this, however, there are, in my view, other serious difficulties with the Adendorf report.

80. Firstly, certain of the assumptions on which the Adendorf report rests are problematic. The first of these is the assumption that Mr Kubheka was paid the cash amounts testified to by Dr Adendorf and the other witnesses for the first and second defendants. As was established by Mr Ncgobo during cross examination, in order for Mr Adendorf's calculations to hold, the defendants' version in this regard would have to accepted. I am not convinced that it should

[4] See in this regard *Stock v Stock* 1981 (3) SA 1280 (A) at 1296E.

be. There were, in my view, numerous inconsistencies and improbabilities in the defendants' version in this regard. Mr Zikalala's evidence did not corroborate that of Dr Adendorf. Mr Adendorf junior's evidence that he remembered as a 12 year old child what Mr Kubheka was paid was improbable. Moreover, Mr Adendorf junior contacted Mr Van der Linde during the course of the trial to discuss what he paid Mr Kubheka. This is highly problematic. Perhaps as a consequence of this, Mr Van der Linde's evidence had a tentative quality. Furthermore, he conceded, somewhat bizarrely, that he was "surprised" that Mr Kubheka had been paid as much as R400.00 a month in the 1970s. Mr Oosthuizen conceded that he had no personal knowledge of what Mr Kubheka was paid and could accordingly take the matter no further. While it is not necessary for me to decide this question for purposes of this judgment, it is doubtful that the defendants' version as to what Mr Kubheka was paid would have been accepted on a balance of probabilities.

81. Another problematic assumption, in my view, is that the seed, fertiliser and use of Dr Adendorf's tractor fell to be allocated to the remuneration side of the equation. In my view, given the common cause evidence that Mr Kubheka was required by Dr Adendorf to sell his oxen, these amounts ought arguably to have been allocated to the cropping side of the equation. Again, it is not necessary for me to decide this question for purposes of this judgment

82. This is because, in my view, the fundamental problem with the Adendorf report is one of approach. As noted above, the Adendorf report used the rental value

of housing and grazing land to calculate the value of those benefits to Mr Kubheka. As this Court has held, this approach wrongly calculates the value of these benefits to the farm owner and not their value to the labour tenant or worker.

83. In *Mahlangu v De Jager* 2000 (3) SA 145 (LCC), this Court held as follows:

> "I must point out, however, that the figures given by both experts as value of grazing are simply grazing rental and do not take into account the value of a right to occupy and use. Being rental, they are value to the landlord or farm owner and not the occupier. The right to occupy and use are value to the occupier. Considerations such as a fenced-in camp, availability of windmills and/or other supplies of water, the fact that a herdsman can be dispensed with are some of the factors which should be taken into account."[5] (emphasis added)

84. In *Msiza and Others v Uys and Others* 2005 (2) SA 456 (LCC), this Court held as follows:

> "I am not satisfied that the above is 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. 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 per ha 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 ha. The value will be the benefit he derives from investing his R15 in renting the ha. That benefit consists of the home he is able to build on that ha, which home in turn provides such benefits as security form the elements (the harsh winter nights, summer rain and hot sun), privacy and dignity. The list is not necessarily exhaustive. This is what Olivier JA called 'hearth and home.' That it is difficult to place a monetary value on that benefit, is no reason for adopting an incorrect formula. The R15 is, to the deceased, input costs, but to the third defendant is income (from rental). Therefore the amount

[5] At para 39.

> of R15 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.
>
> 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 the number of 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."[6] (emphasis added)

85. The above dictum highlights a fundamental consideration when valuing rights of occupation and use in the present context: that of hearth and home. This Court referred to the SCA's dictum in *Ngcobo v Van Rensburg* in which Olivier JA held as follows:

> "It must be overwhelmingly clear that the value of residence, grazing, cultivation and having a hearth and home of their own, a place where they could find the fundamental security of living and surviving off the land, must have far outweighed the benefits they received as remuneration in cash or in kind."[7]

86. The concept of hearth and home goes beyond such things as security from the elements and privacy to encompass the cultural and spiritual value arising out of birthing and raising children in family homesteads, sometimes over generations, of burying the dead on the land and of deep historical and religious attachments to the land. As the Constitutional Court held in *Department of Land Affairs and Others v Goegelegen Tropical Fruits (Pty) Ltd*

---

[6] At p 469 – 470.
[7] Supra, n 1 at para 28.

2007 (6) SA 199 (CC):

> "Finally, it is appropriate to observe that the rights of the individual applicants [labour tenants] were not merely economic rights to graze and cultivate in a particular area. They were rights of family connection with certain pieces of land, where the aged were buried and children were born and modest homesteads passed from generation to generation. And they were not simply there by grace and favour. The paternalistic and feudal-type relationship involved contributions by the family, who worked the lands of the farmer. However unfair the relationship was, as a relic of past conquests of land dispossession, it formalised a minimal degree of respect by the farm owners for the connection of the indigenous families to the land. It had cultural and spiritual dimension that rendered the destruction of the rights more than just economic loss."[8]

87. The Adendorf report does not value Mr Kubheka's rights of occupation and use on the farm from the perspective of Mr Kubheka but from the perspective of the farm owner. This is fundamentally incorrect. Furthermore, it takes no account of the value of hearth and home for Mr Kubheka and his family, which would include giving consideration to, among other things, the security and dignity provided by the Kubhekas' homestead, the fact that the Kubhekas raised 6 children in the homestead and the fact that 2 of the Kubhekas' children are buried on the farm.

88. As such, the approach adopted by the Adendorf report is deficient, and it is for this reason, and apart from the other difficulties referred to above, of little assistance to the Court.

---

[8] At para 86.

89. I am therefore of the view that the Adendorf report does not establish that Mr Kubheka was paid predominately in cash and other forms of remuneration and not predominately in the right to use and occupy the farm.

90. There are however, two elements to the definition of farm worker. The above is the first. The second is that the person must be obliged to perform his or her services personally. As Mr Ncgobo correctly submitted in argument, the first and second defendants led no evidence to establish this, either in the presentation of their case or through cross examination of Mr Kubheka. This element of the definition was therefore not established, and it follows, for this reason alone, that Mr Kubheka is not a farmworker.

91. Mr Kubheka is therefore a labour tenant as defined in the Act.

DID THE PLAINTIFF APPLY FOR AN AWARD OF LAND?

The Law

92. In terms of section 16 of the Act, a labour tenant may apply for the award of land which he or she was entitled to occupy in terms of section 3. Section 3 refers to that portion of the land which the labour tenant was entitled to occupy and use as at 2 June 1995.

93. An application for the award of land is made in terms of section 17 and must

have been made before the cut off date of 31 March 2001.

94. Section 17 of the Act provides as follows:

> **"17 Notice of application and initial procedure**
>
> (1) An application for the acquisition of land and servitudes referred to in section 16 shall be lodged with the Director-General.
>
> (2) On receiving an application in terms of subsection (1), the Director-General shall -
>
> (a) forthwith give notice of receipt of the application to the owner of the land and to the holder of any other registered right in the land in question; and
>
> (b) ..."

95. The question to be answered is whether Mr Kubheka lodged a valid application in terms of section 17 of the Act prior to 31 March 2001.

The Evidence

Mr Kubheka

96. Mr Kubheka testified that he applied for an award of land in 1998. He testified that he did so at a school on a nearby farm where departmental officials had arranged a meeting with labour tenants living on farms in the area. He testified

that the departmental officials helped him to fill out the necessary forms. He testified that he was not given any proof of having made the application to take away with him.

97. Mr Kubheka testified that when, in 2007, he had heard nothing about his claim he went to the departmental offices in Newcastle to make enquiries. There, he said, he lodged new claim.

Mr Malibongwe Kubheka

98. Mr Malibongwe Kubheka is a legal administration officer employed by the third defendant in its Newcastle and Vryheid offices. He is no relation of the plaintiff. To avoid confusion I will refer to him as Mr M Kubheka.

99. Mr M Kubheka testified that the plaintiff lodged an application for the award of land on 18 October 1998. He knew this, he said, because this information was recorded on the department's database. Mr M Kubheka did not, however, have the plaintiff's file with him or any proof of the application having been made.

100. In these circumstances, Mr M Kubheka was requested to return to Court with the plaintiff's file and a print-out the relevant portion of the department's database which he indicated could be obtained.

101. When Mr M Kubheka returned to the witness box, he informed the Court that the plaintiff's name did not in fact appear on the department's database. Mr M Kubheka had obtained the plaintiff's file but told the Court that it was incomplete. In particular, the plaintiff's application form for the award of land was missing.

102. Mr M Kubheka testified however that there were two documents in the file which indicated that the plaintiff had lodged an application before the cut off date. The first of these was a departmental issue information sheet in isiZulu. This contained Mr Kubheka's name, ID number and the date: 23 January 2000. It also contained the following reference number: KZN 3 4 126.

103. Mr M Kubheka testified that this was the standard document given by departmental officials to labour tenants as proof that they had made their applications for the award of land.

104. The second document in the file was a pro forma generated by the law firm Cheadle Thompson and Hayson entitled "case application." The document is date stamped 4 May 2009. Mr M Kubheka testified that this document would have been completed by the person stipulated on it as the responsible departmental officer: Mr Thulani Zungu and that its purpose was to make application to Cheadle Thompson and Haysom to handle the relevant case, in this case, that of the plaintiff.

105. The "case application" recorded as follows:

> "The applicant has lodged an application under section 16 of Land Reform (Labour Tenant) Act 3 of 1993 on 18 October 1998. The notice as given by Section 17 of Act 3 of 1996 was issues (sic) to the landowner and he denied the family's status as labour tenants."

106. I pause to state that the section 17 notice referred to above formed part of the discovered documents in the trial. It was sent by the third defendant to Dr Hubert Adendorf who was thought to be the owner of the farm. It is dated 13 February 2008. It recorded that an application for the award of land had been lodged by Mr Kubheka in respect of the farm, though it did not record the date of the application. All of this was common cause between the parties.

107. Also of importance for present purposes is that the case application stated as follows under "facts of the case:"

> "In 1979 the grazing rights were reduced to 2 grazing camps but in terms of cattle numbers there were no limitations. In 1986 the farm was under ownership of Hubert Adendorf and the farm was leased to various white farmers. The problem started when the farm was leased to George Lubb (sic) in 2004, who decided to reduce the two grazing camps to one and one grazing camp was too little for Mr Kubheka's cattle and he was forced to graze them on the main roadside."

108. Under cross examination, Mr M Kubheka was asked if he could explain why the case application document referred to the plaintiff's application as having been made on 18 October 1998, while the information sheet appeared to refer to the application as having been made on 23 January 2001. He could not.

109. After Mr M Kubheka's evidence, Mr and Mrs Kubeka were recalled and cross examined thereon.

Mr Kubheka and Mrs Kubheka

110. The cross examination of Mrs Kubheka elicited nothing of significance.

111. Mr Kubheka was shown the information sheet and said that he recalled having seen such a document before. He testified however that he had not been given such a document to take away with him.

112. During cross examination, Mr Kubheka said that he had made two applications for the award of land, one in 1998 and another in 2001. When asked whether he had also made a third application in Newcastle in 2007, he said yes.

113. After all the evidence had been led in the trial, it transpired that what purported to be Mr Kubheka's original application form had been found in the department's registry. In the circumstances, Mr Ncgbobo brought an application to reopen the plaintiff's case which application was opposed by the first and second defendants. I granted the application.

Mr Thulani Zungu

114. Mr Zungu is a deputy director of the third defendant based at its Vryheid office.

115. Mr Zungu testified that after a thorough search in the registry of the department, the plaintiff's original application form had been found. The document was handed up to me.

116. There are several parts to the document. The first is a pre-interview questionnaire comprising two pages. The second is a 5 page document which appears to be the application form. The third is an authority given to the Association for Rural Advancement (AFRA) to lodge the application with the Director-General of the department. It is signed by Mr Kubheka. The fourth is a copy of Mr Kubheka's ID document.

117. In cross examination, Mr Du Plessis put it to Mr Zungu that none of these documents constituted Mr Khubeka's application form.

118. Mr Du Plessis argued that Mr Kubeka's evidence that he had lodged three applications for the award of land was untruthful and ought to be rejected. He argued further that the documents in existence did not add up and displayed contradictory dates and references numbers.

119. Ultimately, Mr Du Plessis submitted that there was no evidence of Mr Kubheka's application form nor of any application having been lodged with the Director General prior to the cut off date or at all.

Analysis

120. I accept that Mr Kubheka's testimony that he lodged three applications for the award of land cannot be correct. This is however, in my view, more likely explained by Mr Kubheka's low level of literacy and sophistication, than mendacity on his part. Mr Kubheka may have had three engagements with the department and believed that he was applying for an award of land on each occasion. It is in any event not necessary to decide this point.

121. In my view this question can be decided solely on the basis of the documentation that is in existence.

122. Contrary to Mr Du Plessis's submission, I am of the view that the information sheet and the documentation presented by Mr Zungu accord with each other in all material respects. They both reflect Mr Kubheka's full names and identity number. They both reflect the date as 23 January 2001. They both reflect the same reference number: KZN 3 4 126. It seems clear that the 5 page document in the series of documents presented by Mr Zungu constitutes Mr Kubheka's application form itself. It is also clear that Mr Kubheka authorised AFRA to lodge the application with the Director General on his behalf.

123. Mr Du Plessis made much of the fact that there is no proof of lodgement of the application. It was not clear from the evidence whether there is ordinarily such proof or what it would consist of. In my view however, the section 17 notice

issued by the department indicates that the application was lodged with the Director General. It is, in my view, highly improbable that the department would have issued a section 17 notice in the matter if the application had not been lodged before the cut off date.

124. In my view, the case application made to Cheadle Thompson and Haysom is also an indication that the application was lodged with the Director General timeously. If it had not been, there would have been no basis to request the firm to proceed with a case for the award of land to Mr Kubheka. It is true that the date indicated on the case application to Cheadle Thompson and Haysom as the date on which the application was made – 18 October 1998 differs from the date on the other documentation – 23 January 2001.

125. In my view, having regard to the totality of the documentation before me, the probabilities are that the date of 18 October 1998 is simply an error.

126. I pause to mention that the department's scant regard for applications by labour tenants as reflected in the lamentably inefficient handling of Mr Kubheka's application is a matter of grave concern.

127. I am however satisfied, for all of the above reasons, that the evidence establishes on a balance of probabilities that Mr Kubheka made a valid application for the award of land in terms of section 17 of the Act prior to 31 March 2001.

128. In the circumstances, Mr Kubheka is entitled to the award of the land he was using and occupying as at 2 June 1995. There is a dispute as to whether this included one or two camps for the grazing of Mr Kubheka's cattle. I have no reason to reject Mr Kubheka's evidence that he was entitled to the use of two camps until Mr Lubbe leased the farm in 2001. Mr Kubheka did not waver from his version under cross examination and he was corroborated by his wife. The truth of this is also, in my view, supported by the case application to Cheadle Thompson and Haysom which reveals that Mr Kubheka presented the same version to Mr Thulani Zungu many years ago.

COSTS

129. During argument, Mr Du Plessis submitted, for reasons that were not entirely clear to me, that costs ought to be awarded against the third defendant. When I pointed out that the third defendant had not been put on notice in this regard, it was suggested that the issue of costs ought to be held over for later determination. I can see no basis for doing this.

130. If costs were sought against the third defendant, the reasons for this needed to have been ventilated and the third defendant put on notice timeously.

131. In my view, this is case where, in accordance with the normal practice in this Court, there should be no order as to costs.

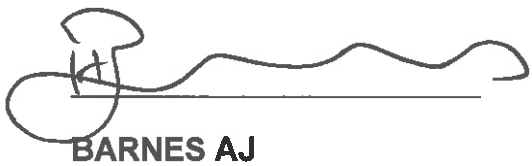
ORDER

132. I accordingly make the following order:

1. It is declared that Mr Kubheka is a labour tenant as defined in the Land Reform (Labour Tenants) Act 3 of 1996.

2. Mr Kubheka is entitled to the award of that portion of portion 1 of the farm Cardie No 12399, Registration Division HS, in the district of Newcastle, Kwa-Zulu Natal which he and his family were occupying and using as at 2 June 1995, including the two grazing camps that Mr Kubheka and his family were utilising at that date.

3. There is no order as to costs.



BARNES AJ

Acting Judge of the Land Claims Court

Appearances:

For the plaintiff: Adv S M Ngcobo instructed by Zuma and Co.

For the defendants: Adv R Du Plessis SC instructed by Loubser Van der Walt Inc