

SOUTH AFRICA / JUDGMENT

# Kunene and Another v Hattingh and Others (LCC126/2008) [2016] ZALCC 28 (13 January 2016)

[2016] ZALCC 28

## COURT

Land Claims Court

## BEFORE

Mpshe AJ

## CASE / FILE NUMBER

LCC126/2008

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD

IN RANDBURG

CASE

NUMBER:

LCC126/2008

Before:

The Honourable Mpshe AJ

Heard

on: .....

Delivered

on: .....

In

the matter between:

FELOKWAKHE

JOHAN KUNENE

First

Applicant

ENOCH

KUNENE

Second

Applicant

And

TIAAN

JOHAN KUNENE

First

Respondent

RUL

SECURITY  
Second  
Respondent  
DEPARTMENT  
OF LAND AFFAIRS  
AND  
RURAL REFORM  
Third  
Respondent

## JUDGMENT

### INTRODUCTION

- [1] This is an application for labour tenancy in accordance with section 33 (2A) of the Land Reform (Labour Tenants) Act 3 of 1996 (“the Act”).

### BACKGROUND

- [2] This application was initially launched by nineteen (19) Applicants. At some stage before close of pleadings, the number of applicants dwindled to two in the names of Felokwakhe Johan Kunene (First Applicant) and Enoch Enos Kunene (Second Applicant).
- [3] The said reduction was done without application for amendment in terms of Rule 22 to rules of this court, save a purported amendment through a supplementary affidavit.
- [4] The Applicants contended that they are labour tenants by virtue of being born laboured on the property known as Potion 1 of farm Spitkop number 402, in the district of Utrecht, Kwa-Zulu Natal province.
- [5] The application is opposed and evidence viva-voce was tendered.

### PARTIES

- [6] First applicant is Felokwakhe Johan Kunene, an adult male person residing on the farm Spitkop.
- [7] Second Applicant is Enoch Kunene, an adult male person residing on the farm Spitkop.
- [8] First Respondent is Tiaan Hattingh, a major male person, the registered owner of the farm Spitkopn 402, HT (“the property”)
- [9] Second Respondent is RLU Security, a legal entity conducting security business with principal place at Droesheid Op Noten Plot, Vrede Road, Volkrust.
- [10] Both Applicants testified viva-voce and I now deal with their evidence.

- [11] First Applicant testified under oath. He is currently 59 years of age having started working on the property at age of sixteen. He is a widower with six children.
- [12] His grandparents and parents all worked and lived on the property but did not receive any financial remuneration by way of a salary or wages. That they ploughed the land and planted beans, pumpkins and mealies.
- [13] They had, as a family unit, livestock in the form of cattle, goats and horses. That his family members are buried on the property. He together with his three brothers Enoch, Lawrence and Jacob worked for one Wessels Nel on the farm Engogo. They would sleep at Engogo during weekdays and travel back home to Spitskop on Saturday to be back the following week.
- [14] The employment terminated on 28 November 1997 when the property was sold and they consequently retrenched.
- [15] Whilst in the employ of Wessel Nel, received an amount of R400.00 (four hundred rand) per month with effect from 1993 to 1997. This however did stop the other rights of cropping and keeping of livestock.
- [16] In the year 2008 First Respondent acquired the property. First Respondent then reduced the Applicants grazing camp known as Kafferkamp as well as cattle from 60 to 20 herds of cattle per person.
- [17] His family operates as a Kunene clan and all occupy a total of 40 house units situated on the farm Spitskop.
- [18] This witness was cross-examined for almost two days. The cross examination concentrated on the permanent residence of the witness.

It was put to witness severally that his permanent residence was not Spitskop but eNgogo and this, the witness disputed. It emerged during cross-examination that the witness had a total of 36 cattle kept on the farm Engogo on the auction premises. This was put to him as an indication that he lived on the farm Engogo. Witness explained that he had to find a place for thee cattle as Fist Respondent had directed that the cattle be reduced or be kept somewhere else and not on his property Spitskop and further that the cattle were dying, that he is renting the palace in Engogo, that some of his cattle are still in Spitskop.

- [19] He categorilly denied that the brought cattle to Engogo because he lives in Engogo. This witness, despite that able and lengthy cross examination stuck to his version.
- [20] The not witness was Enoch Kunene, the brother to the first witness. He corroborated the evidence of the first witness. Enoch also worked on farm Spitsop and Engogo in the employ of booth Tollie Nel and Wessels Nel. His sibilings, inter-alia, Jacob, Petros, Solly and Sam also worked for the same employer for no salary or wages.

- [21] His permanent place was Spitskop and not Engogo. That his family lives and is in Spitskop whereat thee have homestead made up of 40 house units. He had been in the employ of Wessels and Tollie Nel for a period of nineteen (19) years.
- [22] This witness was also cross-examined but nothing turned around the cross-examination. This ten closed the case for the Applicants.
- [23] First Respondent Tiaan Hattingh gave evidence. He is the registered owner of the farm Spitskop which he acquired in 2008. On 12.03.2008 he had a meeting with Applicants whereat he introduced himself as the new owner. At this meeting an agreement was reached that Applicant's would have to reduce their livestock. The Applicants kept their livestock n a camp set aside measuring 28 hectares.
- [24] He denied telling Applicants to go to government for extra grazing fields nor he told Applicants that the farm was not bight fry blacks. Water is available to Applicants livestock from the neighboring stream that is forever flowing.
- [25] That according to information Firsts Applicant resides permanently on the farm Engogo and has resided thereat for the past 16 years. That First Applicant had 39 cattle at Engogo.
- [26] As a rest of information he investigated the actual residence of the First Applicant. He was led to certain houses allegedly belonging to first Applicant whereat Firsts Applicant resided. On pictures handed up as exhibit "B" various structures can be seen.
- [27] That as a result of intimidation by Applicants he had to lay charges with the police but charges were never pursued by the police. That he had to serve Applicants with notices ending residence in terms of Section 8 (1) of Extension of Security of Tenure Act 62 of 1977 (ASTA). This notice was served on 11.07.2008.
- [28] The notice to remove trespassing animals in terms of Section 7 (1) of ESTA were served on both Applicants on 19.06.2008 and 14.07.2008.
- [29] No action was produced by these notices. The rational for the termination of residence centers around intimation, excess livestock
- and demand for more grazing land by the Applicants.
- [30] Under cross-examination this witness repeated the fact the First Applicant does not reside on Spitskop bit permanently in Engogo with his family. He insisted that the houses/ structures on exhibit "B" belong and are occupied by the First Applicant and his family.
- [31] He does not dispute that First Applicant has cattle in Engogo, that Applicants lived in a compound at Engogo and that Applicants worked for previous owners at Spitskop as well as Engogo.
- [32] The term "labour tenant" is defined in the Labour Tenant 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 grandparents resided or resides on a farm and had the use of cropping or grazing land in such farm or another farm of the owner, and in consideration of such right provided for 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."

[33] Paragraphs (a), (b) and (c) of the definition must be read conjunctively.

[34] Central to the determination of whether the first and Second Applicants comply with paragraphs (a), (b) and (c) of the definition

are the following issues:

[34.1] whether the First applicant reside or has the right to reside on Spitskop;

[34.2] whether either of the Applicants had the right to use cropping or grazing land in consideration for such rights provides or provided labour to the owner;

[34.3] whether either of the Applicants parents or grandparents complied with paragraphs (a) and (b) of the definition.

[35] There is a presumption that Applicants are labour tenants as found in the provisions of section 2 (5) of the Act. The section provides thus:

*"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."*

[36] The effect of this provision is therefore that once Applicants place themselves within the ambit of (a), (b) and (c) of the definition of labour tenants, the presumption is that Applicants are labour tenants.

[37] The onus then shifts to the respondent to prove that Applicants are farmers.

[38] In determining whether the applicants are labour tenants, compliance with paragraphs (a), (b) and (c) to the definition of labor tenant is to be established. The required compliance is to be looked at cumulatively or conjunctively.[i][1]

[39] I will first deal with compliance regarding Second Applicant for reasons that will be clear later on this judgment.

ENOCH KUNENE (SECOND APPLICANT)

[40] Paragraph

(a) of the definition states:

*“labour tenant means a person:*

(b) .....

(c) .....”

[41] It is common cause that Second Applicant has resided on the farm since birth and is currently residing thereon. I find compliance with

(a) of the definition.

[42] Paragraph (b) of the definition states:

(a) .....

(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) .....”

[43] There is undisputed testimony by this Applicant that he had the right to crop and graze on the farm Spitskop. He, together with his other siblings provided labor on the farm Spitskop. They worked on the farm in favour of one of the owners in the person of Wessels Nel who was the son to Tollie Nel.

[44] His testimony is further that he worked or provided labour initially in consideration for the right to reside on the farm.

[45] There is evidence uncontradicted that both Applicants were paid a salary of R400.00 per month with effect from 1993 until November

1997. This evidence was not dealt with by the parties in their submissions. As for the impact thereof regarding compliance with

paragraph (b) of the definition, I then called upon parties to make written submissions in this regard. I will deal with that issue upon receipt of submissions.

[46] Paragraph (c) of the definition states:

(a) .....

(b) .....

(c) Whose parent or grandparents 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 labour to the owner or lessee of such other farm...”

- [47] There is uncontradicted testimony the both parents of Applicants namely Paulos Kunene and Malitha Thelamova Mkhwanazi resided and died on the farm and are currently buried non thee farm. That they had grazing and cropping rights. That they had livestock in the form of cattle, goats and horses. At that stage the owner of the farm was Boet Meyer. The testimony is further that they, parents, worked for living and cropping on the farm.
- [48] There is testimony uncontradicted that their grandparents also resided and toiled on the farm in return for residential rights.
- [49] I find that Second Applicant has testified the requirements in paragraph (c) of the definition.

JOHN FELOKWAKHE KUNENE (FIRST APPLICANT)

- [50] Regarding paragraph (a) to the definition, this Applicant insists that he resides on the farm Spitskop.
- [51] His testimony in this regard is disputed by the first Respondent. The version of the Respondent is that First Applicant does not reside on the farm Spitskop but Engogo.
- [52] Applicants version is that he does not permanently reside at Engogo but that he sleeps in a shack made up of corrugated iron sheets. That he is renting this shack on the farm, owned by an Indian person. That he is employed by Chief Kubheka at Engogo.
- [53] It is further Respondents case uncontradicted, that a total number of 36 cattle belonging to First Applicant are currently being kept an auction place at Engogo.
- [54] Applicants version, uncontradicted, is that between 1997 and 2005 he was employed but between 2005 and 2011 he was employed by one Gert van der Merwe at Engogo.
- [55] Regarding the 36 cattle at Engogo, first Applicant explains that he is renting the place at Engogo for the kraaling of his cattle. That he moved the said cattle to Engogo in 2009 because First Respondent had instructed them to redce their livestock, and further that his cattle were dying. The said cattle have been on the auction kraal for 7 years.
- [56] Respondents further testimony is that First Applicant resided in a house on a farm at Engogo. However, it later transpired that this version was incorrect and withdrawn.
- [57] In the place of the withdrawn version, First Respondent produced a catalogue of photos eight in number.[2]
- [58] These photos, in particular photos 3, 4,7 and 8 are said to be residence of Firth Applicant at Engogo.
- [59] First Respondent testified that he received information from persons he can't disclose; for fear of reprisal that he said structures / dwellings houses belonged to First Applicant who resided thereat.

- [60] The First Applicants response is that he dodge not own the dwellings, he does not reside therein, but that he used to visit his late girlfriend who lived there.
- [61] Due to lack of clarity regarding these houses, I directed the sheriff, Utrecht to make enquiries as to ownership of those hoses and report to court accordingly. I will revert to this aspect upon receipt of the report.
- [62] Regarding paragraphs (b) and (c) of the definition of labour tenant, I shall not repeat the evidence as the version of Second Applicant is also applicable to first Respondent. I am satisfied that First Applicant has complied with paragraphs (b) and (c) of the definition.

#### ON ISSSUE OF SALARY

- [63] On the 02.12.2015 I requested parties to present me with written submissions regarding the payment of salary in the amount of R400.00 (four hundred rand) per month to both Applicants. The request reads thus:

*“Parties are requested to make submissions in writing to the court in respect of the facts herein below and the question the follows:*

#### FACTS:-

There is uncontested evidence emanating from the Applicants to effect that both the First and Second Applicants were paid a salary of R400.00 (four hundred rand) per month. That the said payment was from the year 1993-1997.

Record page 28 lines 5-25

Record page 29 lines 1-7

It is also undisputed that the Applicants received the so-called blue cards (unemployment Insurance Fund) and payment ensued therefrom.

#### QUESTION:

Do the facts above have an impact on the Labour Tenancy application?

Response is to reach he Judge within seven (7) days from date of receipt hereof.”

- [64] To date of writing this judgment I had not received any response from any party. Emails and telephone calls did not yield results. I now attend to this issue without the benefit of inputs from the parties.
- [65] It is common cause that both First and Second Applicants received a salary on the amount of R400.00 each whilst in the employ of Wessels Nel from 1993 to 1997 when they were retrenched. The Applicants received salary for a total of 60 (sixty) months translating into a total of R20 000 .00 (twenty four thousand rand each.
- [66] Applicants had worked for a total of 19 years. In the founding affidavit the following is stated:

*“Wessels Nel acquired the farm and this farmer adopted the, whilst allowing us rights of residence, grazing and cropping, also paid an amount of R 400.00 per month...”*

[67] It is therefore clear that the right of resident, grazing and cropping were still enjoyed over and above salary of R400.00 (four hundred rand).

[68] I do not have evidence actual as to the value of right to crop, graze and residence but I am however satisfied that the value of rights enjoyed by the Applicants exceeds that of the salary of R24 000.00 (twenty four thousand rand) received by the Applicants.

#### ON RESIDENCE OF FIRST APPLICANT

[69] First Respondent in support of evidence that First Applicant does not ride on the farm Spitskop filed a bundle of photographs made up of eight photos marked “Annexure B”. First Respondent evidence is the effect that he received information that all the structure’s / houses depicted and occupied by First Applicant.

[70] However, First respondent does not tell as to the source of information saved that the informer does not want to be known, for fear of reprisals. Whilst, this is a valid reason, I do not accept that First Respondent obtained the said information from public officials i.e. officer of the tribal Authority of officer of Local Government offices.

[71] The said evidence is of no value to me save that it is hearsay. I then ordered the sheriff of the area to file a report with me. The order is couched as follows:

*“The Deputy Sheriff, Volkrust is ordered and directed to do an enquiry on property:*

Portion 1 of the farm Spitskop, number 402, registration division HT, district Utrecht, in order to establish

(a) The ownership of the dwellings/houses as depicted in a document Bundle of Photos “B: (1-8) filled in terms of Rule 47(1) (herein attached).

(b) Whether a person known as Felokwakhe Johan Kunene is an occupier or resident of these dwelling’s/houses.

(c) If Felokwakhe Johan Kunene is found to be resident thereof, the period for such residence.

The Deputy Sheriff, Volkrust is to file a report with the court within 10 (ten) days from receipt of this order.”

[72] On 22.12.2015 the sheriff of Paulpietersburg file a report a follows:

*“Enquiries made on 07 December 2015 at 10:30 on the farm Spitskop number 402, Utrecht. No dwellings/houses of the description of photos “B” (1-8) could be found on the farm. Only one Kunene kraal on the farm that belongs to Enos Kunene. According to information Felokwakhe Johan Kunene is residing at Engogo.*

[73] The report of sheriff Paulpietersburg if of assistance only regarding the residence of First Applicant.

[74] On a balance of probabilities given the evidence as a whole, I am satisfied that First Applicant does not reside on the farm Spitskop, but Engogo.

[75] Regarding the requirement of labour tenant I find that first Applicant complies only with regard to (b) and (c) of the definition.

Second Applicant satisfied (a), (b) and (c) to the definition of labour tenant.

[76] I make the following order:

- (a) Application by Firsts Applicant is dismissed.
- (b) Second Applicant is declared a labour tenant in accordance with section 33 (2A) of the Land Reform (Labour Tenants) Act No. 3 of 1996.
- (c) I make no order as to costs.

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MPSHE M J

ACTING JUDGE: LAND CLAIMS COURT

Appearances:

For the applicant : Advocate Chiti

Instructed by : Dlodlu Attorneys

For the respondents : Mr. Grobbelaar

Instructed by : Peet Grobbelaar Attorney

[1] Ngcobo & Others v Salimba CC; Ngcobo v Van Rensburg 1999 (21) SA 1057 (SCA)

[2] Exhibit "B" (1-8)

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