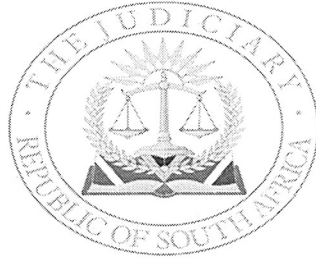


REPUBLIC OF SOUTH AFRICA



IN THE LAND CLAIMS COURT OF SOUTH AFRICA  
HELD AT RANDBURG

CASE NO: LCC203/2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED: YES/NO

28 March 2023

SIGNATURE

DATE

In the matter between:

**XOLILE TSHABALALA**

Applicant

and

**KWAGGA KLIPRIVIER ELENOMS TRUST**

First Respondent

**JACOBUS GERHADUS FOURIE NO**

Second Respondent

**DANIEL RODOLF FOURIE NO**

Third Respondent

**THE DIRECTOR GENERAL OF THE DEPARTMENT  
OF AGRICULTURE LAND REFORM AND RURAL  
DEVELOPMENT (formerly THE DEPARTMENT  
OF RURAL DEVELOPMENT AND LAND REFORM)**

Fourth Respondent

**THE MINISTER OF THE DEPARTMENT OF  
AGRICULTURE, LAND REFORM AND RURAL  
DEVELOPMENT AND LAND REFORM**

Fifth Respondent

**LEKWA LOCAL MUNICIPALITY**

Sixth Respondent

In re:

**LUKE FOURTEEN BINDA**

Plaintiff

and

**KWAGGA KLIPRIVIER EINDOMS TRUST**

First Defendant

**JACOBUS GERHARDUS FOURIE NO**

Second Defendant

**DANIEL RUDOLF FOURIE NO**

Third Defendant

**THE DIRECTOR GENERAL OF THE DEPARTMENT  
OF RURAL DEVELOPMENT AND LAND REFORM**

Fourth Defendant

**THE MINISTER OF RURAL DEVELOPMENT  
AND LAND REFORM**

Fifth Defendant

**LEKWA LOCAL MUNICIPALITY**

Sixth Defendant

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## **JUDGMENT**

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**NCUBE J**

### **Introduction**

[1] This is opposed application for substitution. The applicant seeks an order substituting her as the applicant for purposes of an application for an award of land in terms of Section 16, of the Land Reform (Labour Tenant Act, Act 3 of 1996) ("the Act"). The first, second and third respondents have filed a counter application asking this court to clarify certain paragraphs in the judgment of this court dated 26 October 2018 (Carelse AJ) in so far as those paragraphs refer to the application in terms of Section 16 of the Act. Parties agreed that if this court finds against the applicant in the substitution application, it will not be necessary to adjudicate on the counter application.

## **Background facts**

[2] On 25 September 2015, Mr Luke Fourteen Binda (“Mr Binda”) instituted an action in the Land Claims Court. In that action, Mr Binda sought relief to be declared a labour tenant and to be awarded part of that portion of land which he was using and resided on, on 02 June 1992. The first, second and third respondents defended that action. In a judgment (Carelse AJ) dated 26 October 2018, Mr Binda was declared to be a labour tenant in terms of Section 33 (2A) of the Act. The issue of the award of land was postponed *sine die*.

[3] On 21 March 2001, Mr Binda filed an application with the Director General seeking an award of land in terms of Section 16 of the Act. Mr Henk Terblanche, the landowner, was, in undated letter reference ET6/5/5H, informed of Mr Binda’s application and of the steps which Mr Terblanche could take. In his application, Mr Binda indicated that he was staying on Strekfontein farm with his family and that there were six (6) people in his family. Having been declared a labour tenant on 26 October 2018, Mr Binda passed away on 10 July 2020. It is on that basis that the applicant now seeks an order to be substituted as an applicant in respect of an application for an award of land, on the basis, she claims, she is a spouse of Mr Binda and therefore a family member.

## **Issues**

[4] The respondents deny that the applicant has *locus standi* to bring the present application. Respondents aver that there is no evidence that the applicant is the spouse of Mr Binda apart from what she says in her founding affidavit. There is no proof that she was married to Mr Binda, they aver. Respondents also deny that the applicant can be described as being the associate of Mr Binda as she wants the court to believe. According to the respondents, the applicant in this case, can never be an “applicant” in terms of the Act.

## **The Law**

[5] The Act defines the applicant thus: -

“**applicant**” means-

- (a) a labour tenant, an associate who has lodged an application in terms of Section 17(1); and

(b) for the purposes of the award of land or a right in land to an applicant by the court, any other person nominated by the applicant and approved by the court;”

In turn an associate is defined as: -

“**associate**” means a family member of a labour tenant, and any other person who has been nominated in terms of Section 3 (4) as the successor of such labour tenant, or who has been nominated in terms of Section 4 (1) to provide labour in his or her stead;”.

A family member is defined as:

“**family member**” means a labour tenant's grandparent, spouse (including a partner in a customary union, whether or not the union is registered), or dependent.”

## **Discussion**

[6] In terms of the definition, Ms Tshabalala can be an applicant only if she is a labour tenant or an associate who has lodged an application in terms of Section 17 (1) of the Act. We know she is not a labour tenant. Mr Bhinda was declared a labour tenant but he passed on before the issue of an award of land could be determined. Miss Tshabalala's case is that she is a spouse of Mr Binda, she got married to him in 2004 by customary union which was not registered.

[7] A marriage certificate provides *prima facie* proof of the existence of a marriage. In this matter, the marriage was not registered, and therefore, there is no *prima facie* proof of that customary marriage. The existence of the marriage cannot be presumed.<sup>1</sup> These are motion proceedings. The issues are decided on affidavits only. In an application such as this, Ms Tshabalala bears an onus to state her entire case in the founding affidavit. In *Director of Hospital Services v Mistry*<sup>2</sup> Diemont JA stated the following:

“When, as in this case, proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in *Pountas' Trustee v Lahanas* and as has been said in many other cases, an

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<sup>1</sup> *Acar v Pierce & Other* like applications 1986 (2) SA 827 (W) at 832 H.

<sup>2</sup> 1979 (1) SA 626 (A) at 635B- 636H

applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.”

[8] In ***Monteoli v Woolworths (Pty) Ltd***<sup>3</sup> Willis J said:-

“25 It is absolutely trite that the onus of proving negligence on a balance of probabilities rests with the plaintiff”

“27 Sometimes, however, a plaintiff is not in a position to produce evidence on a particular aspect. Less evidence will suffice to establish a prima facie case where the matter is peculiarly in the knowledge of the defendant.”

“29 In such situations, the law places an evidentiary burden upon the defendant to show what steps were taken to comply with the standards to be expected. The onus nevertheless remains with the plaintiff.”

[9] In the present case, there is no proof that Ms Tshabalala was married by custom to Mr Binda. She only makes a bold and unsubstantiated averment that she is a spouse of Mr Binda. She did not provide a confirmatory affidavit from a member of Mr Binda’s family. There is no proof of the ceremony of a customary marriage. There is no evidence of lobola negotiations. There is not even evidence from a tribal constable who officiated at the customary marriage ceremony. Ms Tshabalala avers that three children were born out of her marriage with Mr Binda but there is not even an affidavit from one of three children confirming that Ms Tshabalala is his or her mother and that he or she is born of the marriage between Ms Tshabalala and Mr Binda. Even a birth certificate showing names of parents could suffice but none is attached to the founding affidavit.

[10] It is doubtful there existed a customary marriage or union between Mr Binda and Ms Tshabalala. The founding affidavit is silent even with regards to the requirements and the ceremony of the alleged marriage. In ***Fanti v Boto & Others***<sup>4</sup> Dlodlo J expressed himself in the following terms:

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<sup>3</sup> 2000 (4) SA 735 (W) pars 26- 29

<sup>4</sup> 2008 (5) SA 405 (W) para 19

"It is actually relatively easy to prove the existence of a customary marriage in view of the fact that there are essential requirements that inescapably must be alleged and proved. These would be:

- i. consent of the bride
- ii. consent of the bride's father or guardian
- iii. payment of lobolo
- iv. the handing over of the bride."

In the absence of these averments from the founding affidavit, no court can ever find that Ms Tshabalala is a spouse, associate or family member of Mr Binda and she is therefore not an applicant in terms of the Act. Having made this finding, there is no need to adjudicate on the counter application.

### **Costs**

[11] The practice in this court is not to make cost orders unless there are exceptional circumstances justifying an award of costs. In this case parties, correctly did not ask the court to make an order of costs.

### **Order**

[12] In the result, I make the following order:

1. The application is dismissed.
2. There is no order as to costs.



**M T NCUBE**

Judge of the Land Claims  
Court of South Africa, Randburg

Date of hearing: 25 November 2022

Date Judgment delivered: 28 March 2023

## Appearances

For Applicant:           Adv Whittington

Instructed by:           Bhayat Attorneys Inc

For First to Third Respondents:   Adv Stone, JS

Instructed by:           Niemann Grobelaar Attorneys