

SOUTH AFRICA / JUDGMENT

Msomi v Train NO and Others (LCC 95/2009) [2010] ZALCC 32 (10 December 2010)

[2010] ZALCC 32

COURT

Land Claims Court

BEFORE

Ncube AJ

CASE / FILE NUMBER

LCC 95/2009

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IN THE LAND CLAIMS COURT OF SOUTH AFRICA
(HELD IN DURBAN)
CASE NO.: LCC 95/2009

In the matter between:

MBELE SONDELA MSOMI
.....PLAINTIFF
and
PETER
LANDALE TRAIN N.O.
.....FIRST
DEFENDANT
ROBERT
LANDALE MACKENZIE TRAIN N.O.SECOND
DEFENDANT
GILLIAN
TRAIN N.O.
.....THIRD
DEFENDANT
GALA
PROPERTY TRUST
.....FOURTH
DEFENDANT
DR WG
MAXWELL
.....FIFTH
DEFENDANT
THE

DIRECTOR GENERAL
DEPARTMENT
OF LAND AFFAIRS
.....SIXTH
DEFENDANT
HEARD
ON 18 NOVEMBER 2010
DECIDED
ON: 10 DECEMBER 2010

JUDGMENT

NCUBE AJ

Introduction

- [1] This is an action in terms of Section 33(2A) of the Land Reform (Labour Tenants) Act 03 of 1996 (“the Act”). The plaintiff seeks a declaration that he is a labour tenant. The affected land is Sub 2 and Sub 6 of Belvedere 1405 of Gala farm, (“the Farm”) situated in the district of Lions River, Province of KwaZulu-Natal. The Plaintiff, Mbela Zondela Msomi 62 years, resided on Sub 2 of the farm. The fourth Defendant is the current owner of Sub 6. The fifth Defendant is the current owner of Sub 2. Defendants 1, 2 and 3 are trustees of the fourth Defendant. All, except the sixth Defendants oppose the action.
- [2] The Plaintiff has also lodged a claim with the sixth Defendant in terms of Section 16 of the Act for acquisition of that land on the farm which he was entitled to use on 2 June 1995, which claim is still pending. As the parties agreed on the separation of

issues, the claim in terms of Section 16 of the Act is not relevant for the purposes of this judgment. The parties also agreed to the amendment of pleadings, substituting Dr WG Maxwell with WG Maxwell Investments (Pty) Ltd in respect of the fifth Defendant.

Provisions of the Act

- [3] Section 1 of the Act defines a “labour tenant” as meaning 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 grand-parent resided or resides on a farm and had the use of cropping and 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 farmworker.”

[4] A “farm worker” is in turn defined as:

“a person who is employed on a farm in terms of a contract of employment which provides that --

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

he or she is obliged to perform his or her services personally.”

[5] The right of a labour tenant to occupy and use land is specified in Section 3(1) of the Act. That Section provides:

“[3] Right to occupy and use land --

Notwithstanding the provisions of any other law, but subject to the provisions of subsection (2), a person who was a labour tenant on 2 June 1995 shall have the right with his or her family members --

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

to occupy and use that part of the farm in question the right to occupation and use of which is restored to him or her in terms of this Act or any other law.”

[6] Like in any other civil matter, the onus is on the Plaintiff to prove his claim on a balance of probabilities. The onus which rests upon the Plaintiff in terms of the Act is set out in Section 2(5) of the Act. That Section provides:

“If in any proceedings it is proved that a person falls within paragraphs (a), (b) and (c) of the definition of a “labour

tenant” that person shall be presumed not to be a farm worker unless the contrary is proved”

[7] Section 2(5) was added to the Act by a 1997 amendment. That amendment was introduced by Act No 63 of 1997. Prior to the amendment, a prospective labour tenant bore the onus of proving both that he or she falls within paragraphs (a), (b) and (c) of the definition of “labour tenant”, and that he or she was not a farm worker¹. As a result of the amendment, once the Plaintiff proves that he or she falls within paragraphs (a) (b) and (c) of the definition of a “labour tenant” the onus resting upon the Plaintiff shifts to the Defendant to prove that the Plaintiff is a farm

worker2.

- [8] Consequently, should the Plaintiff prove that he satisfies the requirements of Section 1(a) (b) and (c) of the definition of a labour tenant, he shall be presumed “not to be a farm worker”. In other words, he shall be presumed to be a labour tenant. The onus will then shift to the Defendants to rebut the presumption by providing evidence to the contrary that the Plaintiff is in fact a farm worker.
- [9] It is important to mention that before the presumption can arise and before the onus can shift to the Defendants, the Plaintiff must prove that he falls within the requirements of paragraphs (a), (b) and (c) of the definition of a labour tenant.
- [10] I turn now to the evidence presented in order to determine if each party has discharged the requisite onus which they bear.
- [11] There were three witnesses who testified at the hearing. They were the Plaintiff himself, Sibaningi Mngadi (Mr. Mngadi) and the first Defendant, Peter Landale Train (Peter). Mr Mngadi is employed by the Department of Rural Development and Land Reform. His evidence was mainly concerned with the application which the Plaintiff lodged in terms of Section 16 of the Act. As stated earlier on in this judgment, that application is not relevant for purposes of this judgment. Therefore I shall not, in this judgment,

deal with the testimony of Mr Mngadi.

Plaintiff's testimony

- [12] The Plaintiff was born on Yarrow farm (Yarrow). He was born in 1947. At the time of his birth, Yarrow was owned by one Mr Robert Fife (Mr Fife). His father Gussha Msomi (Gussha) and his mother Bikiza Msomi (Bikiza) were working and also resident on that farm. Mr Fife gave permission to Gussha to build a kraal for the Msomi family.
- [13] Gussha was looking after Mr Fife's horses. Bikiza was working on the fields, weeding maize plants and reaping potatoes. Gussha was given permission to graze cattle on Yarrow. He grazed about twenty cattle. There was no limit on the number of cattle which Gussha could keep on Yarrow farm. He was also given permission to keep four horses and a limitless number of goats.
- [14] Gussha was also given the right to crop. He cropped maize, madumbe, potatoes and beans. In return for the services which he rendered to Mr Fife, Gussha was paid a salary of one pound and ten shillings per month. That salary, according to the Plaintiff was

equivalent to R3.00 per month. Plaintiff testified to the effect that because the salary paid to Gussha was paltry, an agreement was reached between Mr Fife and Gussha that he (Gussha) had to crop and keep stock.

- [15] According to the Plaintiff, Gusha's salary was inadequate. The Msomi family could not survive on that salary. To supplement his salary, Gusha used his oxen to plough the cropping land in order to get feed the family. He also milked cows to make maas for the survival of the family. When cattle grew older, they were sold, in order to get money to maintain the family.
- [16] The Plaintiff went to school for only two years. Thereafter, he worked on Yarrow farm, as a young boy, pulling a tow rope for the oxen. For that work, the Plaintiff was paid one rand (R1-00) which was given to his father on a monthly basis.
- [17] Yarrow was a very big farm. At some stage it was divided into two large portions. Mr Fife retained one portion. The other portion was sold away. It was sold to Randall Train (Mr Train) the father of Peter. Mr Train named his portion "Gala Farm" which is the farm in question.
- [18] At a later stage, the Plaintiff was employed by Mr Train to work on his farm. The Msomi family was still resident on Yarrow farm. The Plaintiff used to travel from Yarrow to Gala on a daily basis. Later, Mr Train granted permission to the Plaintiff to reside on the farm and to build his house there. It is the same land on which the Plaintiff is currently residing.
- [19] It is not clear what kind of work the Plaintiff was doing for Mr Train. However, for the job he was doing, the Plaintiff was paid a salary of one rand and fifty cents (R1-50) per month. That was in the 1960's.
- [20] Later, Gusha and his family, with the exception of the Plaintiff, left Yarrow and relocated to a farm called "Braco".
- Braco was owned by one Mr Collen Shaw. At farm Braco, Gusha was peeling wattle bark. He was paid according to the number of days worked in accordance with the tick marks reflected on the attendance register.
- [21] After about two and half (2½) years, Gusha left Braco and relocated to the farm. According to the Plaintiff, this relocation was at the instance of Mr Train. According to Peter, the relocation was at the request of the Plaintiff. However, that is not material for purposes of this judgment. When Gusha relocated to the farm, he brought about 10 or 11 herd of cattle. No horses were allowed. That was the first herd of Msomi cattle brought on to the farm. Gusha was also employed by Mr Train. Amongst other duties, Gusha's job was to take Mr Train's cattle to the auction sale. Gusha was given the right to build his homestead on the same yard, where the Plaintiff built his house. He was given the right to graze cattle and the right to crop. He cropped mealies, madumbe, potatoes and beans.

[22] According to the Plaintiff, Mr Train gave Gusha the right to crop and graze cattle because he earned a little salary. These rights were given to Gusha because the number of children increased and he could not afford to maintain his children with an amount of money he earned.

[23] When Gusha passed away, the Plaintiff inherited the cattle. He automatically inherited the right to crop and graze on the farm. Mr Train allocated two grazing sites to him. One site at the place called Entabeni which is now Sub 6 and another site on Sub 2

where he was permitted to keep the cows for milking purposes.

[24] Mr Train gave the Plaintiff the permission to use the farm tractor to plough his own cropping plot. He also assisted the Plaintiff with the dipping of cattle. Mr Train would buy the dipping poison, his cattle would dip first and thereafter, the Plaintiff's cattle. At first, Mr Train attempted to limit the number of cattle to seven. Plaintiff pleaded with him to allow him more cattle. The children were still at school. The salary he was getting was small. He was then allowed to keep more stock in order to keep the children at school.

[25] The Plaintiff testified that, without the right to crop and graze cattle, he and his children could not have survived on the salary he was getting from Mr Train which was R1-50 per month. When the Plaintiff started working for Mr Train, Peter was still a primary school pupil and he was unaware of all the agreements concluded between Mr Train and the Plaintiff.

[26] At some stage, Mr Train's son, Peter took over the management of the farm. That was before Mr Train passed away and when he passed away, Peter was in full control of the farm. Ownership remained with the fourth Defendant. The Plaintiff continued providing labour on the farm. At that stage, the Plaintiff's salary varied from R700-00 to R800-00 per month.

[27] When Peter took over, he immediately imposed a limit on the number of cattle and goats. The number of cattle was limited to seven (7). At that time, the Plaintiff had four children at college. He could not manage to pay school fees with the salary of R800-00 he was earning. This was in 1975. He used to sell cattle at the auction sale and get money to pay school fees. The Plaintiff

testified that Peter had given him the right to crop and graze cattle because of the little salary he was earning. Peter also limited the Plaintiff's right to crop. He was permitted to crop on a smaller scale than before.

[28] The Plaintiff did not adhere to the restriction on the number of cattle. At the present moment, he keeps 32 cattle which graze on both Sub 2 and Sub 6. Peter informed the Plaintiff at some stage that he, (Peter) was selling Sub 2 on which the Plaintiff and

other people were resident, to the fifth Defendant. Plaintiff and other people were shown a small site where they could settle. Whilst other people moved to the new site, Plaintiff and his family refused to relocate.

Peter's testimony

- [29] Peter was the only witness who testified on behalf of the Defendants except Defendant number six. He confirmed that the Plaintiff is resident on Sub 2 whilst he (Peter) is resident on Sub 6 of the farm. His father, Mr Train, bought the farm from Mr Fife in
1960. The farm was named "Gala". It was subdivided into Sub 2 and Sub 6. According to him, the Plaintiff arrived on the farm in 1965 and he is of the age of his elder brother who was five years older than Peter. The brother is now late.
- [30] Mr Train informed Peter that before he took employment on the farm, the Plaintiff had been staying on Yarrow. He used to travel from Yarrow to the farm. In 1967, Mr Train said, the Plaintiff asked for permission to build his house on the farm. Permission was granted. Plaintiff was not charged any rent for residing on the farm.
- [31] Peter testified to the effect that the Plaintiff was paid for his services. He was paid in cash. According to Peter, the Plaintiff's wages would not have changed from what it was before and after he came to reside on the farm. In 1968, the Plaintiff asked if his father could come over to the farm. That permission was granted to the Plaintiff's father to come over. On his arrival, the Plaintiff's father built his residence on the farm and on the same yard as the Plaintiff.
- [32] The Plaintiff's father took up employment on the farm. He was looking after the horses. Plaintiff's father brought cattle to the farm. Peter got information from Mr Train that, two people brought cattle to the farm. One of those was the Plaintiff's father and the other one was Mkhishwa Ndlovu. One was allowed four herd of cattle and the other one three. Mr Train could not remember who was allowed what.
- [33] Peter testified that the Plaintiff's father was paid in cash. In 1975 or 1976, Peter took over the running of the farm. Plaintiff's father passed away. Plaintiff inherited his father's cattle. The Plaintiff's salary remained the same
- as it was before he inherited the cattle. Peter denied that the keeping of cattle on the farm was payment or part payment for the
- services rendered by the Plaintiff to Mr Train. He insisted that the Plaintiff was paid the same salary irrespective of whether he had cattle on the farm or not.
- [34] In 1995/96 the Plaintiff was instructed to keep only 7 herd of cattle on the farm. Peter denied that he granted permission to the Plaintiff to keep unlimited number of cattle. The Plaintiff, he said, was required to render personal service to the land owner. He could not send another person to work on his behalf.
- [35] Peter conceded in cross-examination that in 1995, the Plaintiff's four (4) children were in college but at that time, he was earning R481-50 per month. He conceded further that it would be difficult for the Plaintiff to maintain his family and still

send four children to college whilst earning a salary of R481-50 per month.

[36] Peter testified that the Plaintiff was given four and half (4½) hectares of land to use. In 1995 the value of the land was R4, 905 per hectare and that four and half (4½) hectares would cost R22 702. To rent the same size of land would cost

R2, 207. Plaintiff's annual salary in 1995 was R5, 997-00 whilst rent would cost him R2 207. Therefore, the value of his

salary, Peter said, was more than the value of his right to use the land.

Argument

[37] Mr Singh for Plaintiff, argued that Plaintiff had discharged the onus of proving that he falls within paragraphs (a)

(b) and

(c) of the definition of a labour tenant. Mr De Wet for Defendants, argued that the Plaintiff failed to prove that the right to crop and graze stock was given to him in consideration of labour which he rendered. He also failed to prove that the right to crop and graze stock given to his father was given in consideration for the labour which the Plaintiff rendered to the owner of the farm.

Has Plaintiff complied with paragraph (a) of the definition of labour tenant?

[38] This requirement is not in dispute. It is admitted that the Plaintiff resides on the farm.

Has Plaintiff complied with paragraph (b) of the definition of labour tenant?

[39] The first leg of paragraph (b) is admitted, in other words, it is admitted by the defence that the Plaintiff was given the right to crop and graze stock on the farm. However, it is denied that such a right was exercised in consideration of labour which the Plaintiff provided to the owner of the farm³.

[40] Mr De Wet seems to have adopted the approach that since the Plaintiff did not specifically state in his evidence, that the right to crop and graze stock was exercised in exchange for labour, he is therefore not a labour tenant. I disagree. In my view,

whilst the exercise of the right to use land in exchange for labour is a core requirement of the relationship of labour tenancy, there are other factors which should be considered.

[41] We must look at the evidence in its totality. We must look at the nature of the relationship between the Plaintiff and the owner of the land. We must also look at the probabilities. We must look also at all the agreements concluded between the Plaintiff

and the land owner.

[42] In *Brown v Mbhense*⁴ Van Heerden J A held:

“In deciding whether or not a person is a labour tenant, the court must have regard to the combined effect and substance of all agreements entered into between the person who avers that he or she is a labour tenant and his or her parents or grand parents, and the owner or lessee of the land concerned.”

In casu, the Plaintiff testified that at one stage, he was earning R1-50 per month. Later he earned R6-00 per month. That piece of evidence was not challenged. He testified that Mr Train allowed him the use of the tractor to plough his fields. Mr Train also assisted him to dip his cattle with the same poison which was used to dip Mr Train's cattle. This was confirmed by Peter in his evidence with the addition that Mr Train even allowed the Plaintiff to use the tractor to fetch firewood. He was also assisted with fertilizer to use on his fields.

[43] In my view, the rights which the Plaintiff exercised exceeded the monetary payments which he received. Without the right to crop and graze stock, he could not have survived. Peter also conceded under cross-examination, that without those rights, it would have been difficult for the Plaintiff to maintain his family and pay college fees for his children, whilst earning R481-50 per month.

[44] In *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*⁵, with regard to the rights to reside, crop and graze, Moseneke DCJ expressed himself in the following terms:

“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. And 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 formalized 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.”

[45] In light of the above, it is clear that the rights to reside, crop and graze stock which the Plaintiff exercised were more than the paltry salary which he earned. In fact, in any view, it was not a salary, but a token of appreciation for the good working

relationship which existed between the Plaintiff and Mr Train. He was probably given that money in order to buy small items, like soap, seeing that there were no rations given.

[46] The Plaintiff cannot be expected to know the fine details of the contract between him and the land owner. It must be borne in mind that a labour tenancy relationship was a relationship of inequality. The contracting parties were not always on the same

footing. The farmer was in a stronger position than illiterate and unsophisticated labour tenant.

[47] In *Brown v Mbhense*⁶, Van Heerden J A stated:

“Of course, in order to determine whether the labour tenancy asserted by the Plaintiff has been established, one must have regard to the evidence concerning her right to lay claim as a labour tenant to the relevant portion of the farm. In so doing, it is important to appreciate that when labour tenants ‘conclude’ contracts with farm owners, they are not assisted by lawyers. They represent a vulnerable section of society and almost always impecunious, unsophisticated and unschooled. One should not lose sight of the power imbalance in the relationship between the farm owner and the labour tenant and the truism that only free men and women can meaningfully negotiate.”

[48] In any event, Plaintiff testified that there was an agreement between himself and Mr Train that he had to crop and graze stock because the salary he was earning was little. That evidence was not seriously challenged. Peter could not dispute that evidence. He was not present when that agreement was concluded. He only expressed doubt as to whether his father would have made such an agreement with the Plaintiff.

[49] Looking at the evidence in its totality, looking at the nature of the relationship, the agreements entered into between the Plaintiff and Mr Train and all probabilities, I am persuaded to conclude that the Plaintiff has succeeded to prove that he exercised

the rights to crop and graze in exchange for labour which he provided on the farm.

Has Plaintiff complied with paragraph (c) of the definition of labour tenant?

[50] For the Plaintiff to succeed under this paragraph, he must prove the following: –

that he has or had a parent who resides or resided on a farm (my emphasis)

who has or has had the right to use cropping and grazing land on such farm or another farm of the owner, and

in consideration of such right he provided or provides labour to the owner or lessee of such or such other farm,

[51] Plaintiff testified that his father Gusha and the entire family, were resident on Yarrow farm, which was owned by Mr Robert Fife. Gusha provided labour on that farm. He was looking after horses. He was paid one pound and ten shillings. He was given the

right to crop, and graze cattle on Yarrow. The Plaintiff testified that his father cropped and grazed cattle on Yarrow, because of their agreement with Mr Fife which was to the effect that he had to crop and graze cattle because the salary he was getting was inadequate. That evidence was not challenged.

[52] It is my view, that the right to crop and graze stock on Yarrow farm, was exercised in exchange for the labour which the Plaintiff’s father rendered to Mr Fife. As stated earlier, in this judgment, the value of the right to use cropping and grazing land was more than the value of one pound and ten shillings, which the Plaintiff’s father was earning.

[53] I need not decide whether or not the Plaintiff's father was a labour tenant on Gala farm. The Act requires that the parent or grand parent must have been a labour tenant on a farm not on the farm⁷. (My emphasis). It is therefore not a requirement that the Plaintiff and his father must have been labour tenants on the same farm.

Order

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

It is declared in terms of Section 33(2A) of the Land Reform (Labour Tenants) Act 3 of 1996 that the Plaintiff is a labour tenant

There is no order as to costs.

Ncube AJ

Land Claims Court

For the Plaintiff

S Singh

Sundeept Attorneys

Pietermaritzburg

For the First to the Fifth Defendants

Adv A De Wet instructed by:

Venn, Nemeth and Hart

¹See Mahlangu v De Jager 1996 (3) SA 235 LCC at 241 E-F

²See Mlifi v Klingenberg 1999 (2) SA 674 LCC at 683 A-B

³See Section 1 (b) of the definition of labour tenant.

⁴[2008] ZASCA 57; 2008

(5) SA 489 (SCA) at 495 A-B

⁵[2007] ZACC 12; 2007

(6) SA 199 cc

⁶N4 Supra, at Paragraph 27

⁷See Ngcobo and Others v Salimba cc, Ngcobo and Others v Van Rensburg 1999(2) SA 1057 (SCA) at 1072 H-I

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