

SOUTH AFRICA / JUDGMENT

Mahlangu v Minister of Rural Development and Another (LCC08/2015) [2017] ZALCC 15 (5 June 2017)

[2017] ZALCC 15

COURT

Land Claims Court

BEFORE

Y S Meer, C Loots

CASE / FILE NUMBER

LCC08/2015

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD

AT RANDBURG

Case

No.: LCC08/2015

Before:

Acting Judge President Meer and Professor Loots (Assessor)

Date

of Hearing: 27 March 2017.

Delivered:

5 June 2017

REPORTABLE

In

the matter between:

JAMES

MATTHEWS MAHLANGU

Plaintiff

and

MINISTER

OF RURAL DEVELOPMENT

First

Defendant

OAK

ALLEY FARM (PTY)

LTD

Second

Defendant

REGIONAL

LAND CLAIMS COMMISSIONER,
MPUMALANGA
Participating
Party

JUDGMENT

5 JUNE 2017

MEER AJP.

[1] This is a claim for Restitution of Rights in Land in terms of the Restitution of Land Rights Act No 22 of 1994 (“The

Act”). The rights in land which are claimed by the Plaintiff are those of beneficial occupation and/or the interests of a labour tenant in respect of Portion 21 of the farm Frischgewaagd No 409 JT (“the farm”) which is owned by the Second Defendant, Oak Alley Farm (Pty) Ltd.

[2] In December 1998 the Plaintiff lodged a claim on behalf of his late father Mr Hotnot Matsintsa Mahlangu who was a labour tenant, born on the farm and had lived there for almost 70 years. At the time of the lodgement of the claim the Plaintiff’s father was alive. He has since unfortunately passed away on 27 November 2016.

[3] On 18 March 2013 the Regional Land Claims Commissioner for Mpumalanga, the Participating Party, recommended that the claim be

accepted as it meets the minimum requirements of the Act. The claim was thereafter published in the Government Gazette. The First Defendant, who is the Minister responsible for restitution of rights in land, does not oppose the claim.

[4] On 15 January 2015 the Second Defendant, as owner of the farm, applied to this Court by notice of motion for a declaration that no valid claim had been lodged, and an order directing the withdrawal of the publication of the claim in the Government Gazette. The Plaintiff opposed that application. Due to material disputes of fact the application was referred to trial with the affidavits to stand as pleadings. In terms of Rule 33(8) I ordered, with the agreement of the parties, that the matter would proceed to oral evidence as if it were an action initiated in terms of Rule 44(2)(a).

[5] The trial proceeded before me between 27 to 30 March 2017. The issues to be determined, as agreed between the parties, were as follows:

1. Was Mr HM Mahlangu dispossessed of a right in land, such being that of beneficial occupation and/or a labour tenant’s interests in respect of the subject property?;
2. Is the claim an individual or community claim?

- [6] At the commencement of the hearing the parties agreed that the claim was an individual claim. The first issue thus remained as the only issue to be determined.

Common Cause Facts

- [7] Mr Hotnot Matsintsa Mahlangu, the Plaintiff's father was a labour tenant. He was born on the farm and had worked thereon for various owners until he left in 1989 when he was almost 70. As a labour tenant, he resided on the farm and had cropping and grazing rights. He had the right to occupy and use approximately 11 hectares of the farm. I pause to mention that the extent of the farm that he used and occupied was determined and agreed upon during the course of evidence at the trial, after which it was agreed that the plaintiff was seeking physical restoration of 11 hectares of the farm in his claim for restitution of rights in land.
- [8] The First Defendant very properly conceded during the course of the trial that the Plaintiff's father had a right in land, such being that of beneficial occupation and/or a labour tenant's interests in respect of the farm. The First Defendant however contended that Mr Hotnot Matsintsa Mahlangu was not dispossessed of his right in land by a racial law or practice, but that he voluntarily left the farm when he stopped working, as he wished to go and live with his children in Kwa-Ndebele.
- [9] At the conclusion of the trial the parties requested time to attempt to settle the matter. They were given until 28 April 2017 to settle. Towards this end Mr Mathebula on behalf of the First Defendant undertook to explore the purchase of 11 hectares of the farm in consultation with the parties for the purpose of restoration to the Plaintiff. At the request of the parties I granted an extension until 2 June 2017 to enable them to settle. There has been no settlement and the question of dispossession and the plaintiff's entitlement to restitution by way of restoration, now falls to be determined by me.
- [10] The crisp issue for determination at the trial was whether Mr Hotnot Matsintsa Mahlangu was dispossessed of his right in land by a racial law or practice. The stance of the Plaintiff, the First Defendant and the participating party was that Mr Hotnot Matsintsa Mahlangu was dispossessed by a racial practice that prevailed in respect of labour tenants. The practice, according to them, was that labour tenants who ceased to work and who had no children to work on their behalf, were required to leave the farm and could no longer continue to use and occupy the portion of the farm allocated to them. When Mr Hotnot Matsintsa Mahlangu stopped working on the farm he was subjected to this practice. It was contended that this was a racial practice that labour tenants were subjected to at the behest of farm owners.
- [11] The stance of the Second Defendant in contrast was that Mr Hotnot Matsintsa Mahlangu voluntarily left the farm when he stopped working as he wished to go and live with his children in Kwa-Ndebele.

The Evidence

[12] Four witnesses testified and the Court also had before it an affidavit made by the Plaintiff's father while he was still

alive. The Plaintiff himself testified in support of his claim and his cousin gave some corroborating evidence. For the Second Defendant, Mr Frans Parsons Junior whose family owned the farm during 1974 – 1989, and his brother-in-law Mr Killian, who managed the farm during some of this period, testified.

The Evidence for the Plaintiff

Testimony of James Matthews Mahlangu

[13] The Plaintiff testified that he was born on the farm in 1957. His late father was also born on the farm. Both his parents worked there, his mother in the kitchen and his father as a farm labourer. In return for his labour his father received one bag of mealie meal at the end of each month. This would increase to 10 bags after the harvest. He recalled his father receiving R6 a month and his mother, R5 a month. He could not recall in what year this was. The Plaintiff himself worked on the farm as a young boy during school holidays. He left the farm in 1983 and moved to Thembaletu in Kwa-Ndebele. He took up employment with the Kwa-Ndebele Government as a clerk.

[14] The Plaintiff testified that the family compound consisted of five houses. The Plaintiff's father was allowed to keep cattle and goats which grazed on the farm. He was also allocated land for cultivation and cropping. The family grew mealie meal and potatoes. The Plaintiff had considerable difficulty estimating the extent of the land used by his family, but ultimately with reference to the size of a soccer field he settled on 11 hectares, an extent that was agreed by the parties. Together with his parents' family, the extended family also lived on the farm, included in which were the Plaintiffs grandparents and an uncle, Mr Gentleman Mahlangu. They continued to live on the farm after the plaintiff's departure in 1983. At least 10 family graves, he said, were on the farm.

[15] The Plaintiff's father left the farm in 1989 at the age of about 70. The Plaintiff testified that his father left because he was doing work that was required to be done by many people and his age was against him. In addition Mr Parsons, the owner of the farm at the time, reduced the cropping and grazing land as a consequence of which the number of livestock could not increase. According to the Plaintiff his father could not tolerate to live and work under the conditions which were imposed upon him and he therefore had no option but to leave the farm.

[16] During cross-examination the Plaintiff was insistent that his father left the farm because conditions under which he was working had forced him to leave. He emphasised that his father had wanted to stay on but could not do so because he could not work under those conditions. He also said that his father did not want to leave the farm because his ancestors were buried there. In this regard he said the acceptance report compiled by the Participating Party, the Regional Land Claims Commissioner, was false in stating that family

graves were destroyed by the owner. He denied that his father had voluntarily left the farm because it was time for him to retire and he wished to go and live with his family in Kwa-Ndebele.

- [17] When invited to state the duties which made life unbearable for his late father, the Plaintiff mentioned the cutting of trees, the carrying of 10 meter irrigation pipes and gardening. However, he conceded that there was at least one other labourer on the farm, namely one Ruben.

The Answering affidavit of Mr H M Mahlangu

- [18] Mr HM Mahlangu the Plaintiff's father unfortunately passed away on 27 November 2016 and therefore did not testify. However his answering affidavit in the application launched by the Second Defendant for a declaration that no valid claim had been lodged, explains why he left the farm. The affidavit indicates at paragraph 6.7 that Mr Parsons was the last farmer that Mr HM Mahlangu worked for. It records that Mr Parsons imposed harsh living conditions upon them and caused them to reduce the number of cattle and restricted the cropping and cultivation. The affidavit states at paragraph 6.9:

"Needless to say we struggled to cope under such unbearable living and working conditions. As a result, around the year 1989 we decided to leave the farm as we felt we could no longer tolerate living and working under such strenuous conditions. Our lives had taken a turn for the worst and we felt we had nothing else to do on the farm. I strongly deny that my family and I left the farm voluntarily. Mr Parsons deliberately imposed upon us the harsher living conditions he did, knowing that no human being would be able to tolerate them."

Indeed that was his way of getting us out of the farm, and that was the reason we left, amongst others. It has always been and still is our intention to continue living on the farm where our ancestors are buried, so that we may continue to perform our family rituals and other cultural activities..."

The Testimony of Mr Paulus Mahlangu

- [19] Paulus Mahlangu is the son of the late Hotnot Mahlangu's father's brother. He referred to himself as Hotnot Mahlangu's

brother. He was born on 25 August 1953. He testified that his brother left the farm because he did not have the "power to work" and did not receive money.

Testimony for the Defendants

Testimony of Frans Johannes Parsons

- [20] Mr Parson's father bought the farm in 1974. Around 1975 or 1976, Mr Parsons bought the farm from his father. The latter however remained in charge of farming operations. Mr Parsons testified that Mr Hotnot Mahlangu received a monthly salary and some rations. In 1974 – 1975 his salary could have been in the region of R6 per month. The witness could not

remember what Mr Hotnot Mahlangu's salary was in 1989 when he left the farm. Mr Parsons managed the farm until 1982. His father had disengaged from the farming operations after he suffered a stroke. Thereafter Sarel Killian, Mr Parson's brother-in-law, took over management of the farm and was manager at the time when Hotnot Mahlangu left in 1989. At that stage Mr Parsons was not directly involved in the farm and he heard from his brother-in-law, Mr Killian, that Hotnot Mahlangu had said he is too old to work is leaving.

[21] Mr Parsons testified that a restriction had been enforced on the number of cattle that Mr Hotnot Mahlangu could keep on the farm. He and other labourers could keep no more than 15 head of cattle and the Mahlangu family had a designated area for cattle grazing.

[22] In cross-examination Mr Parsons said he did not know that Hotnot Mahlangu had left the farm because the grazing area was reduced.

During cross-examination by Mr Mathebula on behalf of the Participating Party and the First Defendant, Mr Parsons testified that his brother-in-law had reported that Hotnot Mahlangu told him he was getting old and wanted to leave the farm to live with his son in Kwa-Ndebele. When asked why Hotnot Mahlangu was allowed to continue to work when he was old and on

pension, the witness replied that there was a practice that if someone on pension wanted to work he would be allowed to work.

He denied that Hotnot Mahlangu was compelled to work. He moreover stated that Hotnot Mahlangu would have been allowed to stay on the farm for a reasonable period after he stopped working, but eventually he would have to leave. He added that they were in the process of negotiating the sale of the farm and would have allowed Hotnot Mahlangu to stay till the farm was sold.

[23] He added moreover that when people who worked on the farm for 38 years and longer like Hotnot Mahlangu, stopped working, their children then worked on their behalf. In this way, when elders stopped working, they could stay. That was not the case with Hotnot Mahlangu, whose children had all moved away from the farm. He testified moreover that Hotnot Mahlangu did not ask to stay on, adding that had he stayed on after the farm was sold, depending on the work situation the new owners might have had work for him.

Testimony of Sarel Petrus Killian

[24] Mr Killian is the brother-in-law of Frans Parsons. He became the farm manager in 1982. He testified that when he arrived on the farm it was only Hotnot Mahlangu, his brother Gentleman, their children and their mother Rosy on the farm. In about 1984 or 1985 he spoke to Hotnot Mahlangu about his age as he was older than

65. He took him to the Carolina Magistrate's Court and arranged a pension for him. In 1987 Mr Killian moved to Bethel. He visited the farm every week. Hotnot Mahlangu was in charge of the farm whilst Killian was in Bethel. He gave the following account as to how it came about that Hotnot Mahlangu left the farm in 1989: On one of his visits to the farm Hotnot said he

wanted to leave. He said he was going to Kwa-Ndebele to stay with his children as he was too old and wanted to stop working. Killian said he told Hotnot that if he wanted to go he must go. Killian did not see Hotnot leave. On his next visit to the farm Hotnot Mahlangu had left as had his entire family. Killian said at no stage did he tell Hotnot that his services were no longer required.

[25] During cross-examination Mr Killian said he had informed Hotnot that he could remain on the farm as long as he wanted to. He also said that he would have allowed Hotnot to remain on the farm had he wanted to after he stopped working. In addition his 90 year old mother and sister who were living with him could also have stayed on with him, had he so requested.

[26] When it was put to him during cross-examination by Mr Mathebula that it was the practice not to allow old people to stay on the farm after they had stopped working, he replied that Hotnot had left of his own will. When asked if a person could stay on after they had stopped working, Mr Killian replied,

“We never had anything like that”. He however denied that there was a practice that caused Hotnot Mahlangu to leave. When it was further put to him that there was such a practice as a result of which Hotnot Mahlangu had to leave because he was old and could no longer work, Killian replied that Hotnot was not too old to work. He was still fit.

Discussion

[27] The evidence makes clear that Hotnot Mahlangu born on the farm, who had lived all his life there, and had worked as a labourer there for most of his adult years stopped working after he had reached pensionable age and was about 70 years old. It is undisputed that he was expected to do strenuous work as a farm labourer at the age of

70. The evidence of the Plaintiff that Hotnot stopped working because of the harsh working conditions in his advanced years is corroborated by the affidavit of Hotnot Mahlangu and that of Paulus Mahlangu. The evidence of Parsons and Killian too is that Hotnot said he was too old to work albeit that Killian said this was not so and that Hotnot was fit. The probabilities, given the disquieting evidence of a 70 year old farm labourer who professes he is too old to work, being expected to perform strenuous manual labour, in my view, support the Plaintiff's version as to why Hotnot stopped working and left the farm. I note that the restriction on the number of cattle, a contributory factor complained of by the Plaintiff, is corroborated by the testimony of Parson. In addition, the evidence indicates that the system of labour tenancy was a reason, if not the ultimate reason for Mr Hotnot Mahlangu to leave the farm, for that system did not permit him to remain on the farm in the absence of children who could work on his behalf.

[28] From the evidence of Parsons it emerged that elderly labour tenants like Hotnot Mahlangu who came to the end of their working life, and whose children could not work on their behalf, left the farm. Hotnot Mahlangu would have known about this practice and one can only surmise that this is why he did not ask to stay on. But even had he done so and been allowed by his employer to stay, his security of tenure would have been precarious as the farm was to be sold. Mr Kilian's testimony, that he told Mr Hotnot Mahlangu that he could stay, does not detract from this.

[29] The fact after all is considered, is that Mr Hotnot Mahlangu was a labour tenant who had reached the end of his working life, had no children who could continue working on the farm and, as was stated by Mr Parsons could not continue living on the farm permanently.

His lot was no different in that respect to that of thousands of labour tenants in similar circumstances who had lived and worked all their lives on farms, but at the end of their working lives were required to leave.

[30] The affidavit of Hotnot Mahlangu makes clear that he did not want to leave the farm. It was his intention to always live on the farm where his ancestors were buried. The farm provided open spaces where he could crop and graze. Kwa Ndebele, where he moved, offered none of these attributes. Put simply he would not have left the security of hearth and home, but for the practice of labour tenancy which required a person like him without children to continue working the land, to leave. For, as was aptly stated by Moseneke DCJ in *Department of Land Affairs v Goedgelegen Tropical Foods (Pty) Ltd*,

[2007] ZACC 12; 2007 (6) SA 199 CC at paragraph 86:

'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 where modest homesteads passed from generation to generation. 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 a cultural and spiritual dimension that rendered the destruction of the rights more than just economic loss.'

[31] That the system of labour tenancy is a result of racially discriminatory laws and practices, appears clearly from the preamble to the Land Reform Labour Tenants Act 3 of 1996 which points out that:

'The present institution of labour tenancy in South Africa is the result of racially discriminatory laws and practices which have led to the systematic breach of human rights and denial of access to land;

... it is desirable to ensure the adequate protection of labour tenants who are persons who were disadvantaged by unfair

discrimination, in order to promote their full and equal enjoyment of human rights and freedoms; . . .

. . . it is desirable to institute measures to assist labour tenants to obtain security of tenure and ownership of land; . . .

. . . it is desirable to ensure that labour tenants are not further prejudiced’.

[32] It is ultimately in my view this practice which cannot but be regarded as a racial practice to which black labour tenants were

subjected for generations, which caused Mr Hotnot Mahlangu to leave the farm and to be deprived of his rights of beneficial occupation

and the interests he enjoyed as a labour tenant. Like so many other labour tenants, Hotnot Mahlangu had no security of tenure due to the aforementioned practice which prevailed in respect of generations of labour tenants who fall amongst some of the most vulnerable and discriminated against members of society. As was aptly acknowledged In Goedegelegen supra at paragraph 46 :

“ ...the labour tenancy relationships in apartheid South Africa were coercive and amounted to a thinly veiled artifice to garner free labour.

[33] In view of all of the above I find that Mr Hotnot Mahlangu did not leave the farm voluntarily but was forced to leave because of the system of labour tenancy which is the result of racially discriminatory laws and practices. He was thus dispossessed of his rights in land, being those of the interests of a labour tenant and beneficial occupation, by racial laws and practices, after 19 June 1913, a threshold requirement for entitlement to restitution in terms of Section 2 (1) (a) of the Restitution of Land Rights Act No 22 of 1994.

[34] It is common cause that Mr Hotnot Mahlangu did not receive any compensation, let alone just and equitable compensation as contemplated at section 25 (3) of the Constitution, at the time of dispossession. This is a further threshold requirement for restitution in terms of Section 2 (2) (a) of the Restitution Act. In the circumstances the Plaintiff qualifies for Restitution of the

rights in land lost by his father in his capacity as a direct descendent in terms of Section 2 (1) (c) of the Restitution Act.

Feasibility of Restoration

[35] As it is common cause that the Plaintiff’s father was entitled to use and occupation of 11 hectares on the farm it is in my view just and equitable that those 11 hectares be restored to the Plaintiff. There was no evidence at the hearing that restoration of those 11 hectares was not feasible. The order that I intend making shall however err on the side of caution, and, in addition, provide for the option of restoration of 11 hectares of alternative land on the farm or of 11 hectares of alternative state owned land.

Costs

[36] In keeping with the practice of this Court of making no order as to costs in litigation such as this, being in the genre of public interest/social action litigation, except in exceptional circumstances, of which I find none, I intend making no order as to costs.

[37] I order as follows:

1. Mr Matsintsa Hotnot Mahlangu was dispossessed of rights in land in respect of Portion 21 of the farm FRISCHGEWAAGD No 409 JT ("the farm"), such rights being those of beneficial occupation and a labour tenant's interest;
2. The Plaintiff is entitled to physical restoration of the 11 hectares on Portion 21 of the farm FRISCHGEWAAGD No 409 JT which Mr Matsintsa Hotnot Mahlangu used and occupied. Such entitlement is in terms of Section 21(c) of the Restitution of Land Rights Act No 22 of 1994;
3. The First Defendant is ordered to either:
 - 3.1 acquire the land referred to in paragraph 2 above and to thereafter restore same to the Plaintiff; or
 - 3.2 to restore to the Plaintiff 11 hectares of alternative land on the farm as agreed to with the Plaintiff and the Second Defendant, or to restore to the Plaintiff 11 hectares of state owned land as agreed to with the Plaintiff.
3. The Plaintiff and his family shall be entitled to visit their family graves on the farm, and the Second Defendant is ordered to permit them to visit such graves.
4. There is no order as to costs.

Y S MEER

Acting Judge President

Land Claims Court

I agree,

Professor C. Loots

Assessor

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