IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** **CASE NUMBER:** 18/97

In the matter between:

JABULANI ROBERT NGCOBO	First Applicant
FIKILE NGCOBO	Second Applicant
and	
BWJ VAN RENSBURG	First Respondent
SHERIFF FOR THE MAGISTRATE'S COURT, BABANANGO	Second Respondent
DEPARTMENT OF LAND AFFAIRS	Third Respondent

JUDGMENT

MEER J:

Introduction

[1] The Applicants applied to this court for an interdict preventing the Deputy Sheriff for the magisterial district of Babanango from executing a warrant for their ejectment from the Respondent's farm. The Applicants claimed they were labour tenants and therefore protected from eviction in terms of the Land Reform Labour Tenant's Act[1] (hereinafter referred to as "the Act"). The Application was dismissed because it was found the Applicants were not labour tenants as defined in the Act and were consequently not entitled to the protection against eviction accorded to labour tenants under section 5[2] of the Act. This is an application for leave to appeal against the judgment dismissing their application.

[2] The reasons for the finding that the applicants were not labour tenants as defined in the Act, are contained in the judgment, *Ngcobo and another v BWJ Van Rensburg and others*[3], and

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1 Act 3 of 1996.

2 Section 5 reads: "A labour tenant or his or her associate may only be evicted in terms of an order of the Court issued under this Act".

3 LCC 18/97, 10 October 1997, as yet unreported.

are summarised here for the purposes of this application. The judgment revolved around the interpretation of "labour tenant" in section 1(xi) of the Act. That definition reads:

> "Labour tenant" means a person -
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> (a) who is residing or has the right to reside on a farm;
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> (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
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> (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 the lessee of such farm or other farm,
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> 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."

At issue was the meaning to be attributed to the word, "and" where it appears between the second and third paragraphs of the definition.

The definition of "labour tenant"

[3] This Court, adhering to its decisions in *Mahlangu v De Jager*[4] and *Zulu v Van Rensburg*,[5] found that the word "and" must be read in its normal conjunctive sense, so that compliance with all three paragraphs, (a), (b) and (c) of the definition, is necessary to qualify as a labour tenant. In so finding this court differed with two decisions of the Natal Provincial Division of the High Court, *HB Klopper and others v BE Mkhize and others*[6] and *Tselentis Mining (Pty) Ltd and others v J Mdlalose.*[7] In the *Klopper* case Galgut J found that compliance with paragraphs (a) and (b), or (a) and (c) or (c) alone satisfied the definition of labour tenant. In the *Tselentis* case Meskin J pronounced compliance with paragraphs (a) and (b) or (a) and (c), but not (c) alone, sufficient to satisfy the requirements of the definition.

[4] The First Applicant complied only with the requirements of paragraph (c) of the definition, viz his father had resided on respondent's farm and had had the use of cropping and grazing land in exchange for labour. His counsel, Mr Rall, relying only on the *Tselentis* case, and placing no reliance on the *Klopper* case, properly conceded that he could not succeed as a labour tenant on

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4 1996 (3) SA 325 (LCC).

5 1996 (4) SA 1236 (LCC).

6 NPD 2169/96, 3 March 1997, as yet unreported.

7 [1997] 3 All SA 657.

either the conjunctive or disjunctive interpretation of the definition, and therefore had no case.[8] The Second Applicant complied with paragraphs (a) and (c) in that she resided on the farm and was the daughter of a person who had resided on the farm with the use of cropping and grazing land in exchange for labour. She failed the test on the "conjunctive" interpretation adopted by this court, compliance with paragraph (b) not being satisfied.

[5] Leave to appeal was sought by the First and Second Applicants even though the First Applicant's case had been abandoned at the hearing. The Applicants appealed against the finding that paragraphs (a), (b) and (c) of the definition of "labour tenant" in the Act be interpreted conjunctively, and stated that the ground on which they sought leave to appeal was that this Court ought to have interpreted the definition of labour tenant in the same way as the Natal Provincial Division of the High Court in the cases of *Klopper* and *Tselentis.*

[6] The Applicants argued as follows:

3.1 Given the conflicting decisions in the High Courts and the Land Claims Court regarding the interpretation of the definition of a labour tenant in the Act, it is imperative that the Supreme Court of Appeal interpret the definition of a labour tenant in order to create legal certainty.

3.2 The *Klopper* and *Tselentis* cases held that para (a), (b) and (c) of the definition of a labour tenant must be interpreted disjunctively;

3.3 The cases *Mahlangu, Zulu, Van Niekerk v Nqonwange*[9] and *Salimba v Ngcobo*[10] (the last judgment became available only after the interdict application was heard) held that paragraphs (a), (b) and (c) of the definition of a labour tenant must be read conjunctively.

3.4 There is a reasonable prospect of success that the Supreme Court of Appeal would uphold the interpretation opted for in the *Klopper* and *Tselentis* cases.

3.5 There is a reasonable prospect that the Supreme Court of Appeal may, given the preamble to the Act, find that it is imperative that the provisions of para (a), (b) and (c) be interpreted disjunctively so as not to substantially stultify the object of the Act, as Galgut J pointed out in the *Klopper* case, if paragraph (c) was read conjunctively with both paragraphs (a) and (b).

3.6 The Supreme Court of Appeal may find that the intention of the Legislature was not to create only a second generation labour tenant. It may find that the injustice to a person who resides on a farm, and for his entire working life has been

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8 *Ngcobo v Van Rensburg*, supra n 3 at para 8.

9 TPD 24921/96, 19 August 1997, as yet unreported.

10 NPD 340/96, 4 November 1997, as yet unreported.

> employed by the farm owner in terms of a contract whereby lhe provides labour in return for, predominantly, grazing, cropping and residential rights, but who does not comply with the second generational requirement in paragraph (c), and thus would have no rights under the Act, is so gross, that it calls for a disjunctive reading of paragraph (c).

[7] Of concern to the Court was the following: Mr Rall, counsel for the Applicants who appeared in the interdict application, had abandoned the First Applicants case. Despite this, Mr Loots, the Applicant's attorney who appeared in this application, adopted the somewhat unusual stance of arguing, on grounds which were not entirely clear, against the concessions made by his counsel, in favour of the First Applicant's claim to be a labour tenant.

[8] Mr Van der Merwe for the Respondent argued that the Applicants had no prospects of success on Appeal. He pointed out that the decision of this court in the *Zulu*, (a single judge decision), *Mahlangu*, (a decision of two judges) and *Ngcobo* (a decision of three judges) cases,[11] had been followed in the single judge decisions in *Van Niekerk v Nqonwange* in the Transvaal Provincial Division and *Salimba v Ngcobo* and the *Jacobsz NO v Green Mbongwe*[12] in the Natal Provincial Division. The latest Natal Provincial Division judgment of Hurt J in *Salimba v Ngcobo* had ensured the Natal Provincial Division was in pace with this Court and the Transvaal Provincial Division. Because of the overwhelming support for the conjunctive interpretation, and the fact that the existence of conflicting judgments had fallen away, neither Applicant had reasonable prospects of success on appeal.

The Applicants' prospects of Success on Appeal

[9] It is well established that the test for granting leave to appeal is a reasonable prospect of success on appeal.[13] In order for this Court to grant the Applicants leave to appeal, it must find that there is a reasonable prospect that the Supreme Court of Appeal would find them to be labour tenants. In order to do so the Supreme Court of Appeal would have to adopt the disjunctive as opposed to the conjunctive interpretation of "labour tenant" favoured by this Court.

[10] It is my view that despite the statistics (6 judgments in favour of a "conjunctive" interpretation and 2 against), the fact that two judges have already found in favour of the disjunctive interpretation, for amongst other reasons the fact that the conjunctive interpretation might stultify the object of the Act, suggests I cannot disregard the prospect that this interpretation may be favoured on appeal for this and possibly other reasons. There is merit in the

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11 These decisions held that a person claiming to be a labour tenant needs to satisfy all three requirements (a) (b) and (c) and that definition needs to be interpreted conjunctively

12 *Jacobsz NO & others v Green Mbongwe & Others*, NPD 3700/1995, 3 April 1996, as yet unreported.

13 Gering et al "Civil Procedure" in Joubert (ed) 3 *The Law of South Africa* 2ed (Butterworths, Durban 1996) at para 361; *S v Skosana* 1980 (4) SA 54 (A); *Botes and Another v Nedbank Ltd* 1983 (3) SA 27 (A); *Van Heerden v Cronwright* 1985 (2) SA 342 (T); *Castel v Metal and Allied Workers Union* 1987 (4) SA 795 (A).

Applicant's submission that the Supreme Court of Appeal may, given the preamble of the Act, find that the provisions of paragraphs (a), (b) and (c) should be interpreted disjunctively.

[11] I am of the view that the injustice caused to first generation labour tenants by the word "and" linking paragraphs (b) and (c), of the definition of labour tenant, when considered against the preamble of the Act, provides the basis for a reasonable prospect of success on appeal. The preamble states that it is the intention of the Act to provide labour tenants with security of tenure because of past discrimination, and to ensure that they are not further prejudiced. Compliance with paragraph (c) in addition to (a) and (b) of the definition may well be regarded by another court as sufficiently at odds with the purpose of the Act to warrant a disjunctive interpretation.

[12] On the conjunctive interpretation those first generation persons who have been in occupation of farmland for their entire working lives, and who comply with the requirements of paragraphs (a) and (b) but not (c) would have no rights whatsoever under the Act. The prejudice to them becomes apparent when contrasted with the rights the Act accords to persons who may have provided labour for only a week, but who comply with paragraphs (a) (b) and (c) of the definition.

[13] The harshness of this situation was acknowledged by Dodson J in the earlier judgement in this case[14] with which I concurred. We however found it not to be a sufficient reason to warrant the adoption of a disjunctive interpretation. The conjunctive interpretation, we found retained an inherent logic, and the anomalies arising from a disjunctive interpretation rendered the adoption thereof unacceptable. That notwithstanding, I am of the view that there is a reasonable prospect of success on appeal in respect of Second Applicant alone. Application for leave to appeal is therefore granted to her.

[14] My finding that second Applicant should be granted leave to appeal is reinforced by the belief that it is desirable for there to be legal certainty on the definition of labour tenant, a certainty which only the Supreme Court of Appeal can confer. While there may presently be unanimity in the decisions of the Transvaal Provincial Division, the Natal Provincial Division and the Land Claims Court, on the definition of labour tenant, these, not being decisions of two or three judges, do not bind other judges of the same province, who may believe such decisions to be clearly wrong. Nor do they bind High Court judges in other provinces, nor judges of the Land Claims Court. This is so for the reason that these being courts of equal standing, their decisions are not binding on one another. If a subsequent court of the same standing finds the prevailing decision to be wrong, it will in keeping with the doctrine of stare decisis give the decision it considers correct.[15]

[15] Moreover whilst there may presently be unanimity on the definition of labour tenant, there

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14 *Ngcobo v van Rensburg*, supra n 3 at para 19.

15 Preiss "Courts" in Joubert (ed) 5 LAWSA, 2ed (Butterwoths, Durban 1994) at paras 157 and 162.

is nothing to prevent conflicting judgments arising again within High Courts, between divisions of the High Courts, and between the High Courts and the Land Claims Court. This I believe to be an undesirable situation, given that it could well lead to disparity in the status of labour tenants in different High Court jurisdictions, depending on the preferred interpretation of the Act at any point in time. At present, for example, the Transvaal and Natal Provincial Divisions follow the cases *Salimba v Ngcobo* and *Van Niekerk v Nqonwange*, the most recent decisions, which happen to favour the conjunctive interpretation. Magistrates in these provinces will undoubtedly be influenced by this in following the judgement they believe to be correct. Should another Provincial Division adopt the disjunctive interpretation, magistrates in those provinces would probably follow such an interpretation, thereby subjecting labour tenants there to a different test from their counterparts in Natal or Transvaal. The situation could be further compounded if a judge in the Transvaal or Natal Provincial Divisions were to adopt the disjunctive interpretation in which case magistrates in those provinces faced with two conflicting interpretations would have to choose the interpretation they favoured most.[16]

[16] The First Applicant's claim to be a labour tenant as has been stated, was abandoned at the hearing of this application when his counsel conceded that he did not qualify as a labour tenant on both the conjunctive and the disjunctive interpretations of the definition of labour tenant. I believe that he cannot in the circumstances apply for leave to appeal against a case which was abandoned. Accordingly the First Applicant's application for leave to appeal is dismissed. The Respondent asked for costs against the Applicants on the attorney and client scale. This was granted, our being of the view that the changed stance adopted in respect of First Applicant's case amounted to vexatious conduct, albeit unintentionally. It is well established that conduct which is vexatious and an abuse of legal process may form the basis for an order that costs be paid on an attorney and client scale, even though there is no intention to be vexatious.[17]

[18] At the hearing of the application for leave to appeal I made the following order:

1. The first applicant's application for leave to appeal is dismissed.
2. The first applicant is to pay the respondents's costs associated with 40% of the time spent arguing this matter today on the attorney and client basis. No costs order is made against the first applicant in respect of costs incurred before the commencement of today's proceedings.
3. The second applicant is granted leave to appeal to the Supreme Court of Appeal.
4. The question of all remaining costs associated with the application for leave to

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16 Preiss "Courts" in Joubert (ed) 5 LAWSA supra n 15 at para 163.

17 Cilliers "Costs" in Joubert (ed) 3 LAWSA, 1ed (Butterworths, Durban 1985) at para 803 and the following cases cited therein: *Mahomed & Son v Mohamed* 1959 (2) SA 688 (T); *Giovagnoli v Di Meo* 1960 (3) SA 393 (N); *Lemore v African Mutual Credit Association* 1961 (1) SA 195 (C); *Simmons V Gilbert Hamer & Co Ltd* 1962 (2) SA 487 (D); *Marsh v Odendaalsrus Cold Storages Ltd* 1963 (3) SA 263 (W)*; Phase Electric Co (Pty) Ltd v Zinman's Electrical sales (Pty) Ltd* 1973 (3) SA 914 (W)*; Uitenhage Municipality v Uys* 1974 (3) SA 800 (E); *Sabena Belgian World Airlines v Ver Elst* 1980 (2) SA 238 (W); *Hayes v Baldachin* 1980 (2) SA 589 (R).

appeal will stand over for determination by the Supreme Court of Appeal.

5. Reasons for our decisions will be furnished later.

My reasons are as furnished above.

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JUDGE Y S MEER

I agree

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JUDGE J MOLOTO

DODSON J:

[1] The circumstances surrounding this application for leave to appeal are explained in the judgment of my colleague, Judge Meer. I agreed with my colleagues that the first applicant's application should be dismissed with costs on the basis set out in her judgment but found myself unable to agree that the second applicant should be granted leave to appeal. My reasons follow.

[2] Simply stated, I do not agree that the second applicant enjoys a reasonable prospect of success in any appeal to the Supreme Court of Appeal. My view is based on the formulation of that standard in the decided cases.[18] The second applicant's attorney was not able to offer any counter-argument to the glaring absurdities which, according to decisions of this court and other courts, arise on a so-called disjunctive reading of the word "and" where it appears between paragraphs (b) and (c) of the definition of labour tenant in the Land Reform (Labour Tenants) Act ("the Act").[19] That leaves me unable to discern any basis for an arguable case, let alone one which

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[18] See the authorities cited at n 13 of my colleague's judgment.

[19] Act 3 of 1996. The absurdities referred to are dealt with in *Zulu and others v van Rensburg and Others* 1996 (4) SA 1236 (LCC) at 1254C-E; *Ngcobo and another v van Rensburg and others*, LCC 18/97, 10 October 1997, as yet unreported, at paras 20-21; *Jacobsz NO and others v Green Mbongwe and others*, NPD 3700/95, 3 April 1996, as yet unreported, at 2-3; *Van Niekerk v*

enjoys a reasonable prospect of success.

[3] It may be desirable to have a higher authority resolve the divergence between the two decisions of the Natal High Court which favour a so-called disjunctive interpretation and all the other High Court and Land Claims Court decisions[20] which favour a conjunctive interpretation. However I have not found any authority for this as a ground for granting leave to appeal, nor was the second applicant's attorney able to refer me to any. Indeed, he conceded that if he could not show reasonable prospects of success on appeal, the application must fail. I have also found nothing in the Act which would justify a departure from the tests which are ordinarily applied in deciding whether or not to grant leave to appeal.

[4] For these reasons I indicated at the hearing of the application that I would have made the following order in respect of the second applicant:

1. The second applicant's application for leave to appeal is dismissed.

2. No order is made as to costs.

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JUDGE A DODSON

Heard on: 20 November 1997 **Handed down on:** 4 December 1997

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

For the respondent:
Mr ABT van der Merwe of *Cox and Partners*, Vryheid.

Nqonwange TPD 24921/96, 19 August 1997, as yet unreported, at 4-5; *Salimba v Ngcobo and others* NPD 340/96, 4 November 1997, as yet unreported, at 17-18.

[20] All the decisions are referred to in my colleague's judgment.