

SOUTH AFRICA / JUDGMENT

Mkhize and Another v SA Green Farming CC and Another (LCC166-2018)

[2024] ZALCC 35 (4 October 2024)

[2024] ZALCC 35**COURT**
Land Claims Court**BEFORE**
Ncube**CASE / FILE NUMBER**
LCC166/2018

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IN
THE LAND COURT OF SOUTH AFRICA
HELD
AT RANDBURG
CASE
NO: LCC166/2018

Before: Honourable Ncube J
Heard
on: 15 March 2024
Delivered
on: 04 October 2024
In

the matter between: MZONGAFI
MKHIZE
First Plaintiff
CABANGANI
GLADYS MKHIZE
Second Plaintiff
and
SA
GREEN FARMING CC
First Defendant
DIRECTOR GENERAL OF
THE DEPARTMENT
OF
RURAL DEVELOPMENT AND LAND REFORM
Second

Defendant

ORDER

The following order is

made:

1.

In terms of section 33 (2A) of the Land Reform (labour Tenants) Act 3 of 1996, it is declared that the First Plaintiff, Muzongafi Mkhize is a labour tenant.

2.

There is no order as to costs.

JUDGMENT

NCUBE J

Introduction

- [1] This is an action in which the two plaintiffs seek an order declaring them to be labour tenants in terms of Section 33(2A) of the Land Reform (Labour Tenants) Act[1] (“the Act”). The affected land is Farm Rosebank registration division FT, Province of KwaZulu-Natal held under Deed of Transfer No T33476 /1995 in extent of 33.4823 Hectares. It is commonly known as Kincairn Farm. The First Defendant defends the action on the basis that the First Plaintiff was a farmworker as defined in the Act and the Second Plaintiff was a former employee and a wife of the first Plaintiff, she is therefore an occupier in term of the Extension of Security of Tenure Act[2].
- [2] Both plaintiffs testified and called Falolo Nzimande as their witness. On the defence side, Sean Anthony Green (“Sean”), Martin William Peddle, Dr. Debbie Whelan, Lynn Margaret and Ian Moray Clowes testified.

Definition of Labour Tenant

- [3] Section 1 of the Act defines a labour tenant 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 rights 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 farm worker;”

Definition of a farmworker

[4] A farmworker is defined in section I 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 occupy and use land; and
- (b) he or she is obliged to perform his or her services personally”

Onus to prove labour tenancy

[5] The general rule, is that he who alleges must prove. Therefore, the onus is on the Plaintiff to prove that he is a labour tenant. That onus is set out in section 2 (5) of the Act which states:

‘If in any proceedings it is proved that a person falls within paragraph (a), (b) and (c) of the definition of labour tenant, that person shall be presumed not to be a farm worker, unless the contract is proved’.

[6] Section 2(5) of the Act was added by the amendment made to the Act in 1997. It was introduced to the Act by Act 63 of 1997. Before the amendment the plaintiff had the onus to prove both that he fell within the ambit of paragraph (a), (b) and (c) of the definition of labour tenant and that in addition that he was not a farm worker[3] Since the amendment, the plaintiff has to prove that he falls within the ambit of paragraphs (a), (b) and (c) and the onus shifts to the defendant to prove that the plaintiff is a farmworker[4]

[7] Therefore, in accordance with section 2 (5) , in case the two plaintiffs succeed to prove that they fall within paragraphs (a),

(b) and (c) of the definition of a labour tenant the onus will shift to the first defendant to rebut the presumption by providing admissible evidence to the contrary that the plaintiffs are in fact farm workers.

[8] Section 3(1) of the Act deals with the right of the labour tenants to occupy and use the land and it states as follows:

‘3. Right to occupy over use land –

(1) Notwithstanding the provisions of any other law, but subject to the

provisions subsection (2) a person who was a labour tenant on 2 June 1995 shall have the right with his or her family members---

- (a) to occupy and use that part of the farm in question which he or she or his or her associate was using and occupying on that date;
 - (b) to occupy and use that part of the farm in question the right to occupation and use of which in restored to him or her in terms of this Act or any other law.’
- [9] Against the legal framework and background, I must now look at the evidence presented and consider in the light of the evidence whether each party has discharged the onus which they bear.

Testimony of Mzongafi Mkhize

- [10] Mzongafi Mkhize testified that he is 77 years old. He was born on the farm known to him as Kincairn Farm (“the farm”). Cabangani Mkhize who is the second plaintiff in this case, is his wife. They both reside on the farm with their 4 children and 7 grandchildren. He is not learned, and he cannot read and write except writing his name. His late father Bhekindlela was also born and worked on the farm. His late mother is Makiyaza. Both Bhekindlela and Makiyaza are buried on the farm. His grand father is Sikhohlisi Mkhize. His grand mother is Belinah Mchunu. Both grandparents were born on the farm and were buried there
- [11] Mzongafi testified that he was working on the farm. He started working there since he was still young. He worked for Mr AJ Comrie, Micheal Morris, Lynn Morris and AP Green. They had a right to keep livestock. They also had a right to crop and graze cattle on the farm. When AP Green took over the farm he gave them 25kgs of maize, 1x1kg samp, 4x500ml of soup and 1kg of sugar. They still had cropping and grazing rights. The cattle grazed in a designated communal camp with those of the land owner across Illovo River. Sikhohlisi’s father Cothovana and his mother Piki Mkhize were working for Harrick Comrie in exchange for their right to reside, crop and graze on the farm. Piki’s grave is across Illovo River on the previous site where Mkhize homestead was situated before it was relocated. Cothovana’s grave is at the same place as that of Sikhohlisi.
- [12] Mzongafi was working for Mr Comrie in the kitchen as a cook. He was working with his father, alternating on 6 months each. For the work he did at the kitchen, Mzongafi was paid R2-00 per month. His father was also paid R2-00 per month. Mr Morris, Mr Comrie’s son in-law took over from Mr Comrie. Mr Morris took Mr Mkhize out of the kitchen to milk cows and drive a tractor. He was paid R5-00. Mr Morris passed on and Mrs Morris took over. Mrs Morris paid him R8-00 per month and he was made a supervisor by then. Mr Green took over from Mrs Morris. Mr Mkhize worked for Mr Green until he quarrelled with Mr Peddle who was Mr Green’s farm manager and he was dismissed. Mr Mkhize testified that when he was born his grandparents were working for Mr Comrie but he does not know how his grandparents were remunerated. His grandfather kept 20 herd of cattle and about 5 to 6 pigs.
- [13] He testified that his grandfather’s cattle were grazing over the mountains or near their homestead. They also had a right to use the cropping land on the farm. The cropping area was as big as 3 soccer fields in size. His parents used some cropping field. Mr Mkhize had 8

goats but Mr Green did not permit people to keep goats in the farm. Mr Green stopped cropping, and reduced the number of cattle from 6 to 3. When Mr Green's son took over, he ploughed for the people only one year. Mr Mkhize denied that he was a farm worker employed in terms of a contract of employment with effect from 28 September 1998 as Mr Green was alleging. He testified that he was always resident on the farm since he was born. When Mr Green purchased the farm, Mr Mkhize was already

working there.

[14] In cross examination, Mr Mkhize denied that he signed a contract of employment which was interpreted to him by a certain Sbu Mkhize from the Department of Land Affairs. He admitted that for the work he performed for Mr Comrie in the kitchen he was paid R2-00 per month. He agreed further that when Mr Morris took over in 1974, he was 29 years old. Mr Morris paid him R5-00 per month. In

cross examination Mr Mkhize repeated his claim that when Mrs Morris took over from her husband, Mr Mkhize got paid R8-00. Mr Green took over and Mr Mkhize received R300-00 per month. However, one payslip for Mr Mkhize for the month of June 1994 showed that Mrs Morris paid him R385-00 and in July 1994 he was paid R400-00 and later paid R415-81 per month. R4-00 was deducted for the dipping solution for Mr Mkhize's cattle. He had 5 herd of cattle during the era of Mrs Morris.

[15] Mr Mkhize denied that he was paid predominantly in cash than in the right to reside, crop and graze cattle. He also denied that Mr Morris's contract of employment did not give him the right to permanent residence or occupation since his great grandparents, his grandparents, his parents and himself were born on the farm. He denied that he paid rent for cattle and for the huts at his homestead as is reflected in his alleged contract of employment. He maintained he would never have agreed to pay rent for the huts he built himself.

[16] The second witness was Cabangani Gladys Mkhize ("Gladys"). Gladys testified that she was 74 years old. She did not go to school. She cannot write and read she cannot even write her name. She is married to Mr Mkhize the first witness and they live together on Kincairn farm. Before Gladys got married she was also residing on a certain farm known as Dwanguza. When she got married, Mr Mkhize's grandparents and parents were still alive. The grandparents were not working but Mr Mkhize's father, was working in Mr Comrie's kitchen. She did not know how the father in-law was paid. Mr Morris purchased the farm and Mr Comrie relocated to Richmond. The father in-law relocated with Mr Comrie.

[17] Gladys testified that when she got married, Mr Mkhize's grandparents kept livestock and they were also using the cropping field behind the homestead. They were cropping amadumbe across the river. The father in-law's livestock was grazing over the river. When Gladys got married, Mr Mkhize, had cattle which grazed across the river. They were also cropping the same fields as the father in-law. Later when Gladys had 3 children, in-laws still alive. Mr Mkhize was given his own cropping area which was separate from his parents

cropping area.

- [18] According to Gladys, she also worked for Mr Comrie a year before Mr Comrie relocated to Richmond. She was planting and harvesting. She was paid 1 shilling per day which was paid out every Friday. She also worked for Mr Morris. She was weeding the sugar cane and harvesting maize. Mr Morris paid 2 shillings a day, which was paid out every Friday. Gladys worked for Mr Green as well. She was picking sugar cane on the road and on the cropping field. She worked for 30 days and got paid after 30 days but she could not remember how much Mr Green paid her. She denied having signed a contract of employment by means of a thumb print. She averred that wherever she signed a document, she would make a cross not a thumb print.
- [19] During questioning by the Court, Gladys testified that she was not alternating with any other person in performance of her duties. She testified that only males were alternating on a six months basis. Mr Mkhize, her husband, was the fifth male person in the family. Whilst four of Mr Mkhize's brothers alternated with each other. Mr Mkhize was alternating on a 6 months basis with his father.
- [20] Mr Falolo Nzimande was the third witness. He resides at a farm known as Makhovotho. That farm is owned by one Mr Walsh. He knows Mr Mkhize and his wife Gladys. They all resided at Mr Comrie's farm known to the residents by its isiZulu name, Indlozana. He testified that Mr Mkhize as well as his parents and grandparents were all born on Mr Comrie's farm. Mr Mkhize's grand parents homestead was across Indlozana River where Mr Mkhize and his father were born. Later Mr Mkhize relocated with his father to another site. Mr Mkhize's grandparents also worked for Mr Comrie but Mr Nzimande did not know how they were remunerated. However, the grandparents kept cattle which grazed on a designated piece of land. It was a communal grazing area to be used by all families resident on the farm. He testified that the grandparents were also cropping near the homestead and across the river.
- [21] Mr Nzimande testified that Mr Mkhize's parents had 6 cows, which was a limit a person could keep on the farm. The parents were also cropping at the back of their homestead. He confirmed that Mr Mkhize was working in Mr Comrie's kitchen where he was alternating with his father on a six months basis. Mr Mkhize was cropping on the area allocated to him by Mr Comrie when he got married.
- [22] According to Mr Nzimande, his family was also resident on Mr Comrie's farm where they were also working. His family was evicted from the farm because there was no longer any person rendering services to the owner. Mr Nzimande's father suffered from a stroke and could not work. Mr Nzimande was alternating with his brother on a six months basis. When it was the brother's turn to work, on the farm, Mr Nzimande went to work in Durban waiting for his turn to return to the farm. When it was Mr Nzimande's turn he did not return to the farm. When it was Mr. Nzimande turn he did not return to farm. He was late by two days and his brother had to work two extra days. Both Mr Nzimande and his brother were fired from

work. The whole family had to leave since

no family member was allowed to remain on the farm in the circumstances where no member of that family was rendering services to the farm owner. Mr Nzimande was the last witness for plaintiffs.

[23] Mr Sean Anthony Green (“Sean”) was the first witness for the defence. He testified that he was 42 years old and was 11 years old when his father Mr AP Green acquired the farm in 1995 from Mrs. Morris. The farm was initially owned by the Comrie family since 1857. Before Mr AP Green purchased the farm it was previously operated by Mr Mike Morris and later by his wife Mrs Lynn Morris. The farm was about 760 hectares in size. Mr AP Green passed away in 2011. Sean took over the operation of the farm in 2011 / 2012.

[24] Sean told the Court that they are farming with sugar cane, timber and cattle. He testified that their employees crop little gardens around their homesteads. Mr Mkhize and Busisiwe were the only people who kept cattle on the farm and paid grazing fees for those cattle. In 1995, Anton was the only employee who kept cattle on the farm. Mr Mkhize only arranged with Mr Peddle and Sean to bring cattle to the farm. Sean testified that Mr Mkhize and Gladys were employed in terms of a contract of employment and they were paid

wages for their services.

[25] Sean said Mr Martin Peddle was the farm manager but he had since immigrated to New Zealand in 2016. Mr Peddle was the farm manager. He further testified about pay slips which he obtained from Mrs Morris which covered the period from 1994 to 1995. Mrs Morris destroyed the records in 2016 when she moved to the retirement home consequently, payslips prior to 1994 could not be obtained. Sean testified further that he employed Dr Whelan to do a historical background in this case. Dr Whelan had been involved in three land claim cases involving Kincairn farm in the past. Dr Whelan immigrated to the United Kingdom in 2018.

[26] The next witness was Martin William Peddle. Mr Peddle testified that he was the manager of Kincairn farm. The farm was purchased by Mr AP Green in 1995 from Mrs Morris. Mr AP Green employed all employees found on the farm including the plaintiffs. Thirty employees were taken over from Mrs Morris as on the 1st of November 1995, employment contracts were prepared for the employees. Some of the employees had already signed contracts of employments. Employees were staying in huts. Rooms were built for the employees, some employees moved into the compound Mr Mkhize and his wife stayed at their homestead and did not move into the compound. Mr Peddle testified that it was only Anthony Mkhize who had 3 herd of cattle on the farm. In January 1996, Mr. Peddle allowed Mr. Mkhize to bring 3 cattle on to farm.

[27] Mr. Peddle told this court that Mr. Mkhize was given permission to bring cattle

onto the farm on condition that his cattle grazed together with the cattle of the farm owner and Mr. Mkhize was going to pay grazing fee including payment for the dipping solution. Kincairn was farming with cattle, sugar cane and timber. Mr. Mkhize was cropping in his garden. He cropped vegetables and maize. Mr. Peddle did cropping for the employees when they made a request to that effect. Salaries which were paid were static in the area since employers tend to leave one farm and move to another farm.

[28] According to Mr. Peddle, when Mr. A P Green purchased the farm, Mr. Mkhize was already a tractor driver and he was an Induna on the farm. Gladys took up employment as a general labour in April 1996. She

retired in 2010. Mr. Peddle testified about the employment record relating to Mr. Mkhize's employment in 1994. He also testified

about Mr. Mkhize's contract of employment which was prepared by Mr. Peddle himself, signed by Mr. Mkhize and witnessed by a witness whose name he could not remember. In April 1999, Mr. Peddle prepared a contract of employment for Gladys.

[29] Whilst Mr. Mkhize was paid per month Gladys was paid per fortnight as she was doing tog work. Both Mr. Mkhize and Gladys could not send another person to render services on their behalf. Under cross-examination, Mr. Peddle concede that when Mr. Green acquired the farm in 1995, Mr. Mkhize had been living on the farm for many years. He also agreed that the contract he obtained from Mrs. Morris did not bear the signature of Mr. Mkhize as the employee. Mr. Peddle also conceded under cross examination that if Mr. Mkhize denied having affixed his thumb print on the purported pay-slip, he could not dispute it.

[30] Mr. Peddle confirmed that the document signed on 20 December 1999 was Mr. Mkhize's contract of employment. The name of S. D Mkhize appears both as a witness and also as the interpreter who interpreted for Mr. Mkhize from English to Zulu. Mr. Mkhize first refused to sign but only signed after the contract had been interpreted to him. The contract of employment relating to Gladys was signed on 01 April

1999. The space for the signature of the employee is left blank with no signature of the employee although there is a certificate by one Elizabeth Mazibuko to the effect that she correctly interpreted

for the employee from English to Zulu.

[31] Dr Debbie Whelan is an associate professor at the University of Linden in the United Kingdom. She is also a Director of the Archaic consulting. She prepared an expert report in this case. She conducted labour tenancy investigation in respect of Kincairn firm. The investigation revealed that Kincarin was situated on Parent Property Rosebank

1932. It was granted to James Comrie in 1858. In 1951, the Remainder of this farm was transferred to Augus Comrie. In 1977, that same Remainder was transferred to Michael Morris. Defining labour tenancy, Dr Whelan says, the system worked on the so-called

“sithupha” where the labour tenant provided six months labour on the farm and six months off. If the labour tenant was unable to personally provide labour to the farmer, other family members had to pick up the tenant’s commitment[5]. This practice ultimately tied the family to a certain farm.

[32] The system of working six months on the farm and six months off, provided

tenants with the opportunity of working elsewhere for a cash return at a higher wage in urban areas when he was off. Labour tenancy gave tenants security of living on white owned farms.[6] In many cases, labour tenants would have access to meat, milk and other rations for which they paid in labour.

[33] Dr Whelan referred to figure 2 of her report on page 168 to indicate that the picture of a homestead taken in 2013, showed that the owner of that homestead was controlled by the farm owner on how to build as

the homestead is laid out in linear fashion. Image figure 9 on page 171 of Dr Whelan’s report shows image of the Mkhize’s

homestead in 1967 with what she says is clear evidence of agriculture rather than horticulture, which then made Dr Whelan to conclude that there was no informal cropping by Mr. Mkhize this is despite the fact that Mr Mkhize’s homestead is also in a linear fashion showing controlled building. Dr Whelan also testified that labour tenancy was outlawed in 1964 but in re-examination stated that although it was out-lawed some farmers in Natal resisted the law. Farmers continued with old labour tenancy but did not concluded new labour tenancy contracts.

[34] Lynn Margaret Morris testified, she was born on 11 February

1941. Her father is James Angus Comrie who lived on Kincairn farm. She testified that her father farmed Kincairn till 1973 when he retired and went to a retirement village. Her husband Michael Morris took over from 1974 till 1994, whereafter, Mrs. Morris herself took

over the farming operation till August 1995 when she sold the farm to Mr. A P Green. In her farming operations, Mrs. Morris was assisted by her cousin Mr. Clinton Grey.

[35] Mr. Michael Morris was farming with corn and sugar cane and small amounts of maize for cattle feed and small amount of timber. Mrs. Morris testified further that her husband had 25 to 30 employees. All employees stayed on the farm. There were seven families staying in their homesteads on the farm. Seasonal employees stayed in the compound. People were paid in cash and they were required to render services personally. Permanent employees were paid monthly whilst seasonal employees were paid weekly. Employees were allowed to graze on the farm. There was a limit of 5 cattle which employees were allowed to graze. At first, employees cropped small vegetable and maize gardens near their homesteads. Mr. Morris did ploughing for the

people using his then farm tractor but later stopped when diesel became expensive and introduced rations.

[36] Under cross examination, Mrs Morris testified that rations comprised of beans, sugar, salt and maize meal. Mrs Morris also agreed that Mr Mkhize was working with his father as her mother's cook. They were working on a six months in and six months out basis. When Mrs Morris parents retired and relocated to the village, Mr Mkhize's father left with them. After the relocation of the Comries, Mr Mkhize then alternated six months in six months out with his brother. Mrs Morris confirmed that this was the position when she took over the farming operation. She took over at the end of February 1994.

[37] The last defence witness was Mr. Ian Moray Clowes. He testified that he stayed in Richmond for 60 years. He left Richmond between 2013 or 2014 and relocated to Pietermaritzburg. Mr. Morris is his cousin. He

worked in Kincairn for one month when Mr. Comrie was in hospital. It was in October 1964, when Mr. Mkhize was 16 years old. Mr. Clowes testified that the labour tenancy systems did not apply to Kincairn farm.

[38] Mr. Clowes testified that when Mr. Morris died at the end of 1993, Mrs. Morris asked Mr. Clowes to assist interpreting employment

contracts to the employees and Mr. Clowes signed as a witness. Mr. Clowes testified that a lot of contracts were circulating in the area because the farmers thought there was a need for employment contract as the new government had taken over. He testified that the amount shown as deduction for house rent was just a figure no deduction was made. R50-00 reflected on the pay slip as deduction for rent did not reflect the value of the hut at the employees' homestead.

[39] Mr. Clowes confirmed that 6 month in and 6 months out system applied in Kincairn till mid-1963. He also confirmed that Mr. Mkhize started working for Mr. Comrie as a cook alternating with his father who later relocated with Mr. Comrie to the village. Mr Clowes agreed in cross examination that Mr. Mkhize worked on Kincairn farm long before

1994. He agreed also that the amount of R350 reflected on the payslip as rent was just a strategy for employees to voluntarily leave the farm in case were they not able to pay. However, employees were not expected to pay that rent whilst they remained in employment. When the employee left employment he was than expected to pay rent.

Discussion

[40] In the most celebrated Mwelase decision,[7] dealing with the appointment of a Special Master of Labour Tenants, this court held:

‘The Land Reform (labour Tenants Act of 1996 was enacted in response to the Constitutional imperative at section 25(6) of the Constitution of the republic of South Africa, Act 108 of 1996 for Parliament to enact Legislation for persons whose tenure of land was insecure as a result of past

discriminatory laws or practices. The preamble of the Act states inter alia that its purpose is to provide for security of tenure of labour tenants and to provide for acquisition of land by labour tenants. It also provides that it is desirable to put in place measures to assist labour tenants to obtain security of tenure and ownership of land.’[8]

[41] Labour tenancy is the system which is closely associated with the South African painful history of the past, where people were

discriminated against, based on race and colour of their skin. The end result of that diabolic system was the failure of justice and unequal treatment of people since the system only applied to black people. It is true that you must proceed from behind the veil of ignorance, meaning, you must be ignorant of your race, colour and gender.

[42] Labour tenancy was a disguised slavery as Black people had to provide labour to the farm owner almost free or charge in return for the right to reside graze and crop on the land. In *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*[9] Moseneke DCJ as he then was described labour tenancy in the following terms:

‘In any event, at its very core, labour tenancy under the common law arises from a so-called innominate contract between the land owner and the labour tenant to render services to the owner in return for the right to occupy a piece of land, graze cattle and raise crops. In name, it is an individualized transaction that requires specific performance from the contracting parties. This means that labour tenancy does not sit well with commonly held occupancy rights. It is a transaction between two individuals rather than one between the landlord and the community of labour tenants. It must however be recognized that despite the fiction of common law in regard to the consensual nature of labour tenancy on all accounts, the labour tenancy relationships in apartheid South Africa were coercive and amounted to a thinly veiled artifice to garner free labour’[10]

[43] I now turn to consider whether both plaintiffs have satisfied the requirements of paragraph (a) of the definition of a labour tenant.

Paragraph (a) of the definition of a labour tenant provides that for a person to be a labour tenant, he or she must reside or must have the right to reside on the farm. This requirement of labour tenant should not detain me for long. It is not in dispute that Mr. Mkhize was born on Kincairn farm and that he has resided there since he was born and is residing there till today. He, together with his family were given the right by Mr. Comrie and other successive land owners to reside on that farm. It is equally not in dispute that the second plaintiff, Gladys, before she got married to Mr. Mkhize, was staying on a farm commonly known as Dwangaza. She got married to stay to Mr. Mkhize and came to stay with Mr. Mkhize on Kincairn farm and they are both staying there even today. Both plaintiffs therefore satisfy the requirement of paragraph (a) of the definition of a labour tenant.

Do the Plaintiffs satisfy the requirement of Paragraph (b) of the definition?

- [44] In terms of paragraph (b) for the person to be a labour tenant, he or she must have had the right to use cropping or grazing land on the farm on which he or she reside or another farm of the owner and inconsideration for such a right, the person must provide or must have provided labour to the owner or lessee.
- [45] Both plaintiffs are old. Mr. Mkhize, according to his ID book, is 77 years old, Gladys, his wife is 74 years old. Both plaintiffs are uneducated and illiterate. Therefore one would not expect such plaintiffs to expressly say that they provided labour, inconsideration for the right to use cropping or grazing land on the farm. The court must look at all the circumstances and conditions under which the plaintiffs were working. Mr Mkhize testified that he started working in Kincairn farm when he was still young working for Mr Comrie who owned the farm by then, until he was dismissed by Mr. Peddle.
- [46] According to the evidence tendered before this court, Mr Angus Comrie took ownership of the Remainder of the Parent Farm Rosebank in 1951 when Mr. Mkhize, born on 01-04-1948, was 3 years old. We do not know how young Mr. Mkhize was when he started working on this farm but he says he was very young. What we do know is that when Mr. Clowes worked on that farm in October 1964 Mr. Mkhize was already working there as a cook in Mr. Comrie's kitchen. Mr Clowes was 19 years old and Mr. Mkhize was 16 years old at the time. Mr Mkhize testified that he worked on that farm until he was dismissed by Mr. Peddle who was Mr. AP Green's farm Manager. According to Mr. Mkhize's termination card, his services were terminated on 12 March 2007 when he was 58 years old. If Mr. Mkhize was already working in 1964, it means in 2007 he had worked on this farm for more than 43 years.
- [47] It is not in dispute that Mr. Mkhize had a right to use grazing land on the farm. Even the reason for his dismissal is stated as being refusal to pay cattle rent. Mr. Mkhize testified that even his parents and grandparents kept livestock which was grazing across Illovu River. At some stage the Mkhize family cattle were grazing together with those of the farm owner. According to Mr. Mkhize his family has always exercised the right to crop on Kincairn farm. His evidence was confirmed by Mrs. Morris, who testified that at one stage, they used their tractor to crop for the labourers, but they stopped that practice because diesel was expensive. Mr. Clowes also confirmed that labourers were cropping vegetables in their gardens. Therefore, Mr. Mkhize had both grazing and cropping rights in Kincairn farm.
- [48] What remains for determination, is whether Mr. Mkhize provided labour inconsideration for the right to reside, graze cattle and to crop on the farm. Defence witnesses such as Mrs. Morris and Mr. Clowes denied that labour tenancy was practiced on Kincairn farm but they agreed that Mr. Mkhize was alternating working 6 months off in Mr. Comrie's kitchen with his father. That is exactly the characteristic of labour tenancy. Later, when Mr. Mkhize's father relocated to Richmond with Mr. Comrie, Mr. Mkhize alternated with his brother because there always had to be someone from the family rendering service to the farm owner if the family wanted to continue staying on the farm.

[49] Mrs. Morris conceded that Mr. Mkhize's family would not be allowed to remain on the farm if they did not work for the farm

owner. She further agreed that when she and her husband took over at Kincairn in 1974, Mr. Mkhize, was alternating with his brother on a six months basis. Mr Fololo Nzimande testified that his family was evicted from Kincairn farm when there was no one providing labour. His father was at home suffering from stroke. Fololo did not return from Durban when it was his turn. Fololo's brother had done his turn so the family had to leave the farm. Although the Act refers to the date of 02 June 1995, we must also look at what was happening before 2 June 1995. It is so because the Act also uses the past tense:

'Who has or has had the right to use cropping or grazing land in the farm, referred to in paragraph (a) or another farm of the owner, land inconsideration of such, right provides or has provided labour to the owner or lessees'.

In Ngcobo and Others v Salimba CC, Ngcobo and Others v Van Rensburg[11] Olivier JA Observed:

'in my view, the only way to make sense of the confusion saying in this area is to concluded that the proviso relating to 'farm worker' cannot for the reasons advanced above, refer only to the present time. It must refer to the whole period in respect of which the present occupier, whose occupation is under attack has been occupying the land in question. The proviso relating to farmworker applies not only to para (a) but also to (b) which also refers to the past'[12]

I therefore, find that Mr. Mkhize has satisfied the requirements of paragraph (b) of the Definition"

[50] The last requirement is paragraph (c) of the definition. Paragraph

(c) requires, in addiction to (a) and (b) that your parent or

grandparents must also have resided on a farm and had the use of cropping or grazing land on the farm and inconsideration of such

right, have provided or provide labour to the owner of the farm in question or to the lessees. In other words, this paragraph stipulates

that to qualify as to labour tenant, your parents or grandparents also, must be or must have been labour tenants. The evidence given by Mr. Mkhize that his great grandparents, grandparents and parents resided on Kincairin farm is undisputed. Mr. Mkhize testified about the graves of Cothovana, Sikhohlisi and Bhekindlela which are on the farm. Mr. Peddle and Clowes agreed that there are Mkhize graves on the farm. It is not in dispute that Mr. Mkhize's father was working in Mr. Comrie's kitchen, alternating with Mr. Mkhize himself on six months' basis. According to Mr. Clowes, Mr. Mkhize's father worked until he died in Mr. Comrie's house. I find therefore that Mr. Mkhize has satisfied the requirement of paragraph (c) as well.

[51] The position of Gladys is somewhat different from that of Mr. Mkhize. I have not been persuaded to believe that Gladys satisfies paragraphs

(b) and (c) of the definition of a labour tenant. Whilst Gladys resides and has resided on Kincairn farm, there is no evidence that she had a right, independent from that of Mr. Mkhize to use grazing or cropping land on that farm. Gladys testified that she worked for Mr. Comrie for one year before Mr. Comrie relocated to Richmond. She was tilling the soil and doing harvesting. She was paid 1 shilling a day but paid out every Friday.

[52] Gladys also worked for Mr. Morris. She was weeding sugar cane and harvesting Maize. She was paid 2 shillings a day, which was also paid out every Friday. She also worked for Mr. A. P. Green. She was picking up sugar cane on the road and on the cropping fields. She does not remember how much Mr. Green paid her except that she had to fill up the ticket and got paid after 30 days. There is absolutely no evidence that Gladys ever worked under the labour tenancy system. Although Gladys testified that her parents and grandparents were working at Dwanguza farm, she never said they were labour tenants.

[53] It has been proved that Mr. Mkhize falls under paragraphs (a), (b) and (c) of the definition of labour tenant. Mr. Mkhize is therefore presumed not to be a farm worker. The onus was then on the defence to present evidence to the contrary, to show that the plaintiffs were in fact not labour tenants but farm workers. We have seen the definition of the farm worker. A farm worker is 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 sum other form of remuneration, and not predominantly in the right to occupy and use land; and

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

[54] In an attempt to prove that the plaintiffs are farm workers as defined in the Act,

Defendant produced contracts of employment which were concluded hastily when the new democratic government was ushered in were produced as evidence. According to both Mrs. Morris and Mr. Clowes, with the new government coming in, a lot of such contracts were circulated amongst farmers. It is safe to assume that the purpose was to prevent labourers from claiming to be labour tenants. The contracts were concluded in haste and in many instances they do not make sense. R350 is shown as a deduction for house rent from Mr. Mkhize’s salary but no actual deduction was made. It is said Mr. Mkhize was supposed to pay for the piece of land on which his house was built but initially he was given permission, to construct his house on that land stay there without paying rent. The only requirement was that he had to provide labour to the owner or lessee.

[55] In any event, I carefully went through these so-called contracts of employment to see if they complied with the definition of a farm worker in the Act. I could not find a single sentence which says the employee will be paid predominantly in cash or in some other form of remuneration and not predominately in the right to occupy and use land. The Act says the contract of employment must provide for such stipulation. If there was such a stipulation in

the contract of employment, the defendants would be expected to lead evidence of a valuer to testify on the value of cash payment as compared to the value of accommodation occupied by Mr. Mkhize and also compare that with the value of Mr. Mkhize's cropping and grazing rights to see which one is predominant or greater than the other. No such evidence was presented on behalf of the first defendants.

[56] In any event, Mr. Mkhize testified that he started earning R2-00, it went up to

R5- 00 which went up to R8-00 ultimately going up to about R300-00 per month during the time of Mr. A P Green. So as on 02 June 1995, Mr. Mkhize might have been earning R300-00 per month. The contract of employment does not show how much Mr. Mkhize was earning, but only shows how much was deducted from his salary, the amount of which, is not stated.

[57] I doubt if the value of R2-00, R5-00, R8-00 and R300-00 would have been

greater than or predominant than the value of the land on which Mr. Mkhize built his house to provide shelter for himself and his family. I equally doubt that the value of those amount would have been greater than the value of the piece of land which Mr. Mkhize cultivated to produce food to feed his children. I am also not sure if the value of R300-00 would have been greater than the value of land on which Mr. Mkhize grazed cattle, which he would milk to feed his children, sell to get money to buy food and pay school fees for his school going children if any.

[58] In *Ngcobo and Others v Salimba CC; Ngcobo v van Rensburg*[13] Oliver JA expressed himself in the following terms:-

‘...But what is clear is that the appellants and their forebears had for many years received the absolute minimum in the form of remuneration for their services. It must be overwhelmingly clear that the value of residence, grazing, cultivation and of 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 outweighed the benefits they received as remuneration in cash or in kind.’[14]

[59] I have not, in this judgement, referred to authorities referred to by Mr. Chithi, Counsel for plaintiffs relating to the invalidity of contracts of employment produced by the defendants. It is so, because in my view, those contracts are clearly irrelevant and

invalid for non-compliance with the definition of a farm worker. There is no stipulation in them which says the plaintiffs will be paid predominately in cash or in some other form of remuneration. Such a contract leaves a person with the task to assume, by looking at the amount of remuneration if such is reflected, that the cash amount is predominant to the value of residence, cropping and grazing.

Undue delay

[60] The defendants contend that the plaintiffs delayed in prosecuting this case, looking at the time during which the plaintiffs lodge

their section 16 application for an acquisition of land. This contention by the defendants is misplaced. The plaintiffs alleged

that they lodged their application on time before the closing date 31-03-2021+. The first defendants contend that the plaintiffs must have initiated these proceedings, immediately after lodging the section 16 application. I do not agree. Section 16 and a declaration

in terms of section 33(2A) are totally different procedures, one is not dependent on the other. One can institute an action to be declared a labour tenant in terms of section 33(2A) even if he has not lodged an application in terms of section 16. Whilst there is a time limit in terms of a section 16 application, section 33 (2A) has no time limit.

[61] Mr. Chithi abandoned prayer (c) of his particulars of claim, rightly so since no, evidence was led in that regard. Mr. de Wet has asked me to dismiss prayer (c) as

a result of abandonment by plaintiffs. I cannot dismiss it since I have not heard the merits thereof.

[62] Looking at the evidence in its totality. I am satisfied that the First Plaintiff has succeeded on the balance of probabilities to

prove that he is a labour tenant of the farm in question. The Second Plaintiff is a family member of Mr. Mkhize in the meaning of that phrase in terms of section 1 of the Act.

Costs

[63] The first defendants have asked for the dismissal of this action with costs. The

practice in this court is not to award costs in such cases unless there are exceptional reasons for doing so[15]. There are no reason why I must award costs.

Order

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

1. In terms of section 33 (2A) of the Land Reform (labour Tenants) Act 3 of 1996, it is declared that the First Plaintiff Muzongafi Mkhize is a labour tenant.

Judge of the Land Court

Appearances:

For the Plaintiffs: Adv MM Chithi SC

For the Defendants: Adv A De Wet SC

Heard: 15 March 2024

Delivered on: 04 October 2024

[1] Act 3 of 1996.

- [2] Act 62 of 1997.
- [3] Mahlangu v De Jager 1966 (3) SA 235 LCC at 241 E-F.
- [4] Mlifi v Klingenberg 1999 (2) SA 674 LCC at 683 A-B.
- [5] Page 159 par 4.8 of Dr Whelan's report.
- [6] Page 159 Par 4.2.1 of Dr Whelan's report.
- [7] Mwelase and others v Director General for the Department of Rural Development and Land Reform and Others 2017(4) SA 422 (LCC) (8 December 2016).
- [8] Ibid para 1.
- [9] 2007
- (6) SA 199 (CC).
- [10] Ibid para 46.
- [11] [1999] 2 All SA 491 (A) (26 March 1999).
- [12] Ibid para 26.
- [13] Supra n 12.
- [14] Ibid para 28.
- [15] Van Zuydam v Zulu 1999(2) All SA LCC at 112 (d)- 113 (a)
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