

SOUTH AFRICA / JUDGMENT

Simelane v Human (70310/2013)

[2015] ZAGPPHC 422 (30 June 2015)

[2015] ZAGPPHC 422**COURT**

North Gauteng High Court, Pretoria

BEFORE

Jansen

CASE / FILE NUMBER

70310/2013

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Source record**IN****THE GAUTENG DIVISION THE HIGH COURT, PRETORIA****(REPUBLIC****OF SOUTH AFRICA)****CASE****NO: 70310/2013****DATE:**

30 JUNE 2015

In

the matter between:

WILLEM

SIMELANE.....Applicant

And

FREDERICK

THEUNIS

HUMAN.....Respondent

JUDGMENT**JANSEN J**

[1] This application was first brought as a matter of urgency, but was struck from the roll due to lack of urgency.

- [2] After reserving judgment in this opposed application, the applicant served a notice of amendment of the prayers set out in its notice of motion. This notice of amendment was served on the respondent's attorneys of record and there was no opposition thereto. However, the amendment was served and filed without seeking the court's indulgence.
- [3] The relief sought in the amended notice of motion is the following: —
- "1. Interdicting the Respondent from harassing, threatening and intimidating Applicant and members of his family.*
2. Interdicting the Respondents from enlisting the help of any other person to harass, threaten or intimidate Applicant or members of his family.
 3. Ordering the Respondent to forthwith remove the camera installed in front of the Applicant's home at Farm Sukkelaar, Bethal.
 4. An order that in the event of the Respondent failing to remove the camera as indicated above that the sheriff of the court – Bethal is hereby ordered to remove the aforesaid camera.
 5. Prohibiting the Respondent, its agents and employees from approaching within 500 metres of the Applicant's residence at Farm Sukkelaar, Bethal.
 6. Prohibiting the Respondent from killing any livestock of the Applicant.
 7. Prohibiting the Respondent from forcing the Applicant's livestock off any portion of the farm that the Applicant's family has utilised over the years or grazing.
 8. Costs of suit.
 9. Further and/or alternative relief."
- [4] It further bears mention that the application is confusing in that affidavits used in proceedings in the magistrate's court of Bethal in terms of section 384 (1) of Act 51 of 1977 are relied upon for purposes of the relief sought. This is the case, no doubt, because the application was initially brought as an urgent application which left little time for the proper drafting of affidavits. What follows has been taken, in the main, from the affidavits filed in those proceedings.
- [5] Furthermore, none of the confirmatory affidavits appended to the main affidavit were deposed to.
- [6] The applicant alleges that he and his "family" have been residing on the farm, Sukkelaar, in Bethal, for more than three decades. It bears mention that who the applicant's "family" is, is never explained and is furthermore termed an "extended family" including women and children. Allegedly, the livestock of the applicant and his "family" have been grazing on the farm for many decades before the arrival of the respondent. Furthermore he has also allegedly been selling coal on the farm for many years.

[7] The respondent allegedly purchased the farm approximately a year ago, whereas the respondent contends that he had already occupied the farm in terms of a sale agreement with the previous owner since 2011. It is the applicant's contention that when the respondent purchased the farm from a certain Mr Botha, the respondent knew, or ought to have known, that the applicant had been granted statutory rights in respect of the use, occupation cultivation and grazing of the land in terms of the provisions of the

Land Reform (Labour Tenant) Act 3 of 1996 ("LTA"), the Extension of Security of Tenure Act 62 of 1977 ("ESTA") and the Prevention of Illegal Eviction of Unlawful Occupiers Act.

[8] The applicant alleges that since the respondent bought the farm, the respondent commenced harassing the applicant and his family. The applicant states that the respondent instructed him to sell all his livestock and if he did not comply the respondent would ensure that the applicant and his livestock would be removed from the farm.

[9] The applicant states that subsequent to the respondent's alleged threats his cattle were poisoned. He further states that he could reasonably conclude that it was the respondent who had poisoned his cattle and proceeded to lay criminal charges against the respondent but the criminal charges were withdrawn by the state prosecutor.

[10] The applicant further alleges that the respondent forced his cattle out of the grazing camps which the applicant and his family have used for years. The applicant had no option but to use a small grazing camp and this camp has insufficient grazing land for his cattle.

[11] The applicant alleges that the respondent drives past his house late at night and shoots with a firearm to intimidate him and his family, threatens him and his family, has sent workers on numerous occasions to try and force him off his farm, that the respondent interferes with, steals and kills the his livestock and demands payment of fines which the respondent fabricates,

[12] The applicant further alleges that on two occasions the respondent locked the gate to his house in order to prevent him from gaining access to his home, the respondent arrived at his home with a camcorder and proceeded to record his interaction with the applicant. The applicant also alleges that the respondent was trying to goad him into becoming abusive or violent in order to record him and then use the footage against him.

[13] On the 7th of November 2013, the respondent installed a camera about 5 kilometres away from the applicant's main gate. The applicant alleges that everything he and his family do is being recorded and they have no privacy. (How this is possible from such a distance is incomprehensible.) This is denied by the respondent who states that he merely installed a camera at the gate to the grazing camp, which is about two kilometres away on the farm.

[14] During December 2012, the respondent sought an order against the applicant in terms of section 384 of Act 56 of

1955. This provision is conventionally used to secure orders to keep the peace. The respondent allegedly did this after the applicant had laid criminal charges against him. In these proceedings according to the applicant, the respondent abused the process by applying for an order that the applicant be interdicted from conducting a coal business at his home. The respondent also sought orders restricting the movement of the applicant's livestock. It is common cause that these proceedings have been finalised and that the Magistrate of Bethal made an order in favour of the respondent by holding that the applicant had committed an act towards the complainant namely the respondent in this case, by provoking a breach of the peace or assault.
- [15] The respondent contends that when he bought his portion of the farm the so-called "drakrag" of large livestock was 1 per hectare and sheep and goats approximately 15 per hectare.
- [16] The respondent contends that when he purchased the farm he was informed in writing by the previous owner that the applicant is only entitled to keep three cattle in a grazing camp measuring approximately five hectare. He further alleges that the applicant lives in Emzinoni (a fact which the applicant admits in his answering affidavit in section 384 (1) proceedings in that he alleges that he resides at 1725 4th Street, Emzinoni, Bethal. He deposed to this affidavit on 30 August 2013). However, the respondent contends that the applicant brought a large number of livestock to the farm, namely 15 cattle, 46 goats, 23 sheep, two geese and a large amount of chickens. This amount of livestock is too great for purposes of his allocated grazing camp and hence the livestock feeds on portions of the farm to which he has no right according to the respondent. Also is unclear whether the applicant has the right to graze on the five hectare grazing camp which he is presently using.
- [17] The applicant's livestock escape through the fences and when ill with contagious diseases infect the respondent's livestock. According to the respondent the applicant wilfully opened all the gates on the farm in order to allow his livestock to graze on the farm. He allegedly tried to run the respondent over with his motor vehicle.
- [18] The coal trucks (using the Morgenzon and Bethal roads) load the coal off in this camp and the applicant then fills bags with the coal and sells the coal. (This is not in dispute.) According to the respondent this conduct is unlawful in terms of the "Grondwet"[1] regulations and pollutes the area. Allegedly the respondent undertook to remove the coal from the farm and not to have further supplies delivered. However, on the 1st or 2nd of December 2012 he had another 30 tons of coal delivered.
- [19] On 23 November 2012 when the livestock inspectors inspected the applicant's livestock they found that his goats were infested with red head lice with the result that the respondent's livestock was also infected and the respondent suffered a loss due to this as he could not sell the wool of his livestock.

- [20] Whilst inspecting the livestock the applicant's cattle escaped from the camp and started grazing in the respondent's soya bean land. The inspectors witnessed the incident. The respondent suffered further losses due to this and the assessors must still ascertain the amount in damages.
- [21] In the founding affidavit to this application the applicant makes the following statement: "Applicant and his family have been residing on the farm for more than 3 decades". The respondent's response to this paragraph is that this fact is "not known" to him, which allegation has to be interpreted as an admission according to Erasmus Superior Court Practice page B1-44.
- [22] Furthermore the respondent alleges in his answering affidavit that: "I did however explain to the applicant that he cannot keep more livestock on the property in excess of three (3) head of cattle that he was given consent to keep on the land by the previous owner". In addition, the respondent admits that certain of the applicant's cattle died between February and April 2012 because the cattle had eaten soya beans planted by him which are apparently poisonous to cattle.
- [23] The applicant alleges that the respondent harbours antagonism towards him and quotes the following statement from the answering affidavit as an example of such hostility: —
- "As a result of the Applicant's unlawful use of my property, an unbearable situation has developed between myself and the Applicant*

which I will enumerate to (sic) in more detail below."

The applicant's alleged entitlement to occupy the respondent's farm:

- [24] The entire basis for the application is that the applicant alleges that he and his family have a statutory right to occupy the respondent's farm.
- [25] In the matter of Mothlhaudi and another v Rossouw and others
- [2001] 4 All SA 334 (LCC) the court held that the interpretation of the Land Reform (Labour Tenants) Act 3 of 1996 is the sole domain of the Land Claims Court.
- [26] The Land Claims Court was established by section 22 of the restitution of Land Rights Act 22 of 1994 (Chapter III thereof). Section 22(1)(cC) thereof provides as follows: —

"22 Land Claims Court

(1) ...

(cC) to determine any matter involving the interpretation or application of this Act or the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996), with the exception of matters relating to the definition of 'occupier' in section 1 (1) of the Extension of Security of Tenure Act, 1997 (Act 62 of 1997);"

[27] An “occupier” is defined by the Extension of Security of Tenure Act 62 of 1997 (“ESTA”) as follows:—

“‘occupier’ means a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding: —

- (a)
- (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and
- (c) a person who has an income in excess of the prescribed amount;”

[28] Section 20 (3) of the Extension of Security of Tenure Act 62 of 1997 (ESTA) is similar to section 13 (1A) (a) of the aforesaid Act and provides as follows: -

“(3) If in any proceedings in a High Court at the date of the commencement of this Act that Court is required to interpret this Act, that Court shall stop the proceedings if no oral evidence has been led and refer the matter to the Land Claims Court.

[Sub-s.

(3) substituted by s. 29 of Act 61 of 1998.]”

[29] The first question which presents itself is whether this court has jurisdiction to hear this matter. As a result, further heads of argument were requested. In these heads of argument, filed by the applicant, the respondent was blamed full squarely for not raising this point in limine in its heads of argument but arguing it from the bar. Hence, the applicant contended that the matter, in terms of section 13(1A) and section 29 of the Land Reform (Labour Tenants) Act 3 of 1996 should be referred to the Land Claims Court.

[30] Section 29 of the said Act reads as follows: —

“29 JURISDICTION

The Court shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power to grant interlocutory orders and interdicts, and shall have all such powers in relation to matters falling within its jurisdiction as are possessed by a provincial

division of the Supreme Court having jurisdiction in civil proceedings at the place where the affected land is situated, including the powers of such a division in relation to any contempt of the Court.”

[31] In terms of section 22 of the Restitution of Land Rights Act 22 of 1994 (save for the caveat contained in subsection (cC)) the Land Claims Court was created as a special court with exclusive jurisdiction to decide matters involving the interpretation or application of the Land Reform (Labour Tenants) Act 3 of 1996.

[32] The other statute applicable to this application, as set out above, is the Land Reform (Labour Tenants) Act 3 of 1996. A “labour tenant” is defined as follows in the said Act: —

“‘labour tenant’ means a person:—

- (a) who is residing or has the right to reside on a farm;
- (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and
- (c) whose parent or 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 farmworker;” [emphasis added]

[33] The court which is to hear matters relating to the Land Reform (Labour Tenants) Act 3 of 1996 is the Land Claims Court. “Affected land”, for example, in terms of the definition section (section 1) of the said Act means land in respect of which an application has been lodged in terms of section 17(1) which reads as follows: —

“17.(1) An application for the acquisition of land and servitudes referred to in section 16 shall be lodged with the Director-General.”

[34] Of great importance are the following provisions of the Land Reform (Labour Tenants) Act 3 of 1996: —

“13 Proceedings in other courts

- (1) The provisions of sections 7[2] to 10[3] shall apply to proceedings pending in any court at the commencement of this Act.

(1A) With the exception of issues concerning the definition of 'occupier' in section 1 (1) of the Extension of Security of Tenure Act, 1997 (Act 62 of 1997), if an issue arises in a case in a magistrate's court or a High Court which requires that court to interpret or apply this Act and: —

- (a) no oral evidence has been led, such court shall transfer the case to the Court and no further steps may be taken in the case in such court;
- (b) any oral evidence has been led, such court shall decide the matter in accordance with the provisions of this Act.”

[35] The wording of section 13(1A) indicates that the legislature wishes the Lands Claim Court to deal exclusively with matter involving the interpretation and application of the Labour Tenants Act. See *Van der Walt & Others v Lang & 10 Others* Unreported Case LCC102/98, Land Claim Court at paragraph 15.

[36] The Extension of Security of Tenure Act 62 of 1997 contains a similar provision namely section 20(3). Section 20 is quoted below for ease of reference: —

“Land Claims Court

“20(1) The Land Claims Court shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power:—

- (a) to decide any constitutional matter in relation to this Act;
 - (b) to grant interlocutory orders. declaratory orders and interdicts;
 - (c) to review an act, omission or decision of any functionary acting or purporting 50 to act in terms of this Act; and
 - (d) to review an arbitration award in terms of the Arbitration Act, 1965 (Act No. 42 of 1965), in so far as it deals with any matter that may be heard by a court in terms of this Act.
- (2) Subject to the provisions of section 17(2), the Land Claims Court shall have the powers set out in subsection (1) to the exclusion of any court contemplated in section 166(c), (d) or (e) of the Constitution.
- (3) If in any proceedings in a High Court at the date of commencement of this Act that court is required to interpret this Act, that Court shall stop the proceedings if no oral evidence has been led and refer the matter to the Land Claims Court.
- (4) The President of the Land Claims Court may make rules to govern the procedure in the Land Claims Court in terms of this Act.”

[37] The additional heads of argument which were filed by both the applicant and the respondent are bizarre. It is submitted by the respondent that this court has jurisdiction to hear the matter and that the “labour tenancy status of the Applicant is irrelevant”.

[38] It is further stated in the respondent’s supplementary heads of argument pertaining to this court’s jurisdiction: —

“2.6 It is submitted that only when an applicant invokes the provisions of the LTA to establish a cause of action or defence, the Land Claims Court has exclusive jurisdiction.[4] Although the Land Claims Court may in terms of section 29 grant interdicts, a High Court is not precluded from dealing with interdictory relief relating to a labour tenant in terms of the common law, as long as the decision does not require interpretation

of the LTA. See *Crystal Holdings (Pty) Ltd and Others v The Regional Land Claims Commissioner and Others*[5] where it was held that the High Courts are vested with jurisdiction to protect the common law rights of any individual, but that the Land Claims Court has exclusive jurisdiction as soon as the applicant invokes the LTA to establish a cause of action.”

[39] Further issues raised by the respondent in its supplementary heads of argument are: —

[39.1] The applicant applies for common law relief that is not dependant on the status of labour tenancy or occupancy of land. It is emphasised that the applicant’s grounds for relief as it appears from the founding affidavit does not in any way rely on labour tenancy and the question of labour tenancy is raised only in the applicant’s replying affidavit, and merely as a bald statement.

[39.2] The applicant’s cause of action is not based on his residential status on the respondent’s farm. Although he makes conflicting statements under oath regarding his place of residence, the respondent’s allegation that the applicant visits the farm daily is undisputed and his counsel has conceded in argument that the applicant resides in Bethal.

[40] Section 3(3) of the Land Reform (Labour Tenants) Act 3 of 1996 provides that: —

“(3) A labour tenant shall be deemed to have waived his or her rights if he or she with the intention to terminate the labour tenant

agreement: —

- (a) leaves the farm voluntarily; or
- (b) appoints a person as his or her successor.”

[41] The respondent also alleges that the applicant is limited to the relief in his notice of motion, which can be decided without the necessity to investigate his alleged labour tenancy status. Other relief argued by the applicant’s counsel, such as “giving the applicant part of the farm”, “negotiating a land settlement” and “protecting his rights as a labour tenant” fall entirely outside the ambit of the applicant’s case.

[42] Furthermore, the respondent’s argument is that in order to establish whether the applicant is an occupier in terms of the Extension of Security of Tenure Act 62 of 1997, depends upon whether he resides on the affected property.

[43] A person can therefore only be an occupier in terms of the Extension of Security of Tenure Act 62 of 1997 if he or she “resides” on the land in question. The word reside has been held to mean a person’s place of abode. A person cannot reside at more than one place. The Supreme Court of Appeal held in *Kiepersol Poultry Farm v Phasiya* 2010 (3) SA 152 (SCA) that the term “reside” bears the meaning ascribed to it in the matter of *Barrie NO v Ferris and Another* 1987 (2) SA 709 (C) namely: —

“Reside’ means that a person has his home at the place mentioned. It is his place of abode, the place where he sleeps after the work of the day is done ... It does not include one’s weekend cottage unless one is residing there ... The essence of the word is the notion of ‘permanent home’.[6]”

[44] It was contended on behalf of the respondent that the definition of “occupier” in ESTA is limited to a person “residing on land” and that the land use intended in section 6(1) of Extension of Security of Tenure Act is “use in association with the right of residence”. The respondent also relied upon the case of *Marge Property Holdings CC v Jewula*

[2005] 2 All SA 119 (E) at page 124 where the following is stated: —

“The right of an occupier of a farm to use the land by grazing livestock thereon is a right of a very different nature to those rights

specified in section 6(2) ... such use was clearly not the kind of use contemplated by the Legislature”.

[45] However this contention does not take into account the proviso contained in subparagraph (b) of the definition of “occupier” contained in the Extension of Security of Tenure Act 62 of 1997.

[46] The respondent submitted that the applicant does not reside on the farm on the applicant’s own version. However, on the applicant’s and the respondent’s versions, the applicant constantly allows his cattle to graze on the farm (which he contends that he is entitled to do) and also utilises part of the farm for coal distribution purposes and the like. The

applicant’s entire case and the relief sought in this application were argued and based on the allegation that he is an “occupier” of the farm. In addition, the respondent more often than not referred to the “informal housing on the farm” and “the dwellings of any of the occupiers on the property or the so-called “home of the applicant”.

[47] The respondent submits that the Extension of Security of Tenure Act 62 of 1997 involves only rights associated with residential rights and that other rights, such as grazing and cropping rights, do not fall within the ambit of the Act. The submission, per definition, requires an interpretation of the definition of an occupier of property and whether the definition includes his family, chattel such as livestock, dwellings and the like.

[48] However, sight must not be lost of section 5 of the Land Reform (Labour Tenants Act) 3 of 1996 quoted above: —

“5 Prohibition on eviction

Subject to the provisions of section 13, a labour tenant or his or her associate may only be evicted in terms of an order of the Court issued under this Act.”

[49] Eviction is defined in section 1 of the Act as “deprivation of a right of occupation or use of land”. [emphasis added]

- [50] Section 5 of the Act renders it unlawful for anyone, except the Land Claims Court, to deprive a “labour tenant” of a right to use the land.
- [51] The applicant argues in his supplementary heads of argument that analogous to the position of a judge recusing himself/herself such a learned judge does not retain a vestige of jurisdiction to deal with the matter. It is submitted that this court must therefore forthwith transfer this case to the Land Claims Court as contemplated in section 13(1A) of the Land Reform (Labour Tenants Act) 3 of 1996.

The applicant’s locus standi:

- [52] This issue was raised during argument (but not replied to by the applicant in argument) and also not dealt with in the urgent application brought by the applicant which was struck from the roll. As a result, the respondent invited the applicant to reply to the denial of his ownership of the cattle on the respondent’s farm and his alleged resultant lack of locus standi as a result thereof. (This challenge, by the respondent, may actually put the lie to the respondent’s earlier submissions that rights of occupation, grazing and cropping are completely separate to the right of occupation, save if the argument is limited to the actual ownership of the livestock.) Here the respondent seeks to tie the applicant or his family’s ownership of the cattle to the applicant’s right of occupation and the consequential grazing rights arising therefrom, thus rendering these rights determinative of the applicant’s locus standi.

The “new” prayers in the amended notice of motion:

- [53] The only differences between the prayers as currently worded in the new notice of motion and the old notice of motion are as follows:—
- [54] There is no longer a Part A and a Part B.
- [55] The word “interdicting” has been replaced with the word “ordering” where the word “interdicting” appeared initially.
- [56] What the applicant has sought to do with its amended notice of motion, received on 26 November 2014, is merely to seek to amend the entire nature of the application to one seeking non-harassment of the applicant apparently forgetting that the applicant was allegedly being harassed because he was an “occupier” of the Farm Sukkelaar (aptly named) at Bethal.
- [57] The prayer relating to the removal of the camera is also tied to the alleged harassment.
- [58] Prayer 5 is impossible to give effect to because there is allegedly a residence (but not of the applicant, but maybe his family members who have not been joined as parties) on the Farm Sukkelaar, Bethal because if there were, then he is an occupier of the property.
- [59] Prayers 6 and 7 of the new notice of motion are interestingly interwoven with the applicant’s claim to be an occupant of the Farm Sukkelaar, Bethal.

- [60] In the premises the matter should summarily be transferred to the Land Claims Court.
- [61] The applicant should have known, when it launched its application, that there would be material disputes of fact, or, as now contended by him, that the matter should be heard by the Land Claims Court. This court is entitled to raise the point *mero motu* when it becomes clear to the court that it involves issues which lie within the sole domain of the Land Claims Court. This is particularly so, given the far reaching rights conferred on the Land Claims Court by section 29 of the Land Reform (Labour Tenants) Act 3 of 1996.
- [62] The grazing of cattle, cropping, the occupation of the farm, etc and the respondent's alleged hostility towards the applicant regarding his actions on the farm and the applicant's allegations that the respondent has intentionally poisoned his cattle by planting soya beans all revolve around the issue of whether the applicant and his family may occupy the farm. Furthermore all these issues are in dispute.
- [63] This Honourable Court could have refused to entertain the Respondent's argument about jurisdiction as it was not pleaded and does not arise anywhere on the pleadings. It was raised in argument by the respondent. By this court agreeing to adjudicate the issue of jurisdiction, this court agreed to consider the issue whether section 13(1A) had come into operation and whether the current matter ought to be transferred to the Land Claims Court. The respondent's challenge to the jurisdiction of this honourable court has the effect of: —
- [64] Making jurisdiction an "issue" as contemplated in section 13(1A) of Land Reform (Labour Tenant) Act 3 of 1996 before this court, thus compelling this court to interpret or apply the provisions of section 13(1A), that is, to interpret or apply a provision contained in the Land Reform (Labour Tenants) Act 3 of 1996, and to interpret the meaning of the word "occupier" in terms of the Extension of Security of Tenure Act 62 of 1997.
- [65] To state that the manner in which the application was brought and argued by both the applicant and the respondent, was in an extremely disorderly and incoherent fashion, is to put it mildly. One minute the applicant was an occupier of the farm, the next minute he was not. It was because of this completely confusing manner in which the matter was argued (borne out by the fact that the applicant now alleges that the matter must be heard by the Land Claims Court and the respondent's vehement denial thereof whereas the court's jurisdiction to hear the matter was raised by the respondent in argument) that this court is of the view that not a single issue can be decided before the question of whether the applicant is an occupier or even a labour tenant has been decided by the Land Claims Court.
- [66] For this very reason the court requested heads of argument pertaining to this court's jurisdiction to hear the disputes raised in this application. In fact, this application is a prime example of how a matter should not be argued and the applicant should, at the outset, of its own volition, have addressed the issue of the jurisdiction of the court, and the applicant's locus standi. Furthermore, had the respondent wished to attack the jurisdiction of this court to hear the matter it should have done so at the outset. Given the material disputes of fact and the bald and sketchy nature of the very short founding affidavit the matter will probably

have to be referred to oral evidence or trial. It should also be borne in mind that the respondent's version has to be accepted in terms of the Plascon Evans rule. The belated attempt to amend the relief sought without any application for condonation is also unacceptable.

[67] The haphazard way in which this application was brought would have resulted in punitive costs order, had the court not been obliged to refer the matter to the Land Claims Court.

Order

1. The application is referred to the Land Claims Court.
2. The Land Claims Court will then adjudicate the relief prayed for by the applicant including the costs incurred in these proceedings (including the costs of additional heads of argument) and still to be incurred in the Land Claims Court.

JUDGE OF THE HIGH COURT

For the Applicant Mr C Smith

Instructed by Christo Smith Attorneys (013 7533187) c/o Serfontein Viljoen & Swart (012 362 2556)

For the Respondent Mr Z Omar

Instructed by Zehir Omar Attorneys (011 815

1720) c/o Friedland Hart Solomon & Nicholson

- [1] The papers were drafted in Afrikaans. It is unclear what is meant by the term "grondwet".
- [2] Section 7 provides as follows:— "7 Order for eviction (1) The Court shall have the power to make an order for the eviction of a labour tenant or his or her associate. (2) No order for eviction in terms of section 5 shall be made unless it is just and equitable and — (a) subject to the provisions of section 9 (1), the labour tenant has, contrary to the agreement between the parties, refused or failed to provide labour to the owner or lessee and, despite one calendar month's written notice having been given to him or her, still refuses or fails to provide such labour; or (b) the labour tenant or his or her associate has committed such a material breach of the relationship between the labour tenant or associate and the owner or lessee, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship. (3) If proceedings are instituted for the eviction of a labour tenant in terms of this section, the person instituting those proceedings may also ask for an order for the eviction of the associates of the labour tenant. (4) If the Court is asked to make an order in terms of subsection (3), it shall make such order as it deems just and equitable under the circumstances."

[2] Section 7 provides as follows:—

"7 Order for eviction

-
- (1) The Court shall have the power to make an order for the eviction of a labour tenant or his or her associate.
- (2) No order for eviction in terms of section 5 shall be made unless it is just and equitable and —
- (a) subject to the provisions of section 9 (1), the labour tenant has, contrary to the agreement between the parties, refused or failed to provide labour to the owner or lessee and, despite one calendar month's written notice having been given to him or her, still refuses or fails to provide such labour; or
- (b) the labour tenant or his or her associate has committed such a material breach of the relationship between the labour tenant or associate and the owner or lessee, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship.
- (3) If proceedings are instituted for the eviction of a labour tenant in terms of this section, the person instituting those proceedings may also ask for an order for the eviction of the associates of the labour tenant.
- (4) If the Court is asked to make an order in terms of subsection (3), it shall make such order as it deems just and equitable under the circumstances.”
- [3] Section 7 provides as follows:— “10 Effect of order for eviction (1) If the Court makes an order for eviction in terms of section 7- (a) the Court shall order the owner to pay compensation to the extent that it is just and equitable; and (b) the Court may order the owner to give the labour tenant a fair opportunity to — (i) demolish such structures and improvements as were erected by the labour tenant and his or her associates or predecessors, and to remove materials so salvaged; and (ii) tend a crop to which he or she is entitled, until it is ripe and thereafter to reap and remove it. (2) The compensation referred to in subsection (1) shall be determined by the Court as being just and equitable, taking into account — (a) the replacement value of such structures and improvements; (b) the value of materials which the labour tenant may remove; (c) the value of materials supplied by the owner or his or her predecessors for the erection of such structures and improvements; (d) if the labour tenant has not been given the opportunity to remove the crop, the value of the crop; and (e) the circumstances which gave rise to the eviction, including the conduct of the parties. (3) No order for eviction made in terms of section 7 may be executed before the owner has paid the compensation which is due in terms of subsection (1).
- [3] Section 7 provides as follows:—
- “10 *Effect of order for eviction*
- (1) If the Court makes an order for eviction in terms of section 7-
- (a) the Court shall order the owner to pay compensation to the extent that it is just and equitable; and
-

- (b) the Court may order the owner to give the labour tenant a fair opportunity to —
 - (i) demolish such structures and improvements as were erected by the labour tenant and his or her associates or predecessors, and to remove materials so salvaged; and
 - (ii) tend a crop to which he or she is entitled, until it is ripe and thereafter to reap and remove it.
 - (2) The compensation referred to in subsection (1) shall be determined by the Court as being just and equitable, taking into account —
 - (a) the replacement value of such structures and improvements;
 - (b) the value of materials which the labour tenant may remove;
 - (c) the value of materials supplied by the owner or his or her predecessors for the erection of such structures and improvements;
 - (d) if the labour tenant has not been given the opportunity to remove the crop, the value of the crop; and
 - (e) the circumstances which gave rise to the eviction, including the conduct of the parties.
 - (3) No order for eviction made in terms of section 7 may be executed before the owner has paid the compensation which is due in terms of subsection (1).
- [4] Dhlamini v Looock and another 2001
- (3) SA 56 (SCA).
- [5] [2008] 1 All SA 243 (N).
- [6] At page 714F.

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Prepared on 11 October 2026 · Esheria